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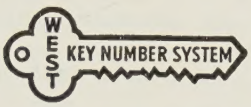

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SECOND SERIES

In Bank.

Appeal from Superior Court, Sacramento County; Dal. M. Lemmon, Judge.

Charles James was convicted of first-degree murder, and he appeals.

Affirmed.

Everett M. Glenn, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., for the People.

LANGDON, Justice.

Defendant appeals from a conviction of murder in the first degree without recommendation by the jury.

The evidence shows that on July 4, 1935, he went to Isleton, Cal., to spend the holiday. He met the deceased, Dave Jennings, a truck driver, and the latter's assistant, John Shepler, in a beer parlor. They drank a good deal together. About midnight, the three parties got into the deceased's truck to drive to Santa Ana with a load of beer. A few miles from Isleton defendant struck the deceased several blows with an iron crowbar, killing him. Shepler, the assistant, was asleep in the rear of the truck, and only witnessed the fall of deceased.

Defendant's version of the affair is that the deceased was trying to get him to help unload beer at his destination, and that defendant refused, whereupon the deceased became abusive, and while the truck was parked, got out and came around to beat defendant. Defendant testified that he struck the blows in self-defense, being in fear of his life.

On the other hand, defendant, when arrested, had in his possession the deceased's watch, keys, and some of his clothing; and in a confession made to the district attorney, the admissibility of which is not questioned, he admitted killing the deceased for the purpose of robbing him, and also admitted the taking of the articles after the killing. This evidence is clearly sufficient to support the verdict.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; CONREY, J.

6 Cal.2d 226

PEOPLE v. JAMES.

Cr. 3951.

Supreme Court of California.

April 30, 1936.

Homicide ⇐253(1)

Evidence supported conviction of murder in first degree.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6 Cal.2d 190

PEOPLE v. MURGUIA.

Cr. 3850.

Supreme Court of California.

April 29, 1936.

1. Constitutional law ⇐266

Courts are not obliged to enforce statute which through rule of evidence arbitrarily deprives litigant of his rights, or which permits a defendant to suffer conviction without due process of law.

2. Homicide ⇐340(1)

In murder prosecution where death resulted from shooting, instruction embodying statutory provision that, in prosecution for commission of felony against another's person, fact that assailant was armed with firearm in violation of statute should be prima facie evidence of intent to commit such felony, *held* prejudicial error where evidence would have supported verdict of not guilty (St.1923, p. 696, § 3).

WASTE, C. J., and SEAWELL and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

On rehearing.

Former opinion reversed, and judgment of the lower court reversed.

For prior opinion, see 48 P.(2d) 958.

Gregory P. Maushart, of Los Banos, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and S. P. Galvin, Dist. Atty., of Merced, for the People.

CONREY, Justice.

"The defendant appeals from a judgment of conviction of murder of the second degree and from order denying his motion for new trial. It was admitted by the defendant, and proved by the only eyewitness to the offense, that defendant killed the deceased, Martinez, by shooting him in the head. The defendant took the stand and testified that he and Martinez had been playing poker with some other Mexicans; that he and Martinez got into a quarrel over the game, and Martinez cursed him and called him a vile name. He remonstrated, and Martinez invited him outside. They did not go out immediately, but did so after a short time, defendant going first and Martinez following him. When they got outside, the defendant testified, Martinez started toward him with a knife; that he (the defendant) warned him not to come closer, and fired two shots from a revolver into the ground; that Martinez still advanced with a knife in his hand, whereupon he fired a third shot, this one at Martinez, hitting him in the temple. The defendant then started away from the scene, but was brought back, unresistingly, by the only person who witnessed the shooting, and who, as a witness for the defense at the trial, corroborated the defendant's testimony. * * *

"Complaint is made by appellant that the trial court gave to the jury an instruction on flight by one who has committed a crime. The complaint has little merit. After shooting Martinez, the defendant had walked some sixty or seventy feet from where the body of the deceased lay when he was stopped and brought back to the spot by the man who had witnessed the shooting. While it is true the defendant had not gone far from the immediate scene of the crime, we are of the view that the case is well within the line of the decisions of this court in People v. Erno, 195 Cal. 272, 281, 232 P. 710, and People v. Minamino, 56 Cal.App. 386, 391, 205 P. 463. Immediate flight, in the absence of any accusation—in advance, perhaps, of the probability of an accusation, formal or informal—may afford persuasive evidence of a consciousness of guilt. See People v. Erno, supra. In this case, the defendant had killed the deceased. No other inference can be reasonably drawn from the record than that he knew he would be charged with the crime. The defendant was, therefore, not prejudiced by the giving of the instruction."

"The defendant had no license or permit to carry a pistol, as is required by the act to control and regulate the possession of pistols, revolvers and other firearms capable of being concealed upon the person (Stats. 1923, p. 695). The court charged the jury as follows: 'You are instructed that section 3 of the act of the legislature of the state of California entitled "An act to control and regulate the possession, sale and use of pistols, revolvers and other firearms capable of being concealed upon the person," approved June 13, 1923, Statutes of 1923, p. 695, as amended, reads in part as follows: "In the trial of a person charged with com-

mitting or attempting to commit a felony against the person of another while armed with any of the weapons mentioned in section one hereof, or while armed with any pistol, revolver or other firearm capable of being concealed upon the person, without having a license or permit to carry such firearm as hereinafter provided, the fact that he was so armed shall be prima facie evidence of his intent to commit such felony." Therefore, if you find from the evidence that the defendant was at the time of the killing of the said Aristeo (Aristideo) Martinez armed with a pistol or revolver and did not have a license to carry such pistol or revolver, then, the fact that he was so armed and did not have such license is prima facie evidence that he intended to kill and murder the said Aristeo (Aristideo) Martinez.'"

The foregoing paragraphs are quoted from the former decision of this court, rendered in this case prior to the order granting the present rehearing. Assuming, without deciding, that the evidence was sufficient to support the verdict, it is at least equally true that the evidence would have been sufficient to sustain a verdict of not guilty. In other words, the jury might well have found a justifiable killing by the defendant in defense of his own life; and therefore, if the instruction hereinabove set forth is erroneous, the error in giving it to the jury was prejudicial and should entitle defendant to a reversal of the judgment.

[1] It is a conceded fact that the defendant, at the time and place of the occurrence now under review, was carrying on his person the pistol with which the shooting was done, and that he did not have a license to carry such weapon. If the statute simply provided for licenses or permits to carry such weapons, and prohibited persons from carrying them without license, and did not undertake to enact a rule of evidence governing cases of this kind, a court would have no hesitation in deciding that the mere absence of a license to carry the weapon is a fact entirely unrelated to the question of the intent with which the possessor of the weapon used it in the shooting of another person. It follows that the rule announced in the instruction, to be valid at all, must derive its force exclusively and solely from the legislative will as enacted in the statute. We need not follow counsel in their learned discussions concerning the right of the Legislature to enact rules of evidence. That power has been extensively assumed and exercised, with the concurrent approval of the courts. But it is not based upon any unlimited legislative authority. The courts, as custodians of the judicial powers of government, are not obliged to enforce a statute which through a rule of evidence arbitrarily deprives a litigant of his rights, or which permits a defendant to suffer conviction without due process of law. Under this statute it appears that a defendant armed with a pistol or revolver and not having a license therefor is not only prima facie guilty of intent to commit the felony charged against him, but that it is not even necessary to prove that the weapon was used by him in making the alleged assault. The words "prima facie evidence of his intent to commit such felony" are somewhat uncertain in their meaning. But if they are to have any effect at all, it is reasonable to assume that they refer to evidence sufficient in itself to stand as proof of the fact of intent, i. e., the fact of intent of the defendant, in this case, to kill and murder his opponent, the deceased.

[2] The arbitrary character of the instruction is provable by mere inspection of the statute from which the instruction was derived. It is only when a person is "charged with committing or attempting to commit a felony *against the person of another*" that the fact of his being (without license) armed with the described weapon becomes prima facie evidence of his intent to commit such felony. So if the defendant here had been charged with the commission of a crime against property—larceny or burglary, for instance—the fact that he was then and there (without license) armed with a pistol would not be evidence of his intent to commit the larceny or burglary. Indeed, under the terms of this statute, if the evidence were to the effect that a killing was done with a sword or with a club six feet long, then the mere fact that at the same time the defendant (without license) had a pistol in his pocket, would by the statute be made prima facie evidence of his intent to kill with the sword or with the club.

For the reasons above set forth, we are of the opinion that the court erred in giving the said instruction and that such error was so far prejudicial that the conviction amounted to a miscarriage of justice.

The judgment is reversed, and the order denying motion for new trial is reversed.

I concur: THOMPSON, J.

CURTIS, Justice (concurring).

I concur in the foregoing opinion and judgment on the ground stated therein, but I think also that the judgment might have been reversed on the further ground that the evidence is not sufficient to support the verdict of second-degree murder, or of any lesser crime embraced therein. The evidence shows, in my opinion, a clear case of justifiable homicide and consequently our decision should direct the discharge of the defendant.

I concur: LANGDON, J.

WASTE, Chief Justice (dissenting).

I dissent. I am unable to agree with the judgment of reversal ordered by the majority opinion on the ground that the instruction was so far prejudicial that the conviction amounted to a miscarriage of justice. I also quote from the former opinion of this court in this cause as follows:

"The argument against the constitutionality of the statute establishing the presumption rests upon the many cases which, in effect, hold that a law which provides that certain facts are conclusive proof of guilt are unconstitutional, as are those laws which would make an act prima facie evidence of crime which has no relation to a criminal act, and no tendency whatever to establish a criminal act. Such an authority is State v. Beach, 147 Ind. 74, 43 N.E. 949, 46 N.E. 145, 146, 36 L.R.A. 179. The reason for this rule is that 'in judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs.' 2 Cooley's Constitutional Limitations (8th ed.) (Carrington) pp. 768, 769. 'If, however, the legislature, in prescribing the rules of evidence in any class of cases [as, for instance, here, felonies against the person of another], leaves a party a fair opportunity to establish his case or defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional.' State v. Beach, supra. As was said by the Supreme Court of Ohio: 'It may be conceded that, within proper constitutional limits, the Legislature has the general power to prescribe rules of evidence and methods of proof—to determine what may or may not be competent evidence in a particular case—and, with certain qualifications, has, perhaps, the power to enact and prescribe that in criminal prosecutions certain facts, when duly established, shall be held to be presumptive or prima facie evidence of guilt.' Hammond v. State, 78 Ohio St. 15, 84 N.E. 416, 15 L.R.A.(N.S.) 906, 125 Am.St.Rep. 684, 14 Ann.Cas. 732. Mr. Justice Lurton, in the case of Mobile, etc., R. Co. v. Turnipseed, 219 U.S. 35, 42, 43, 31 S.Ct. 136, 137, 55 L.Ed. 78, 32 L.R.A. (N.S.) 226, Ann.Cas.1912A, 463, has this to say: 'Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous.'

"If, in the present case, the presumption declared by the statute was made 'conclusive,' the objections to its constitutionality would be sound. The 'prima facie' presumption here involved does not in any way preclude defendant from establishing his innocence in opposition to it. The Legislature here has merely prescribed a rule of evidence in a class of cases, felonies against the person of another, and yet leaves the defendants in such cases a full and fair opportunity to establish their defense. In the case at bar, the defendant, by his own admissions, committed a voluntary homicide. Pen.Code, § 192, subd. 1. In committing the crime he used one of the weapons which, by the terms of the act, he was forbidden to carry without a license, which he did not have. We are of the view that the inference to be drawn from the fact that the defendant was in the unlawful possession of the revolver he carried at the time was not so unreasonable as to be a purely arbitrary mandate. The defendant accepted the challenge of the deceased to meet him outside the place where they were playing cards. He was the first to go out and, being in possession of the revolver, no doubt felt he was ready for the anticipated fray. It was therefore not error for the court to read to the jury the provision of the act relating to the intent of one charged with a felony against the person of another, under the circumstances of this case."

In my opinion, the judgment should be affirmed.

We concur: SEAWELL, J.; SHENK, J.

6 Cal.2d 317

KELLY v. McCARTHY et al.

S. F. 15319.

Supreme Court of California.

May 1, 1936.

Rehearing Denied May 28, 1936.

1. Gifts ⇐47(3)

Where confidential relation exists by reason of promise of marriage and there is great opportunity for fraud, donee has burden to show that gift was not obtained by fraud or undue influence (Civ.Code, § 2235).

2. Gifts ⇐6

Donor's right to dispose of his property as he willed *held* not affected by merits of controversy between him and other members of family or whether donor's judgment was right or wrong or his reasons for gift were good or bad.

3. Gifts ⇐38

Rules applicable to exercise of undue influence in testamentary matters are applicable to creation of joint tenancies where question of undue influence is involved.

4. Gifts ⇐49(2)

Evidence *held* insufficient to support judgment invalidating bank deposit originally made by depositor in his own name and afterward transferred into joint tenancy account in name of himself and another on ground of fraud or "undue influence," notwithstanding possible confidential relationship arising from understanding of parties that they were to intermarry (Civ.Code, § 2235).

"Undue influence" means influence amounting to moral coercion destroying grantor's free agency and constraining him to do what is against his will but what he is unable to refuse, and cannot proceed alone from sympathy or affection for grantee, but must be such as to dominate grantor's will and coerce it to serve will of another in act of conveying; comprehending overpersuasion, coercion, or force that destroys or hampers free agency and will power, and mere affection or attachment or desire to gratify wishes of certain beloved, respected and trusted person, or influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced, even though testator is induced thereby to make unjust disposition of property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.

[Ed. Note.—For other definitions of "Undue Influence," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Charles G. Kelly against Alice S. McCarthy and others. Judgment for plaintiff, and the named defendant appeals.

Reversed.

Carroll S. Bucher, of San Francisco, for appellant.

H. H. McPike and W. F. Mathewson, both of San Francisco, amici curiæ.

Walter H. Linforth, Wm. M. Cannon, and Jesse H. Miller, all of San Francisco, for respondent.

SEAWELL, Justice.

This appeal is from a judgment invalidating certain separate bank deposits originally made by John J. Kelly in his name and which he afterwards transferred or changed into joint tenancy accounts in the name of himself and Alice S. McCarthy, payable to either of them or to the survivor, approximately two years before his demise. The question presented is whether the evidence, directly or inferentially, is sufficient to sustain the findings of the trial court to the effect that the appellant procured said transfers to be made by the exercise of undue influence and by the employment of fraudulent means practiced upon John J. Kelly, deceased, as found, or was guilty of procuring said assignments to be made by the employment of either of said means or methods.

[1] John J. Kelly was a resident of the city and county of San Francisco on the day of his death, November 22, 1932. He was a widower, and left no child or children or the issue of any child. Respondent claims that decedent was seventy-three years past at the time of his death, and appellant contends that he was under those years. The question as to his exact age is not material, as there is no evidence whatsoever that his mind was weakened by years or by any other cause. In fact, it is very clear from the evidence that he was mentally vigorous and alert to the end of his life, and none of the evidence offered at the trial tended in the slightest degree to prove mental incompetency. We do not understand that respondent relies upon the allegations of the complaint as to unsoundness of mind or mental incompetency on

the part of decedent, but he in fact abandoned any attempt to support said allegations at the trial. He seems to rely for support of the judgment upon want of consideration and undue influence and fraud arising out of a confidential relation existing between the decedent and appellant by reason of an understanding that they were to be married, the time being contingent upon the happening of future events. The respondent, upon the case presented, is thrown entirely upon the rule announced in Shea's Appeal, 121 Pa. 302, 15 A. 629, 1 L.R.A. 422, which holds that where a confidential relation exists (promise of marriage), and there is great opportunity for fraud, it is incumbent on the donee to show that the gift was not obtained by fraud or undue influence.

The suit was commenced by Charles G. Kelly, a brother of decedent, after request made by him of the special administrator, Bank of America National Trust & Savings Association, to bring suit, which request the special administrator refused to grant.

The decedent had been for some twenty-six years or more an employee, and latterly an inspector, in the service of the Market Street Railway Company. At the time of his death he was retired from active service and was receiving compensation as provided by the system of retirement. He and his wife were unquestionably persons of frugal habits, and decedent had been accustomed for many years to make deposits of his savings with the Hibernia Savings & Loan Society and the Bank of America National Trust & Savings Association. His wife predeceased him by nine or ten years.

In 1910 he opened a savings account with the Hibernia Savings & Loan Society, and in 1917 he opened a similar account with the Bank of America National Trust & Savings Association (Humboldt Bank Branch). Said savings accounts stood in his name. On February 19, 1931, he accompanied Mrs. McCarthy to each of said banks and closed his original accounts and caused the bank officials to open new accounts in which the moneys formerly in his individual name were credited in the new joint account to "John J. Kelly or Mrs. Alice S. McCarthy, payable to either or the survivor of either." The handwriting of decedent, together with his signature, appear upon the record cards and Mrs. McCarthy signed her name several times on the records of the transaction. It is the rule of banks, where deposits are made in joint names as was done in the instant case, to furnish keys to each of the joint tenants so that both tenants may have access to the box in which the papers of said parties are kept. There is no reason to doubt that the usual custom prevailed in the instant case and that a key was delivered to Mrs. McCarthy.

On February 19, 1931, the day said joint accounts were opened, there was on deposit in Mr. Kelly's name in the savings department of the Bank of America National Trust & Savings Association, $802.76. At the time of his death, November 22, 1932, it was reduced to $393.52. All withdrawals were made by him. On said February 19, 1931, John J. Kelly had on deposit with said the Hibernia Savings & Loan Society the sum of $2,205.49. On the day of his death, November 22, 1932, the joint deposit account of decedent and Mrs. McCarthy with said Savings & Loan Society had increased from $2,205.49 to the sum of $3,671.15, totaling $4,064.67 on deposit with both banks. This amount does not include any interest which may have then been earned or which may have since been earned by said deposits.

The main charge upon which respondent relies to invalidate the transfers of said deposits or accounts into joint tenancy accounts is that decedent was of the belief and opinion that the relatives here claiming his property as heirs at law were at "enmity with him." It is not alleged that Mrs. McCarthy put such thoughts into his mind, but, on the contrary, it is alleged that they originated with him, and she, well knowing that the beliefs and opinions of decedent in regard to his relatives were false, took advantage of his weakness of mind and the control and domination which she held over him, and caused him to be confirmed and fixed in said beliefs which he had erroneously formed, and she thereby influenced him to execute the transfer of said accounts as above related. But, as above noted, we fail to find any evidence in the record which would support a finding as to the mental weakness or the incompetency of the decedent.

Mrs. McCarthy answered the complaint and denied all allegations which imputed or tended to impute fraud or undue influence on her part, and affirmatively alleged that the transfers of said accounts were the free and voluntary acts of the de-

cedent, and that he was not at any time affected with any disability whatsoever.

The Bank of America National Trust & Savings Association in its answer denied that the $393.52 held by it in joint tenancy was a part of the estate of John J. Kelly, deceased. As a separate defense said bank alleged that on February 19, 1931, John J. Kelly had on deposit with it the sum of $802.76, and on said day said account was closed and said sum withdrawn by said John J. Kelly and on the same day he and Mrs. McCarthy opened a new account in the name of "John J. Kelly and/or Mrs. A. S. McCarthy as joint tenants," said account being payable to either of them, and that various withdrawals were made from said account, leaving the sum of $393.52 remaining in the joint names of John J. Kelly and/or Mrs. A. S. McCarthy.

The Hibernia Savings & Loan Society answered that on November 22, 1932, it had on deposit in an account standing in the name of "John J. Kelly or Alice S. McCarthy, payable to either or to the survivor of them" the sum of $3,671.15. All other allegations of the complaint going to the merits of the action are denied for want of information or belief.

Both banks disclaimed any interest in said deposits and asked leave to pay the amounts held by them into court for the use of the person or persons whom the court should determine were entitled to receive the same.

John J. Kelly was a native of Ireland and came to America as a very young man. He was vigorous mentally and physically and was devoted to the religion of his childhood. He was dependable and for some twenty-six or more years was an employee of the Market Street Railway and earned his right to retire upon compensation. He was unquestionably loyal to tried and deserving friends and sympathetic with and considerate of the unfortunate. He and Jeremiah McCarthy had been friends for forty years. Following the death of his wife, to whom he was greatly devoted, he became a frequent visitor at the McCarthy home. He often accompanied Mr. McCarthy from mass and other church services to the McCarthy home and their companionship was constant until terminated by the death of Mr. McCarthy in October, 1926. Shortly after the death of his wife, Mr. Kelly lived with his sister, Mrs. Hand, for a period; but as they could not live harmoniously in the same house, Mr. Kelly left and came to live with the McCarthys some three months before Mr. McCarthy died. He paid them $60 per month for his keep, the same amount he had paid his sister, Mrs. Hand, for similar accommodations. During the last illness of Mr. McCarthy, Mr. Kelly was constantly in attendance at his side, ministering to his personal comfort in every way that he was able to render service.

We have examined the evidence of the sixteen witnesses called by the respective parties and, taking the record by its four corners, we are of the view that it does not present sufficient reasons for denying to the decedent the right of disposing of his own at his will. Pertinent to the facts of the case is the rule expressed in Re Kaufman's Estate, 117 Cal. 288, 49 P. 192, 194, 59 Am.St.Rep. 179: "The right of absolute dominion over his property is sacred and inviolable, and whatever may be his [testator's] motives, or however great or unfounded his dislikes or his resentments against those who might be thought worthy of his bounty, his will, in the disposition of his property, is paramount. [Citing authorities.] 'The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own, and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust.'"

A will may not be set aside upon suspicion or because it does not conform to the ideas of others as to what was just or proper. In re McDevitt's Estate, 95 Cal. 17, 30 P. 101; In re Estate of Smith, 200 Cal. 152, 252 P. 325; In re Estate of Shay, 196 Cal. 355, 237 P. 1079; Lobb v. Brown, 208 Cal. 476, 281 P. 1010.

We will not attempt a meticulous review of all the evidence, or attempt to reconcile conflicts or contradictions as to matters which could not affect the final conclusion which naturally and inevitably follows as the only deduction that may be reasonably made from the controlling facts of the case; but we deem it proper to make reference at some considerable length to the important features of the case which directly shed light on the main question, to wit: Were the joint-deposit transactions of February 19, 1931, the result of a duly considered plan or purpose freely and voluntarily executed by decedent with a full

appreciation of the relationship which existed between him on the one hand and the respective contending parties on the other, or were his acts the products of undue influence or fraud perpetrated on him by appellant? Our view is that there is no evidence in this case, under the settled law governing the right to dispose of one's property, which can sustain the judgment taking from the decedent the right to dispose of his property in the manner and form shown by the oral and record evidence adduced at the trial.

Mrs. McCarthy first met Mr. Kelly in 1925, when he was brought to their home, No. 2207 Fulton street, San Francisco, by her husband, Jeremiah McCarthy, after they had attended mass. Jeremiah McCarthy and John J. Kelly had been friends for a period of forty years. Mr. Kelly was then living with his sister, his wife being dead. For a short time Mr. Kelly attended church in another neighborhood, but he soon returned to the church at which the McCarthys worshipped, and he often went to the McCarthy home following church services. He left the home occupied by his sister and himself in 1925 because they were not on agreeable terms, and went to San Mateo and from there to Los Angeles. Upon his return from the latter city to San Francisco he went to a hotel. Shortly thereafter he visited the home of the McCarthys and, according to the testimony of Mrs. McCarthy, said to Mr. McCarthy that his sister had been insulting to him and he was without a home; that he could not stand her. Jeremiah McCarthy said: "John, while we have a roof over our heads you will always have a home. Come with Alice and me. Take any room in the house; it is yours. Make yourself comfortable. We will do all we can for you." Mr. Kelly asked how much his keep would cost him. He said that he had been paying his sister $60 per month. Jeremiah McCarthy said, "We don't want anything from you." Mr. Kelly replied that he had never stayed at any place without paying his way and he would not stay unless he was permitted to pay. Mr. McCarthy replied to this, "Whatever you think, as long as you feel at home." He said to Mrs. McCarthy that he wanted her to do his cooking as he was a diabetic and was on a diet and could eat only certain foods. The lady who did the cooking for the McCarthys suggested that he tell them what food he wished and they would cook it for him. The house contained eight bedrooms and he made his selection, paying $60 per month for his board and lodging. Mr. McCarthy suffered a fatal illness which continued for several months, and Mr. Kelly assisted in caring for him through his last sickness to the end. It would seem that at one time Mr. and Mrs. McCarthy were in comfortable circumstances, as they owned several pieces of property of a tenantable character. When the depression came she found her houses vacant. One had been destroyed by fire, and its destruction was a total loss. After her husband's death Mrs. McCarthy rented her Fulton street property and moved to her Guerrero street flat. From there she returned to the Fulton street property and Mr. Kelly continued to occupy a room in the house, as he had done at the Guerrero street flat. During all the times that Mr. Kelly occupied a room in her houses there also resided with her Mrs. Hannah L. Sweet, a lady past ninety years of age who was blind and paralyzed, and a lady who assisted her in her household affairs. Mrs. McCarthy had known Mrs. Sweet since she (Mrs. McCarthy) was a very young woman. She had lived in the McCarthy household for many years and Mrs. McCarthy was very deeply attached to her and regarded it as her sacred duty to support and care for her so long as she should live. From the Fulton street residence Mr. Kelly moved to San Mateo, where he owned two houses. He remained there some time and finally went back to San Francisco. When in San Francisco he stopped frequently at Mrs. McCarthy's, but he also divided his time with the Lankershim, Odeon, Grand Central, and Argonaut hotels, at his pleasure. He also made a trip to the springs, where he remained for a period. In 1928 he decided to visit his old home in Ireland. He was then living at San Mateo. He came to San Francisco and left his personal effects with Mrs. McCarthy. When he came back from Ireland he first went to the Argonaut Hotel, but he told Mrs. McCarthy it was too noisy at the hotel and he returned to her house. Before he went to Ireland he had talked with her about her affairs and advised her to make a will, as it would save a great deal of trouble after she was gone; that if she did not the public administrator would profit quite a bit by her failure to make a will. He gave her his photograph, a copy of which was attached to his passport, upon which was

written, "May 10, 1925." He remained in Ireland more than three months visiting his brother and old acquaintances. Although he was in the old country for that period of time, neither his brother Charles nor any one of his sisters knew that he had been absent from the state, even for months after he had returned. They occasionally saw him by chance on the street or on a street car, and none of them ever invited him, after June, 1925, to call upon them or had any conversation with him except to pass the time of day in the most formal manner, and did not know that he had been sick in the hospital at any time, nor did they make any effort to locate him. The testimony of each shows that they were absolutely indifferent as to his comfort or welfare or whereabouts.

Mrs. McCarthy testified that Mr. Kelly asked her to marry him and said to her if she would marry him they would live in one of his new houses at San Mateo and he would give her care that she had never before had. She replied to his proposal by telling him that she could not do him the injustice of having him assume the responsibility of the care and support of the old invalid lady she was supporting; that she could not tell how long she would last; that she loved her. He said she was a grand old lady and he had never seen her equal. Mrs. McCarthy told him she would marry him after the old lady went to her rest. She testified that she intended to marry him when the old lady passed, and he said he would wait.

Mr. B. L. Grow, a real estate broker and notary public, a resident of San Mateo, was a close friend and business adviser of Mr. Kelly since 1924. He handled his properties, and Mr. Kelly received his check from the Market Street Railway on the first day of the month at San Mateo. His mail was directed to San Mateo in care of Mr. Grow. He visited San Mateo on the forepart of each month, and frequently two or three times a month. On one or two occasions he had Mrs. McCarthy visit San Mateo and he introduced her to Mr. Grow. He made Mr. Grow's office his headquarters. He discussed business very often with him. In 1925, after his trouble with Mrs. Hand, he said he was not going to leave anything to his folks; "that they were liars and they were not his kind." He had Mr. Grow write a policy of insurance in the amount of $3,500 on the house which Mrs. Hand and Kelly owned, and inferentially it was the discovery of a representation made to him that the house had been insured when in fact it had not been which provoked the word "liars." Mr. Grow testified that Mr. Kelly spoke very frequently of his deceased wife and Mrs. McCarthy. He said he was very sorry he broke up his home, quit housekeeping and gave his furniture to Mrs. Hand. He thought of leaving his property to charity. He spoke at that time as though Mrs. McCarthy had plenty, but after he returned from his visit to Ireland in 1928 he seemed worried that Mrs. McCarthy, as he said, through no fault of hers had lost the Fulton street home by fire, recovering no insurance, which was a heavy blow to her, and her property was unrented and he wanted to help her in every way he could. He spoke of her as a capable woman, generous and kind, and he told him she was taking care of an old lady without compensation and he thought it was very noble in her and wanted to help her. He often spoke of her kindness to him and to others. He brought her to San Mateo with the view of exchanging her San Francisco property for San Mateo property. Approximately a year before he died he told the witness that he had converted his bank account into a joint tenancy and asked him if he did not think it was a good thing to do. He was anxious that Mrs. McCarthy should not want and was regretful that she had sustained financial losses. He spoke of his visit to Ireland and the kind treatment accorded him by his brother and his family. He made no mention of his local relatives after his return from Ireland.

James Casey, an employee of the Market Street Railway, had known Mr. Kelly more than twenty years. He met him after his return from the old country, and in the course of their conversation it developed that Mr. Kelly was living at a hotel, and he said to him, "You shouldn't live in a hotel; you should live with your own people," and he replied that he couldn't live with them; couldn't get along with them. Mr. John J. Bolger had known decedent for twenty-five years. During a conversation he had with him at the Lankershim about thirty days before he died, Kelly spoke of making a will, and Mr. Bolger told him he had in contemplation the making of his will and the conversation turned on the subject. Kelly said he had left everything to a friend and had given his relatives $5 each; that he had left the key

to his safe deposit box with said friend, who could enter the bank and take anything the friend wished; that he had left the bank book with the friend as he had full confidence with his friend, who beyond doubt was Mrs. McCarthy, who had access to his deposit box. Kelly also told him that he had left the Hand home and was living at a hotel. It is plain that the "friend" above referred to was Mrs. McCarthy.

Mrs. Eileen Byrne, who was an inhabitant of the same neighborhood in Ireland as was Mr. Kelly, and was a personal friend of Mrs. McCarthy, testified that a few months before he died he told her that he owned one-half of the house Mrs. Hand lived in and that he formerly lived there with her, but he could not get along with her; that his mail was opened and he had to leave his own relations.

Mrs. Florence Napier, an acquaintance of Mrs. McCarthy for more than twenty years, called on her a short time before Mr. Kelly died. She was out and Mr. Kelly engaged her in conversation while waiting for Mrs. McCarthy's return. He said that he was living at a hotel and in reply to her question as to why he did not live with his relations he said he could not get along with them and they were not his kind. He said that Mrs. McCarthy was a grand woman.

Mrs. Jennie Hand's testimony at least shows that she was indifferent as to the comfort and welfare of her brother, whom she testified was seventy-three years of age. She apparently justified her treatment of him on the ground that she saw him walking in the park on one occasion with Mrs. McCarthy. She said, presumably to the persons whom she was with, "It was too bad to be going around with a married woman; they might wait until her husband passed out." Thereafter, when she returned home she found on the kitchen table the following note, written in his hand: "I am stopping at the Vendome Hotel, Second and North B Streets, San Mateo. You can have everything here. I don't want anything. Wishing you all sorts of good luck. You will be better off without me. J. J. Kelly." The note was written in June, 1925. He came back on August 1st for a check due him from the Market Street Railway Company and directed that his mail be sent to his San Mateo address. That was all the conversation had. After making the remark that she had seen him with Mrs. McCarthy he said to her, "I don't want anyone to interfere with my affairs." She further testified that she saw him on the street several times thereafter and the only words that passed were, "How are you?" and the usual salutation in passing the time of day. The last time she saw him was about two months before he died at the Hibernia Loan & Savings Society, and they passed the time of day. She made no inquiry where he was stopping after he left her home; did not know that he had visited Ireland; never talked to him afterwards about Mrs. McCarthy. She never thereafter invited him to her home. She testified that her brother never discussed with her his private affairs or his property. The deed which he had made and delivered to her conveying a one-half interest in said residence property was recorded by her on the day of the funeral. Mrs. Hand was a widow and had no children.

The deposition of Martin Craevan, aged eighty-two years and a resident of San Mateo, was read into the evidence. The witness was too infirm to appear in court. He had known Mr. Kelly for six or seven years. He visited and conversed with him at San Mateo several times a year. Mr. Kelly also had visited him when he was confined at St. Luke's Hospital at San Francisco. A relatively short time before his death Mr. Kelly said to him, while they were visiting, that he was not going to leave his relatives any money; that he would leave it to charity rather than leave it to them. He said that he and Mrs. Hand owned a house "between them, a partnership, * * * and he could not get along with her and he told her so. He walked out, put his effects in an automobile, and went to Los Angeles and stayed there for five or six months and didn't go back again." Asked whether he mentioned Alice McCarthy by name, he replied: "I don't think he called her by name, but I think a friend. I cannot remember." Fourteen months before Mr. Kelly's death he was confined by illness in the St. Francis Hospital. He had Mrs. McCarthy call up Mr. Eugene L. Byington, an official of the Market Street Railway, and tell him to come to the hospital at once. Mr. Byington, who was called by the respondent, testified that when he arrived he asked him what the matter was and Mr. Kelly replied: "I am very ill and they think I am going to die."

Mrs. McCarthy was present all the time. He arranged for his funeral and the disposition of his remains. He directed the following paper to be drawn, which he signed in his own hand:

"San Francisco, September 1, 1931.

"This is to certify that the undersigned have entered into an agreement whereby Alice S. McCarthy (Friend) and Eugene L. Byington (Friend) will have equal shares in the insurance of John J. Kelly. These shares are to be used to pay the following costs:

"Undertaking services;

"Church services;

"Purchase of a niche in center of mausoleum;

"Mass for repose of soul."

The above was signed by all parties thereto. Upon leaving the hospital he went to Mrs. McCarthy's Ford street home, where he recuperated and returned to the hotel.

The above transaction clearly indicates his faith in Mrs. McCarthy, and it is also characteristic of decedent's strict business methods in all matters, including the most solemn, and it furnishes strong evidence that his mind was operating freely and unhampered in the performance of the most solemn acts of life. Surely he was not under the influence or domination of Mrs. McCarthy when he arranged that a policy in the sum of $1,500 should be devoted to the payment of funeral and burial expenses. Every dollar of the above, and more, were expended in compliance with his wishes.

Charles G. Kelly, a bachelor brother, testified that Mrs. Hand had told him that she spoke to her brother about going out with Mrs. McCarthy and he went "woof"; got mad and left. He said he saw Kelly occasionally at McDonnell's stock brokerage office. He talked to him when he met him in a street car or on the street, but he would not tell him where he stayed, except that he said he stopped at a hotel. He never had a meal with him after 1925.

[2, 3] Mrs. Walton, another sister of Kelly, went east to reside in 1928. She returned in 1932 and met him once on the street and he told her he had made a trip to Ireland. She never saw him again and did not know where he was. Her brother Charles told her that decedent and Mrs. Hand had had words. One or two witnesses called by the respondent testified that they had visited the Hand home while Mr. Kelly was stopping there and he and Mrs. Hand appeared friendly and he seemed to be well satisfied with his home life. Notwithstanding the testimony of the relations that they never saw any indications that Kelly felt unfriendly toward his relations, nevertheless each one knew of the final breach between him and Mrs. Hand, and their utter indifference as to his welfare is indubitable proof that a wound was inflicted in 1925 by one side or the other which never healed. This being so, it matters not whether the decedent's judgment in the premises was right or wrong, or whether his reasons for doing as he did with his property were good or bad; his right to dispose of his property as he willed did not depend on the merits of any controversy which may have existed between them. In re Estate of Shay, supra; In re Estate of Smith, supra. The rules applicable to the exercise of undue influence in matters testamentary are also applicable to the creation of joint tenancies where the question of undue influence is involved.

Aside from the bank officials and the bank records themselves, Mrs. McCarthy gave the only testimony in the case as to the transfer of the bank accounts. She testified that Mr. Kelly requested her to meet him at Fourth and Market streets in San Francisco at 2 p. m. on February 19, 1931, as he had some business to attend to. She met him at the appointed time and place. She asked him what he wanted her to do. He said he wished her to do him a favor and she said she would do anything for him. He then said, "I wish you to allow me to put your name on my bank book." The deposition of the witness had been taken some time before the trial and she was examined in great detail from the deposition as to the order in which certain things were done and said at the time the transfers were made at the bank. In her deposition she stated that her reply to Mr. Kelly's request that she allow him to place her name on the bank book was: "Oh, certainly; I have my business fixed, Mr. Kelly, so if anything happens to me what I have is yours and you take care of the old lady." Her recollection at the trial was that this was after the bank transaction; she was not sure as to the time but she was willing

to abide by the deposition. She testified from the first, however, that she made her will in his favor in 1928 with the understanding that if anything should happen to her he was to take care of the old lady, and he said he hoped that nothing would happen to her because no one could take care of her as she did. Conceding that she told him, even before he made the transfer of said deposits, that she had her business fixed up and if anything happened to her everything she had was his, it was but the repetition of what she admittedly told him in 1928, and there would be no point in her deliberately falsifying that fact.

Respondent assails Mrs. McCarthy as being evasive, equivocating and mendacious in her testimony and says that she was not honest or truthful as shown throughout her testimony. We have carefully examined her testimony and there is nothing in it, in our opinion, to sustain such charges. Respondent relies entirely upon the testimony of Mrs. McCarthy to sustain his judgment. Mrs. McCarthy was a widow forty-eight years of age who had been a housewife during the years of her majority. Her character stands unimpeached. There is no evidence in the record upon which a charge of immorality or venality could be sustained. The testimony of Mrs. Hand that on one occasion she saw Mrs. McCarthy walking with Mr. Kelly in the park, standing alone, is not sufficient to raise a suspicion of meretricious relations on her part. Mrs. McCarthy testified that the only time she was ever in the company of Mr. Kelly unattended by others during her husband's lifetime was at the latter's request, upon which occasion he asked Mr. Kelly to accompany her to the office of the public administrator or coroner to report the death in their home of a young man who had been a roomer there. They rode on a street car on that occasion. No testimony was offered at the trial which tended to impeach her in any way, unless the testimony of Mrs. Hand, by implication, had such a tendency.

Every witness that had occasion to speak of the character of Mrs. McCarthy, with the exception above noted, referred to her as a deserving and worthy woman. She was not a highly educated person, but she appears to have been well grounded in her duty in the common affairs of life. Respondent finds fault with her testimony with respect to some contradictions as to when certain events occurred. She was examined by respondent under the provisions of section 2055, Code of Civil Procedure. Her examination was conducted in an exceptionally able and skillful manner and chiefly with reference to a deposition which respondent had taken some time prior to the trial. Many of the questions were a test of memory rather than a real test of veracity, and naturally there was some uncertainty exhibited and some discrepancies were shown in her evidence by way of comparison. There is no indication that the witness wilfully gave false testimony, or that the inaccuracies in her testimony were sufficient to defeat her right to a judgment. Her testimony as to the making of a will in Kelly's favor, which she claims she informed him of and which she placed in an envelope with her tax bills and other papers kept in Kelly's deposit box for a time, but which later came into her possession with said other papers and which was destroyed by her after Mr. Kelly's death, is not important for the reason that she admitted that she had told him in 1928 about the will. Whether it ever existed, or whether it was destroyed, as related by her, becomes unimportant so far as it may have influenced him to make the transfer in controversy. Respondent also assails her testimony with respect to two deeds which she claims she executed and delivered to Mr. Kelly, but which were not found among his effects. That she actually executed said deeds was proved beyond controversy by Mr. Grow, who furnished the notarial record of said transactions, and by Mrs. Roma Thomas, formerly an employee of the San Francisco Bank, who typed the deeds for Mrs. McCarthy. The deeds were, in all probability, destroyed by him, as the evidence is that he told Mrs. McCarthy he didn't want anything from her. That he did not want any of her property is made clear by the course of his relations with her. His concern was not in acquiring more property but in disposing of that which he had. This is shown by his act at the hospital in making preparation for death, and also by the joint tenancy transaction, and lastly by a will which he executed in 1930 in which his brother in Ireland and Mrs. McCarthy were made his beneficiaries. After his hospital experience in September, 1931, he knew that the end was not far distant. There could be no question in his mind as to which one would survive the other.

Respondent stresses two other features of Mrs. McCarthy's testimony. The first consisted in the fact that the witness, at the trial, enlarged on her testimony contained in the deposition. Her answer to the question as to why she did not give the testimony at the trial that she was then giving, was as follows: "A. No, I didn't tell in the deposition, I never was used to—I was not coached what to do, I did to the best of my knowledge, with no sleep in three months with a neurotic patient." The context which follows shows very clearly that the witness did not mean that she had been instructed by her attorney as to the answers she should give to any questions asked her, but that the subject-matter of the question had not been considered by her or her attorney and she was taken by surprise. There is no merit in the claim that she had been coached as to what answers she should give to questions asked without regard to the truth or falsity of her answers. Counsel cites as a reason why the witness should be discredited, the following: "Q. Have you talked with Mr. Grow about these deeds since this case came up as to whether or not he had acknowledged these deeds?" The question obviously contains two propositions. The witness in open court turned to her attorney and said: "Mr. Butcher, what shall I say?" This incident, so far as affording grounds of impeachment is involved, is, we think, too trivial to require discussion.

[4] Respondent claims that a confidential relation existed between the parties by reason of the contingent understanding of the parties that they were to intermarry; that Mrs. McCarthy is deemed a trustee. Section 2235, Civ.Code. He did not plead the existence of promise of marriage as the basis of undue influence, nor did the court make a finding that such relationship existed. Granting, however, without deciding, that under the relationship which existed between Mr. Kelly and Mrs. McCarthy a confidential relation was established, the proof is so conclusive that the conversions of said bank deposits into joint accounts were not obtained by fraud or undue influence as to rebut any presumption of undue influence. The evidence, both record and oral, aboundantly shows that said acts were freely and voluntarily done and there was no weakness of mind on the part of Mr. Kelly at any time prior to his fatal illness. While it is not necessary that a reason for his acts should appear, provided he was free of legal disability, nevertheless substantial reasons support said acts.

Undue influence in procuring execution of a deed means influence amounting to moral coercion destroying grantor's free agency and constraining him to do what is against his will but what he is unable to refuse. Walters v. Walters, 151 Ga. 527, 107 S.E. 492.

"The influence which will avoid a deed cannot proceed alone from sympathy or affection for the grantee, but must be such as to dominate the grantor's will and coerce it to serve the will of another in the act of conveying, and a grantee who, by his kindness and attention, won the affection of a relative, who executed a deed to him as he anticipated, did not thereby obtain the deed by undue influence." Stroup v. Austin, 180 Ala. 240, 60 So. 879, 880.

"Undue influence comprehends overpersuasion, coercion, or force that destroys or hampers the free agency and will power of the testator, and mere affection or attachment or a desire to gratify the wishes of one beloved, respected, and trusted may not of itself amount to undue influence affecting testamentary capacity." Newman v. Smith, 77 Fla. 667, 82 So. 236.

"Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practiced, even though it induce the testator to make an * * * unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. In re Gleespin's Will, 26 N.J.Eq. 523." Mackall v. Mackall, 135 U.S. 167, 10 S.Ct. 705, 707, 34 L.Ed. 84.

Many other cases of the same import may be added to those above cited. The facts of the instant case cannot withstand the test which the law prescribes. The evidence is without contradiction to the effect that decedent was a free agent, going from place to place at will, free to adopt his own course, and was not under the restraint of any person. He was a man positive of character, self-willed, mentally sound and independent in thought and action.

That his acts were the result of mature deliberation is further attested by the fact that he made a will in 1930 in which he devised his real property, of the value of about $7,000, to Mrs. Mc-

Carthy and his brother residing in Ireland. This will was treated as admitted in evidence at the trial, but as a matter of fact it was not included in the record on appeal.

Decedent being under no legal obligation to provide for respondent by will or otherwise, and said respondent having failed to show any valid reason why the transaction of February 19, 1931, with respect to said bank accounts and deposits should be held to be invalid, he must fail in his action.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; CONREY, J.; SHENK, J.



6 Cal.2d 324

SHEEAN v. MICHEL et al.

S. F. 15469.

Supreme Court of California.

May 1, 1936.

Application for Modification Denied May 28, 1936.

1. Perpetuities ⇐6(7)

Declaration of trust for minorities of trustee-trustor's children, born and to be born, *held* void as possibly suspending alienability beyond lives in being at time of execution and delivery of trust instrument (Civ.Code, §§ 715, 716, 749, 771).

2. Perpetuities ⇐6(10)

Where declaration of trust may by any possibility suspend alienability beyond allowable period, no trust is created and no estate is vested in trustees, regardless whether events actually transpiring require suspension for more than allowable period (Civ. Code, §§ 715, 716, 749, 771).

3. Perpetuities ⇐6(7)

Declaration of trust for "benefit * * * of * * * children born and to be born" to trustee-trustor, providing for settlement when "youngest of my said children" attain age of 21, *held* not construable as limiting period of suspension only during minorities of children living and named in instrument in order to avoid invalidity and defeat claims of trustor's creditors (Civ.Code, § 715).

4. Trusts ⇐112

Declaration of trust will not be construed to prevent invalidity in order to defeat claims of trustor's creditors.

5. Fraudulent conveyances ⇐24(1)

Declaration of trust *held* to show that it was executed to remove trustor's property from reach of trustor's creditors, rendering it void as to trustor's creditors, where declaration made trustor the trustee, and left management and ownership of property little affected until trustor's youngest child reached its majority, and only then in event trustor had not exercised power reserved to trustor to revoke trust whenever he deemed it necessary.

6. Fraudulent conveyances ⇐24(1)

Public policy is against permitting person to have absolute ownership of property for his own purposes and at same time be able to keep it from his creditors.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by William A. Sheean against Emile Michel and others, wherein defendants filed a cross-complaint. Judgment for defendants, and plaintiff appeals.

Reversed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

William E. Harvent, of Oakland, for respondents.

SHENK, Justice.

The plaintiff became the purchaser at an execution sale of certain lots situated in Alameda county. He brought the present action to quiet his title thereto against the claims of the defendants. The court ordered judgment for the defendants, from which judgment the plaintiff appealed.

The claims of the defendants were based upon a declaration of trust executed by the defendant, Emile Michel, purporting to convey extensive real property, including the lots here involved, to himself in trust. The instrument was recorded in Alameda county on January 26, 1932. A judgment for the sum of approximately $25,000 was recovered in November of the same year against said defendant Emile Michel, pursuant to which the execution sale to the plaintiff took place. The va-

lidity of the provisions of the trust instrument was called into question by the plaintiff's action and the defendants' answer and cross-complaint. The plaintiff contends that the pertinent provisions of the trust create a suspension of the power of alienation in violation of section 715 and related sections of the Civil Code. If this contention has sufficient merit, the judgment must be reversed, and it will not become necessary to consider other facts involved or points presented.

In the instrument in question the trust purposes and objects are specifically declared to be the "use, benefit and enjoyment, and behoof of my wife, Marie P. Michel, and my children born and to be born of the marriage of myself and Marie P. Michel, my wife, the children now living being named as follows," naming six children, the eldest of whom was in his twelfth year at the time the instrument was executed. Although Marie P. Michel was declared to be a beneficiary of the trust, no specific provision for her benefit was included. Emile Michel, as the trustee, was empowered to hold and manage the property conveyed by the instrument, and any property subsequently added by him, and to sell any of it without notice or court order or approval, and without bond or appraisement, or to mortgage or lease any of it, and to invest the proceeds in such property or securities as he should deem best. The trustor declared that he should not be held for any loss by reason of accident, or mistake, or error in judgment exercised by him in good faith. The seventh clause provided that the trustee should receive so much of the income as should accrue during the "minority of my children," and apply the whole or any part to the board, lodging, education, or maintenance in any manner he should deem best without accountability for his judgment in such application. By the eighth clause the trustee was given power to permit "any one of my said children to draw from said trust fund any amount I shall think to be best up to the amount of such child's undivided share in such fund, but no more"; and that in case of the "death of one or more of my said children," the issue of such deceased child or children shall receive the parent's share by right of representation. By the ninth clause the trustor provided that in the event of the death of "any of my said children" without issue, such child's portion of the fund "and its accumulations" shall be divided equally among "my said other children or their issue" in like manner as the balance of the fund "shall be handled, and not otherwise." The tenth clause states: "When and at the time the youngest of my said children shall have attained" the age of 21 years, the trustee is directed to make a settlement "with each of said children," each to receive an equal share in the trust property and any accumulated income.

The trustor reserved the power, whenever he should deem it necessary, to revoke the trust. The trustee was empowered to nominate his successor, who should administer the trust in the same manner, and be vested with the same powers and duties. The thirteenth clause reads: "That I as trustee shall defend the title to said real estate and every part and parcel thereof, against the claims of all persons whomsoever." The trustor declared that he, as trustee, would keep a strict account of the trust fund and all additions and accumulations and render a yearly statement. The twenty-first to twenty-fourth clauses inclusive contained some general and special provisions relating to the creation of so-called spendthrift trusts, designed to prevent the assignment, transfer, hypothecation, sale under execution or other process, or any other application of any part of the trust income or property to debts incurred by any of the beneficiaries.

[1,2] If the trust thus attempted to be created is by its terms designed to be continued during the minorities of children born after the delivery of the trust instrument, it is obvious that the instrument creates a suspension of the power of alienation in violation of the provisions of section 715 of the Civil Code. That section provides that, except in the single case mentioned in section 772, which exception is not material here, "the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows: 1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or 2. For a period not to exceed twenty-five years from the time of the creation of the suspension." The possibility of the suspension of the power of alienation created by the contingency that all of the persons in being at the time of the creation of the trust may die before the youngest unborn child becomes 21 years of age,

or the possibility of the suspension beyond the 25-year period, renders the trust void at its creation and title does not vest in the trustee. Sections 716, 749, 771, Civ.Code; In re Estate of Troy, 214 Cal. 53, 56, 3 P.(2d) 930. "Section 716 declares that 'every future interest is void in its creation which, by any possibility' may suspend the power of alienation longer than the Code permits. This possibility is to be determined by the conditions existing 'at the time of the creation' of the limitation or future interest, * * *" in this case at the time of the execution and delivery of the trust instrument. Sections 749, 771, Civ.Code. "'The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity [suspension] results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument "by any possibility may suspend" the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustees.' In re Estate of Steele, 124 Cal. 533, 537, 57 P. 564." In re Estate of Whitney, 176 Cal. 12, 15, 16, 167 P. 399, 401; In re Estate of Maltman, 195 Cal. 643, 649, 234 P. 898; In re Estate of Troy, supra, 214 Cal. 53, at page 57, 3 P.(2d) 930.

[3-6] The defendants contend that the language of the instrument may be interpreted as limiting the period of suspension only during the minorities of the children living and named in the instrument, and yet carry into effect the intent of the trustor to apply the income and corpus of the trust property for the benefit of all the children of the trustor and his wife, both as to those living at the creation of the trust and those born thereafter. They state that this result may be achieved by ascribing the words "said children" and "my said children," appearing in the clauses of the trust declaration, and especially in clause 10, to the children in being named in the trust instrument. By so applying the words noted to those children who are named and living at the time of the creation of the trust, it is contended that the settlement directed in the tenth clause may be interpreted as a direction to make the settlement with all of the children both born and to be born, but at a time when the youngest of the named children arrives at the age of majority. If we assume that this interpretation would cure the defect, nevertheless it may readily be demonstrated that such a reading of the trustor's language would defeat rather than carry out his intention. The tenth clause reads: "When and at the time the youngest of my said children shall have attained * * * the age of twenty-one years * * * I as trustee or my successor in trust shall make a final settlement with each of said children. * * *" This one instance, apart from all the other clauses noted in which similar language appears, is sufficient to show that there could not be such a construction or application of those words without changing the grant made by the trustor. The same result is demonstrable when we seek so to construe identical language in other clauses of the deed herein noted. To give it the effect contended for would be to cut off from the operation of the trust instrument children born after the creation of the trust and deprive them of the share in the trust property clearly intended as well for their use and benefit.

To adopt the construction invoked without destroying the intent that all children be deemed to participate would require a holding that the first use of the words "my said children" in clause 10 was intended to refer to the children in being named in the instrument, and that the second use of the same words in the same clause, and the use of similar words in other clauses of the instrument where appropriate to the result sought, referred to all children of the spouses, both those in being and those who might be born in the future. This would result in according to identical language, which in fact is plain and unambiguous, two different meanings for the purpose of upholding the trust. With much temerity, it would seem, the defendants seek first a strained and unwarranted interpretation of the plain language of the trust declaration, and then invoke the assistance of the court to the end that just claims of creditors may thereby be avoided. The courts have often construed the provisions of a will purporting to create a trust so as to prevent its invalidity where it is possible to do so and still carry out the intent of the testator; but the end in such cases is to prevent the intestacy which would otherwise result. In re Estate of Troy, supra;

In re Estate of McCray, 204 Cal. 399, 402, 268 P. 647; In re Estate of Heywood, 148 Cal. 184, 188, 82 P. 755; In re Estate of Dunphy, 147 Cal. 95, 99, 81 P. 315. But no case has been cited, and doubtless none could be cited, wherein a court has followed that policy where the sole end to be accomplished is that just claims of creditors be defeated. Cases relied on by the defendants, such as Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370, and Noble v. Learned, 153 Cal. 245, 94 P. 1047, have no application here, inasmuch as the intent to create a trust in the present case is not questioned. The further contention is advanced by the plaintiff that the provisions of the trust instrument alone are sufficient evidence that the instrument was executed for the purpose of isolating the property from the reach of the creditors of the trustor, and is void for that reason. There is sufficient merit in the contention within the reasoning of the decision in Ullman v. Cameron, 186 N.Y. 339, 78 N.E. 1074, 116 Am.St. Rep. 553, to dissuade this court from adopting the construction contended for by the defendants. A perusal of the provisions of the trust instrument herein briefly outlined indicates that the handling and management, and even the ownership, of the property, is or would be but little affected until the youngest child reached the age of majority, and only then in the event the trust had not previously been revoked. Here the defendants attempt to justify the provisions by virtue of their characteristics as a spendthrift trust; but it is quite obvious that the creation of a spendthrift trust to endure practically only during the minorities of the children discloses the key to the true effect of the instrument, viz., to keep the corpus and income for the use and enjoyment of the trustor and his family and at the same time place it beyond the reach of creditors. This court should not be expected to grant a certificate of approval to a plan the result of which is to tie up property for the benefit of the trustor and his family freed from any application thereof to the payment of the trustor's just obligations. This view is sustained by the sound public policy, stated in the following cited authorities, that a person may not be permitted to have absolute and uncontrolled ownership of property for his own purposes and at the same time be able to keep it from his creditors: In re Estate of Morgan, 223 Pa. 228, 72 A. 498, 132 Am.St.Rep. 732, 25 L.R.A.(N.S.) 236, and note; Ullman v. Cameron, supra; In re Reich's Estate, 146 Misc. 616, 262 N.Y.S. 623; Pacific National Bank v. Windram, 133 Mass. 175; see 27 Cor.Jur. p. 602 et seq. The statement of the applicable policy bears repetition in the words of the New York Court of Appeals in the case of Ullman v. Cameron, supra, 186 N.Y. 339, at page 346, 78 N.E. 1074, 1076, 116 Am.St.Rep. 553, viz.: "As to my creditors, property is mine that becomes mine for the asking, and no words can make an instrument strong enough to hold it for me, and keep it from them." In the present case the trustor did not even have to ask for any or all of the trust property. It was his for the taking. This condition, combined with other features of the trust herein noted, in our opinion assists in clearing the way for the proper disposition of the appeal.

The application of the stated policy to facts thus calling for its application does not contravene the rule that a person may become trustee of a trust created by him, noted in Cahlan v. Bank of Lassen County, 11 Cal.App. 533, 540, 105 P. 765; or the rule declared in Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43, Tennant v. John Tennant Mem. Home, 167 Cal. 570, 140 P. 242, and In re Estate of Willey, 128 Cal. 1, 9, 60 P. 471 (Civ.Code, § 2280), that a power to revoke a trust may be reserved. Nor does it run counter to the well-established law that a valid spendthrift trust may be created. In re Estate of Edwards, 217 Cal. 25, 27, 17 P.(2d) 116.

It does not appear from the record that the judgment of the court was based on any invalidity in the plaintiff's asserted title other than an invalidity supposedly existing by reason of the creation or attempted creation of the trust here involved. That being the case, the appeal is disposed of by the foregoing observations. It follows that the judgment should be, and it is, hereby, reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; CONREY, J.

PIMENTEL et al. v. CONSELHO SUPREMO DE UNIAO PORTUGUEZA DO ESTADO DA CALIFORNIA et al.

S. F. 15441.

Supreme Court of California.

April 29, 1936.

Rehearing Denied May 28, 1936.

1. Insurance ⇐784(7)

Rights of beneficiary in insurance policy vest immediately upon death of insured and cannot thereafter be modified by action of the insurer, and hence filing of interpleader or payment into court by insurer can be construed only as a recognition of liability to rightful claimant, and not as waiver of insured's failure to comply with policy provisions concerning change of beneficiary.

2. Insurance ⇐784(7)

Although payment of fund into court by insurer does not amount to a waiver to extent that second beneficiary becomes entitled to money, such action by insurer operates to relax rule that insured must follow procedure prescribed in policy for change of beneficiary, since insurer thereby disclaims all further interest in fund and waives right to insist upon a rigid adherence to regulations.

3. Insurance ⇐784(1)

Exceptions to rule that, where policy provides a method for changing beneficiary, insured must follow substantially method prescribed, are where insurer has waived strict compliance with its own rules and, in pursuance of a request of insured to change his beneficiary, has issued a new certificate, or where it is beyond insured's power to comply literally with regulations, or where insured has followed method prescribed by insurer and has done all in his power to change beneficiary, but, before new certificate is issued, insured dies.

4. Insurance ⇐784(1)

Where insurer is not contesting change of beneficiary, and insured makes every reasonable effort under circumstances, and there is a clear manifestation of intent to make change, equity should regard change as effected.

5. Insurance ⇐784(2)

Where insured, who was ill, signed change of beneficiary clause in life policy, and acknowledged signature and instructed attorney who prepared change of beneficiary clause and friend to take necessary steps to complete change, change of beneficiary was effective notwithstanding such action by insured, who died before further steps were taken, was not full compliance with method prescribed in policy.

6. Insurance ⇐728

Constitutional prohibition of insurer against assignment of proceeds of policy for consideration, or a pledge, *held* not to preclude insured from substituting his brother as beneficiary in place of insured's minor children so as to make proceeds of policy available for payment of hospital and funeral expenses of insured (St.1935, p. 638, § 10130).

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Maria C. Pimentel and others, minors, acting by and through their legally appointed, qualified, and acting guardian, Emelia Dezzutti, against Conselho Supremo De Uniao Portugueza Do Estado Da California, which filed a cross-complaint, making J. C. Pimentel a party defendant. From a judgment for plaintiffs, cross-defendant appeals.

Reversed and remanded, with directions.

Carlos R. Freitas, Jerome A. Duffy, and Thomas F. Keating, all of San Rafael, for appellant.

J. Lenox Ward, of Oakland, for respondents.

THOMPSON, Justice.

This action was brought by the minor plaintiffs through their guardian to recover the benefits under an insurance policy upon the life of their father, Antonio Cardozo Pimentel, issued by the defendant, a fraternal benefit society. Plaintiffs had been named as beneficiaries in the policy but, shortly before his death, the insured attempted to change the beneficiary clause in favor of his brother, J. C. Pimentel. The defendant paid into court the $1,400 due under the policy and, by cross-complaint, brought in J. C. Pimentel as a party. The trial court found there had been no change of beneficiary in accordance with the terms of the policy, the constitution, and by-laws of the society, and gave judgment for the plaintiffs. This appeal is taken by the cross-defendant J. C. Pimentel.

The undisputed facts are that Antonio Cardozo Pimentel, a member of the society and holder of the policy in question, entered a hospital on April 1, 1933. Shortly after entering the hospital, he requested Manuel Cardoza, a friend and lodge brother then visiting him, to ask his brother, J. C. Pimentel, the cross-defendant and appellant, to get the policy, take it to Freitas, an attorney, and have himself named as beneficiary in place of the then beneficiaries, the minor children of the insured, in order that appellant might, out of the proceeds of the policy, pay the funeral and last illness expenses of the insured and deliver the remainder to the plaintiffs. Cardoza delivered the message to appellant and, the next day, went with him to the office of Freitas and delivered the policy with the instructions of the insured. The attorney then prepared the change of beneficiary clause on the policy for the signature of the deceased and drew up an agreement, which appellant signed, whereby he undertook, in consideration of being made beneficiary, to pay the last illness and funeral expenses of his brother and distribute the balance equally among the plaintiffs, the five minor children. Cardoza and Freitas then went to the hospital and read the agreement to Antonio Pimentel in Portuguese; he signed the change of beneficiary clause, acknowledged it before Freitas as notary public, and instructed Freitas to take all necessary steps to complete the change. Freitas made inquiry of the secretary of the society and was fully informed as to the steps necessary to be taken but nothing further was ever done.

Freitas asked Cardoza to tell appellant that his brother had signed the change of beneficiary clause and to ask him (the appellant) to call at Freitas' office to get the policy and receive further instructions. Appellant sent his minor daughter, who, in the absence of Freitas, was given the policy by a secretary without any instructions as to the further steps necessary to effectuate the change. The appellant thinking the matter completed, replaced the policy in his safety deposit box and Freitas, relying upon the call of appellant to remind him of the matter, did nothing further about it. On several occasions thereafter the insured inquired of both appellant and Cardoza whether the change had been completely taken care of and was assured by them that it had.

The constitution and by-laws of the society required a change of beneficiary to be made by written indorsement upon the back of the policy, acknowledged before a notary public, authenticated by the signature of the secretary of the order and the seal of the council, for a fee of 50 cents. The certificate, with the change duly made, was required to be forwarded to the secretary to be presented by him to the directors at their first regular session, another certificate to be issued if the change was found to have been made in due form. None but the first two requirements were met.

It is the appellant's contention that this case comes within the exceptions to the rule that a change of beneficiary can be effected only through compliance with the rules and regulations contained in the contract of insurance, and (2) that the rules, being for the benefit of the society, can be waived and were so waived in the present instance by the insurer's payment into court of the amount due under the policy.

[1, 2] While there is a division of authority on the question of whether interpleader and payment into court operates as a waiver of the insured's failure to comply with the policy provisions concerning change of beneficiary, it is settled in this jurisdiction that it does not. McLaughlin v. McLaughlin, 104 Cal. 171, 37 P. 865, 43 Am.St.Rep. 83; Supreme Lodge v. Price, 27 Cal.App. 607, 150 P. 803. In Barboza v. Conselho Supremo, etc., 43 Cal. App. 775, 185 P. 1028, and Johnston v. Kearns, 107 Cal.App. 557, 290 P. 640, although the point was not discussed, it was not considered that payment into court waived compliance. Appellant concedes this to be the present rule in this state, but argues that it is against the weight of authority and asks that the cases so holding be overruled. We are satisfied that the better reasoning supports the rule adopted by our courts, that the rights of the beneficiary vest immediately upon the death of the insured and cannot thereafter be modified by action of the insurer and that the filing of an interpleader or payment into court by the insurer can be construed only as a recognition of liability to the rightful claimant and as a measure taken to protect the insurer against a double liability. Nor are we convinced that the rules requiring certain formalities for the change of beneficiaries are solely

for the benefit of the insurer and are not in any degree intended to protect the insured and the original beneficiary. For collection and discussion of the authorities see Notes, 2 A.L.R. 1680; 15 A.L.R. 1260; 78 A.L.R. 970, 975; and Cooley's Briefs on Insurance (2d Ed.) vol. 7, pp. 6461–6465. While payment of the fund into court by the insurer does not amount to a waiver to the extent that the second beneficiary thereupon becomes entitled to the money, upon the theory that no one now has a right to insist upon compliance with the rules, it does, we think, operate to relax the rule, for the insurer has disclaimed all further interest in the fund and waived its own right to insist upon a rigid adherence to the regulations, hence a more liberal rule may obtain than if the insurer were disputing the rights of the second beneficiary. Jory v. Supreme Council A. L. of H., 105 Cal. 20, 38 P. 524, 26 L.R.A. 733, 45 Am.St.Rep. 17; Adams v. Grand Lodge of A. O. U. W., 105 Cal. 321, 38 P. 914, 45 Am.St.Rep. 45; Johnston v. Kearns, 107 Cal.App. 557, 290 P. 640; Cooley, op. cit., supra, p. 6465.

Turning to the question of whether there has been an effective change of beneficiary, appellant complains that the findings are not full enough to disclose "the circumstances under which said Antonio Cardozo Pimentel sought to have the beneficiaries upon his life insurance policy changed and the motives which prompted him to desire such change, or to disclose facts showing whether or not there were substantial, even though purely sentimental, reasons in support of or actuating the desire to make the change, or showing whether or not there appeared, or appear, any equitable considerations on the other side sufficiently forceful to overcome such reasons, or showing whether or not it appeared or appears, that deceased had, prior to his death, done all that lay in his power under the circumstances by which he was beset at the time, to accomplish the desired change, in order to determine whether or not a court of equity would be justified in interposing its aid to enforce and give effect to the manifest intention of the deceased, notwithstanding the rules of the society were not strictly observed," and insists that findings should have been made in detail substantially as the facts have been set forth at the outset of this opinion. Conceding that the evidence would have warranted such findings, it appears from the findings made that Pimentel signed the change of beneficiary clause on January 20, 1933, while ill in the hospital from a malady of which he died on April 1, 1933; that he acknowledged his signature before a notary public; that, prior to signing, he stated to Cardoza that he wanted his brother to be made beneficiary; that Cardoza so informed Freitas who prepared the clause for signature and took the acknowledgment; that Freitas took the policy to his office and that it was delivered by a secretary to appellant's daughter in Freitas' absence; that no further steps were taken by insured or by anyone on his behalf; that, simultaneously with the signing of the change of beneficiary clause, J. C. Pimentel made, executed, and delivered to insured the agreement to pay his illness and funeral expenses and turn over the balance to the minors; that he paid insured's bills out of his own pocket to the extent of approximately $600; that, subsequent to January 30, 1933, insured, who was still ill in the hospital, inquired of Cardoza whether the change of beneficiary had been effected and was assured by him that it had been completed. It appears that the steps left undone were the forwarding of the certificate to the secretary, with the 50-cent fee, and the various ministerial actions to be taken by the officers of the insurer.

[3] There are three often-repeated and well-recognized exceptions to the rule that where the contract of insurance provides a method for making a change of beneficiary the insured must follow substantially the method prescribed: (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; (2) if it is beyond the power of the insured to comply literally with the regulations a court of equity will treat the change as having been made; and (3) if the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been made. McLaughlin v. McLaughlin, 104 Cal. 171, 37 P. 865, 43 Am.St.Rep. 83; Supreme Lodge v. Price, 27 Cal.App. 607, 150 P. 803; Bar-

boza v. Conselho, etc., 43 Cal.App. 775, 185 P. 1028.

With the first exception we are obviously not concerned. The second and third are not so clear of application nor always easily distinguished from each other. However, we think the second does not apply here for the reason that it was not impossible that the course prescribed by the constitution and by-laws of the society be carried out. The third exception has been variously interpreted as meaning all that is required of the insured, leaving only ministerial duties to be performed by the insurer (McLaughlin v. McLaughlin, Barboza v. Conselho, etc., both supra, and Garrett v. Garrett, 31 Cal.App. 173, 159 P. 1050), or as all that it was possible for the insured to do under the circumstances under which he attempted to make the change. Supreme Lodge v. Price, supra; Johnston v. Kearns, 107 Cal.App. 557, 290 P. 640, 643, and see Bell v. Criviansky, 98 Mont. 109, 37 P.(2d) 673.

[4, 5] We think that where the insurer is not contesting the change the rule is not to be applied rigorously and where the insured makes every reasonable effort under the circumstances, complying as far as he is able with the rules, and there is a clear manifestation of intent to make the change, which the insured has put into execution as best he can, equity should regard the change as effected. See 42 Harv.L.Rev. 250. Barboza v. Conselho, etc., supra, can be distinguished on the ground that nothing had been done in execution of the intent to change beneficiaries. Other comparatively late cases indicate a relaxation of the rule. In Supreme Lodge v. Price, supra, while it was held that the insured did not do all within her power to effect the change, the court indicated that had she executed all the necessary papers and directed their filing with the necessary fee the change would have been effective. That case also emphasizes the element of notice to the association during the life of the insured, but in Johnson v. Kearns, also supra, the notice was mailed after the death of the insured, although at his direction, the court remarking that change in beneficiary "depends, not merely upon the records in the office of the company at the moment of the death of the insured, but also upon what steps have been taken by the insured prior to his death. The only new question here presented arises from the fact that the request for change of beneficiary was not actually mailed prior to the death of the deceased, although the insured upon his deathbed handed it to his employer for the purpose of mailing. If the insured had himself mailed the letter, and thereafter died before it reached the office of the company, under the terms of the contract and the authorities, it would be held that the beneficiary had been changed. We do not think the result should be any different in the case at bar. Prior decisions have, in effect, held that the right of an insured to change his beneficiary does not depend upon how far he may happen to live from the home office of the company. We think also such a right does not depend upon when the next mail train happens to leave that particular locality. *The right depends upon the acts of the insured himself, as measured by equitable rules.*" (Italics added.) Nor do we think it should depend upon the inadvertence of the insured's agent. It does not appear that had the certificate been sent in with the required fee, as insured directed and as he supposed was done, the society would not have issued the new policy in favor of appellant as beneficiary, or that all was not in order so as to meet the approval of the insurer's officers. The insured, having complied so far as he was able with the rules of the society, by executing and acknowledging the indorsement and by directing his attorney, brother, and friend to see that the rest of the necessary steps were carried out, it must be held, under the equitable principles considered above, that there was an effective change of beneficiary.

[6] Respondents contend that, even if made with all the formalities required, the attempted change was invalid under section 7 of the constitution forbidding an assignment for consideration or a pledge of the policy.

Assuming that the transaction can be considered an assignment rather than an attempt to appoint a new beneficiary, there is no merit in this contention. In Lewis v. Reed, 48 Cal.App. 742, 192 P. 335, 336, such a restriction in the policy was held ineffective. The court there said (48 Cal.App. 742, at page 745, 192 P. 335): "under the statute of this state the right is preserved to the insured to assign his policy of insurance, and that right cannot be taken away by a term of the contract which attempts so to do. Generally speaking, it may be stated as a well-recognized rule that a person may

waive the conditions of a statute designed solely to secure to him a personal privilege where no question of public policy enters into consideration. Section 2764, Civil Code [now, with slight changes, section 10130 of the Insurance Code (Stats. 1935, ch. 145, p. 638; Deering's 1935 Supp., Act 3748)] provides that—'A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered.'" See, also, Beaumond v. Prudential Ins. Co., 5 Cal.App.(2d) 632, 634, 43 P.(2d) 820.

The judgment is reversed, and the cause remanded to the trial court, with directions to enter judgment for the cross-defendant and appellant J. C. Pimentel.

We concur: WASTE, C. J.; SHENK, J.; CONREY, J.; SEAWELL, J.; CURTIS, J.



6 Cal.2d 204

BELSER v. AMERICAN TRUST CO. et al.

S. F. 15471.

Supreme Court of California.

April 30, 1936.

Gifts ⇐49(4)

Evidence that there was no intent on part of father to part with title to land under purported gift deed to his son supported judgment refusing to quiet title to such land, claimed by son under such deed, but granting to son interest representing his contribution towards purchase price and decreeing lien for improvements made by him.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Paul A. Belser against the American Trust Company, executor of the last will and testament of Julius Henry Belser, deceased, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. E. White, of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe and McKinstry & Haber-Peirce Coombes, all of San Francisco, for respondents.

LANGDON, Justice.

This is an action to quiet title to real property. In May, 1925, Julius Henry Belser and plaintiff, his son, purchased the property in question for $7,750. The father paid $7,000, and plaintiff and his wife paid $750. The deed from the vendors was made to the father as grantee, and so recorded. The father died April 18, 1930. In his safe deposit box was found an instrument in the form of a gift deed of the property from the father to plaintiff, dated October 19, 1926.

Plaintiff brought an action in the superior court against the executor of his father's estate to quiet title to the property. The lower court found that there had been no delivery of the purported deed to plaintiff, and gave judgment for the defendant executor, which was affirmed on appeal. Belser v. American Trust Company, 125 Cal. App. 344, 13 P.(2d) 951.

Subsequently, plaintiff brought the present action with the same object, but relying upon a purported earlier gift deed alleged to have been delivered to him on May 4, 1925, the same day the property was purchased from the original owners. Plaintiff testified that this earlier deed was returned to his father a few days later for safe-keeping, and that his father destroyed it, telling him that he would substitute another one for it. The evidence shows, however, that plaintiff agreed to pay a monthly rental of $35 to his father for the use of the property, and made regular payments for some time. The deceased's ledger showed these charges, and also indicated certain defaults in payment. The witness Callahan testified to a conversation with plaintiff at the time of his father's funeral in which plaintiff said: "I wonder what my father did with the Piedmont property?" In this conversation plaintiff made no reference to a gift deed, but asserted that he had put some money into the purchase, and remarked: "I am going to see that I get it back."

The lower court found that there was no intent on the part of the deceased to part with title by said purported gift deed. Judgment was given in favor of plaintiff for a 3/31 undivided interest in the property

(representing the $750 contributed by him toward the purchase price); and also decreeing a lien upon all of the property in the sum of $903.23, together with interest at 7 per cent. from June, 1925, for improvements on the property made by plaintiff with the consent of the deceased.

The judgment is supported by substantial evidence, and is accordingly affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; CONREY, J.; SEAWELL, J.



6 Cal.2d 331

PEOPLE v. BERRYMAN.

Cr. 3952.

Supreme Court of California.

May 1, 1936.

1. Criminal law ⇐1171(2)

In murder prosecution, making of declaration by district attorney in opening statement, which was not proved during trial, that it would be shown that blood found on defendant's trousers had same blood count as that of deceased *held* not reversible error.

2. Criminal law ⇐730(1), 1037(1)

Where no objection is made by defendant to misconduct of district attorney claimed to be prejudicial or court sustains objection and properly admonishes jury, such misconduct is insufficient to justify granting of new trial or reversal of judgment.

3. Criminal law ⇐1171(1)

Where case is closely balanced and there is grave doubt of defendant's guilt, acts of misconduct of district attorney are such as to contribute materially to verdict and require reversal of judgment.

4. Criminal law ⇐730(1)

Where misconduct of district attorney is such that harmful results cannot be cured by any retraction of counsel or instruction of court, such misconduct requires reversal of judgment notwithstanding giving of proper admonition by court.

5. Criminal law ⇐730(14)

Where evidence in murder prosecution was overwhelmingly against defendant, statement of district attorney in argument to jury that stand must be taken against ease with which people throw over their regard for rights of others, and that whole country was watching jury on case *held* not reversible error where jury was instructed to disregard such statement.

6. Criminal law ⇐687(1)

Reopening case to take further evidence after both sides had rested is within sound discretion of trial court.

7. Criminal law ⇐687(1), 1168(2)

Reopening of murder case after close of all evidence for introduction in evidence of bottle bearing fingerprints of defendant which was found in deceased's automobile *held* not error, and if error, harmless where fact that such bottle had been so found was already in evidence.

8. Homicide ⇐347

Reviewing court had no authority to commute death sentence for first-degree murder to life imprisonment, since fixing of punishment for first-degree murder was within exclusive discretion of jury.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

John B. Berryman was convicted of first-degree murder, and he appeals.

Affirmed.

A. J. Harder, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

CURTIS, Justice.

Defendant was convicted of murder of the first degree. The verdict of the jury was silent as to the punishment which the defendant should suffer as a result of his crime. The court, as was its duty in pursuance of such a verdict, imposed the death penalty upon the defendant. He has appealed from the judgment and from the order denying a new trial.

From the evidence we gain but little knowledge of the defendant, John B. Berryman, before his appearance on July 8, 1935, in Wilton and Elk Grove, two small communities, situated near each other in Sacramento county, and some 8 to 10 miles

from the city of Sacramento. At about 6 o'clock of the evening of that day he came with the deceased, John Grant, to the gasoline station and store of C. H. Edwards, situated about a half a mile south of the Seven-Mile House, which is near the town of Wilton. The two came to the station in Grant's machine driven by the defendant. Grant ordered gasoline for his machine, and then went into the house of Edwards which was connected with the store. He was an old friend of the Edwards' family. While Grant was in the house, Edwards and the defendant engaged in conversation. The defendant asked for a sack of tobacco from Edwards' store, and told Edwards to charge it to Grant. The defendant claimed to have met Edwards before, which fact caused Edwards to scan Berryman's features very closely to determine whether he had ever met the defendant before. He concluded that he had never seen defendant before that evening. Grant thereafter came out of the house, took out his pocket book in plain view of defendant, displaying therein something between thirty and forty dollars. He paid for the gasoline and then he and defendant rode off together in Grant's machine. Edwards said Grant had been drinking and that when they left he was pretty sure the defendant was driving the machine. Evidently the two went from Edwards' place of business to Grant's house, which was located on a small farm near or in Wilton. Grant's house was set back from the main highway something less than a mile, and a private driveway or roadway led from the public highway to his house. Mrs. Grant was at home when they arrived. Both men entered the house, which was a small five-room house. Grant complained of not feeling well and went into the bedroom to take off his shoes, intending to lie down on the bed for a while. The defendant was in the kitchen and possibly in the bedroom during their short stay in Grant's house. Mrs. Grant conversed with him, and had every opportunity to acquaint herself with his physical appearance. He told Mrs. Grant he was to stay at their house for a few days and work as he needed money. While Grant was taking off his shoes, something was said about the battery to the radio, which had been taken to the shop for repair. Grant then changed his mind about going to bed, and put on his shoes, and told Mrs. Grant he was going after the battery. He and the defendant then left the Grant home in Grant's machine, defendant driving, evidently for the reason that Grant was slightly at least under the influence of liquor. Mrs. Grant testified that it was about 6:30 in the evening when her husband and the defendant visited the Grant home. The next we see of Grant was at Mack's Welding Works, where he had evidently gone to get the radio battery. A man was with him, but Mr. Mack was unable to identify him as the defendant. Grant and the defendant were next seen together at Baldwin's Radiator Shop just outside of the town of Wilton, where Grant brought his automobile to have the radiator fixed. Mr. Baldwin conversed with the defendant, and the latter claimed he had met Baldwin before, which caused the latter to observe closely the features of the defendant in order to determine when he had ever met the defendant before. Grant was still under the influence of liquor and took out his pocket book and displayed his money. Baldwin said he saw a $20 bill and some small change in the pocket book as it was displayed by Grant. Grant and Berryman arrived at Baldwin's place between 6:30 and 7 o'clock of the same evening on which they had visited Grant's house. About one hour thereafter, or about 8 o'clock of that evening, Mrs. Grant saw her husband's automobile as some one drove it from the public highway on the private road leading to her house. After the machine had entered the driveway, it stopped. She saw a man get out of the machine, and after a few minutes' delay he re-entered the machine and drove away at a rapid rate of speed. Some fifteen minutes later, a couple of ladies, while driving along the road, discovered the dead body of Grant lying in the driveway at the point where Grant's automobile was seen to stop and then turn and leave on the public highway. Grant had been so badly beaten over the back of the head that he had died from the result of the wounds so inflicted. Grant's pockets were turned inside out and his money was gone. The next we see of the defendant was at the home of E. F. Poston at Elk Grove. He arrived there about 8 o'clock of the same evening, and offered Poston $2 to take him to Sacramento. He said his wife was sick in the hospital in that city and he was in a hurry to get there. Poston agreed to take defendant to Sacramento, and the latter voluntarily raised the price of the trip from $2 to $2.50. He was well supplied with money. A neighbor of Poston by the name of Martin Moritz rode with Poston and the defendant on their

trip to Sacramento. Under the directions of the defendant, they left him near the corner of L and Second streets. He asked them into a beer parlor where they all had a drink or two. Poston left the defendant at the beer parlor and returned to his home where he heard the report of Grant's death. He immediately telephoned the sheriff of Sacramento county, and told him of taking Berryman from Elk Grove to the city of Sacramento. At the request of the sheriff, Poston went to Sacramento, and seeing defendant on Second street between K and L close to the beer parlor where he had left him earlier in the evening, pointed him out to the deputy sheriff who accompanied him. On being arrested, the defendant denied he knew Grant or that he had been at his house or in Wilton or Elk Grove on that day or ever. Blood was found on his trousers, which the experts testified was human blood. Grant's machine was found parked about 200 feet from Poston's house. After his arrest, the defendant was placed on trial, and at the trial he failed to take the witness stand or to testify in the case.

No serious contention is made that the verdict is not supported by the evidence produced at the trial. Defendant claims, however, that on account of certain errors occurring during the progress of the trial he was so prejudiced before the jury that he was denied a fair trial. These alleged errors consist of statements made by the district attorney in his opening statement to the jury, which he subsequently did not prove, and statements made by the same officer in his argument to the jury, and the action of the court in reopening the case at the request of the district attorney for the purpose of admitting in evidence a bottle containing a small amount of whisky marked Exhibit 5, which it was claimed bore the defendant's fingerprints.

[1] In his opening statement to the jury the district attorney said among other things that the officers found blood on his (defendant's) trousers. "We will show that that was human blood. We will show you it has the same blood count as Mr. Grant's blood." On the trial of the case while the prosecution established the presence of human blood upon the trousers worn by the defendant on the day the deceased was killed, it failed to prove that the blood on the trousers was the blood of the deceased, as the district attorney claimed in his opening statement the prosecution would prove at the trial of the action. It is not contended that this statement of the district attorney was not made in good faith nor in the honest belief that the prosecution would be able to prove all that he claimed it would prove in his statement. But even if this claim were made, there is nothing in the record which would tend to support it. The question raised by the defendant has frequently been before this and the appellate courts of this state, and we are not cited to any instance where a contention like that made by appellant in the present case has been held to be reversible error. On the other hand, the conclusion of the appellate courts is that such an overstatement reacts upon the party making it, rather than injuring the party against whom it was made. "It is the duty of counsel making an (opening) statement to state the facts fairly, and to refrain from stating facts which he cannot or will not be permitted to prove. Yet, the mere violation of the rule by a prosecuting attorney is not of itself evidence that he acted in bad faith, and reversible error. Usually such an overstatement reacts upon the party making it." 8 Cal.Jur. 260; People v. Gleason, 127 Cal. 323, 59 P. 592; People v. Lewis, 124 Cal. 551, 57 P. 470, 45 L.R.A. 783.

The statements of the district attorney which the appellant contends constituted such serious misconduct on the part of said officer as to prejudice the substantial rights of the defendant were made during the argument of the district attorney to the jury as shown by the following excerpts from the reporter's transcript: "We have got to take a stand against the ease with which people throw over their regard for the rights of another, we have got to do it, and I want to say to you Ladies and Gentlemen of the Jury that this whole county, this whole state is watching what you do today upon this case. Why, it is an awful thing. * * *

"Mr. Harder: To that statement, your honor, we assign as error on the part of the district attorney.

"The court: The court will agree with you on that, Mr. Harder. I would direct counsel to refrain from that sort of argument; I think it is improper.

"Mr. Babcock: Very well, your Honor.

"The Court: * * * And the jury is instructed to disregard it.

"Mr. Babcock: I did that in good faith, that these punishments are meted out so that other people will know. * * *

"The Court: Well, you went farther than that.

"Mr. Babcock: Very well, your Honor."

[2-4] The general rule regarding misconduct of the district attorney which tends to and is likely to result in prejudice to the defendant is that where no objection is made to such misconduct by the defendant, or where objection is made and the court sustains the objection and properly admonishes the jury, the misconduct claimed to be prejudicial to defendant's rights will not furnish grounds sufficient to justify the granting of a new trial or the reversal of the judgment. 8 Cal.Jur. § 603, p. 623, and cases there cited. There are two exceptions to this general rule. One is where the case is closely balanced and there is grave doubt of defendant's guilt, and the acts of misconduct are such as to contribute materially to the verdict, a miscarriage of justice results requiring a reversal. People v. Fleming, 166 Cal. 357, 381, 136 P. 291, Ann.Cas.1915B, 881. The other exception is where the act done or remark made is of such a character that a harmful result cannot be obviated or cured by any retraction of counsel or instruction of the court. In such cases the misconduct will furnish ground for a reversal of the judgment, even where proper admonitions are given by the court. People v. MacDonald, 167 Cal. 545, 551, 140 P. 256; People v. Derwae, 155 Cal. 592, 597, 102 P. 266.

[5] Appellant cannot possibly come within the first of these exceptions; that is, that the case against him is a close case and therefore the objectionable statement of the district attorney contributed materially to the verdict against him notwithstanding the admonition of the court to the jury to disregard it. The evidence showed without a shadow of a doubt that the deceased Grant met his death as a result of the criminal act of some one, and points unerringly to the appellant as the perpetrator of the crime. In a case so overwhelmingly against the defendant, the objectionable remark of the district attorney could not have had any material weight with the jury even had they been disposed to violate the court's admonition. The evidence before us would have compelled the conviction of the defendant had the objectionable remark not been made. Neither do we think that appellant can bring the remark of the district attorney within the second exception; that is, that the statement was so inherently prejudicial to defendant's rights that the harmful results therefrom were not obviated and cured by the court's admonition. A remark quite similar to that of the district attorney's in this case, and to which the defendant made objection, was the subject of consideration in the case of People v. Plum, 88 Cal.App. 575, 584, 263 P. 862, 265 P. 322, and it was held by the appellate court that such a remark, and the refusal of the court to sustain defendant's objection thereto, were not prejudicial to the defendant's rights. Defendant contends that the remark was in the nature of a threat, and was therefore highly prejudicial to his rights, citing People v. Warr, 22 Cal.App. 663, 136 P. 304, 307. There is nothing to be found in the opinion in that case which sustains this contention of the defendant. The following statement from the opinion is adverse to defendant's position where the court said: "It very seldom happens that a mere observation of an attorney, expressed during the heat of his oration, fastens itself with such tenacity upon the minds of the jurymen as not to be dislodged by a direct instruction from the trial judge."

[6, 7] After both sides had rested, but before the argument to the jury had commenced, the prosecution asked that the case be reopened for the purpose of permitting the introduction in evidence of a bottle, which had been previously marked Exhibit 5 for identification, but which had not been offered in evidence. The request of the district attorney was granted, and the bottle was admitted in evidence as Exhibit 5. This was done over the objection of the defendant. The bottle was found in the deceased's automobile, and the evidence showed that it bore the fingerprints of the defendant. The matter of reopening a case to take further evidence is within the sound discretion of the trial court. People v. Oxnam, 170 Cal. 211, 214, 149 P. 165; People v. Champion, 193 Cal. 441, 447, 225 P. 278. No claim is made that the bottle, Exhibit 5, was not material in the case or that it had not been properly identified by competent evidence during the progress of the trial. There was no error in permitting the case to be opened for the purpose of admitting this exhibit in evidence. Even if there was error, it was harmless as it was already in evidence that the bottle had been found in deceased's car shortly after his death and that it bore the fingerprints of the defendant. The mere admission of the bottle itself in evidence could not have prejudiced the defendant in the eyes of the jury after it had heard the evidence relative to the

place where it was found and that the fingerprints of the defendant were found on the bottle. This is particularly evident when we consider that the only value of the bottle as evidence was that it bore the defendant's fingerprints and that the only purpose of having the bottle admitted in evidence was that it might be submitted to the inspection of the members of the jury, who, of course, were unable to discover the fingerprints thereon which the experts in the case testified were on the bottle.

[8] Finally, the appellant states that in view of the errors occurring during the trial, which have just been considered by us, and also in view of the excited and inflamed state of the public mind due to this and similar crimes committed in the county in which the defendant was tried, this court should take the necessary steps to bring about a commutation of defendant's sentence to life imprisonment. The power and authority to fix the punishment for murder of the first degree has been by legislative enactment committed to the exclusive discretion of the jury trying the case. This court has no authority to review such discretion. People v. Adams, 199 Cal. 361, 366, 249 P. 186; People v. Vukich, 201 Cal. 290, 298, 257 P. 46; People v. Superior Court, 202 Cal. 165, 169, 259 P. 943.

The judgment and order denying motion for a new trial are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CONREY, J.



6 Cal.2d 171

LERTORA v. RILEY et al.

BIGGIO v. SAME.

S. F. 15523.

Supreme Court of California.

April 27, 1936.

1. Animals ⇐36½

Officials who wrongfully slaughter animals under Bovine Tuberculosis Law are guilty of tort and are responsible to owners of animals (St.1931, p. 2392).

2. States ⇐78

State is not liable for unauthorized act of its officers unless expressly provided by statute.

3. Animals ⇐36½

State is not liable for wrongful slaughter of animals under Bovine Tuberculosis Law by state officers in absence of statute imposing such liability on state (St.1931, p. 2392).

4. Mandamus ⇐164(1)

Where defendants, who were state officers, filed unverified answers to petitions for writs of mandate, issues raised by answers *held* properly before trial court, since answer of officer of state of California need not be verified.

5. Animals ⇐36½

Destruction of healthy cattle under color of police regulation or for benefit of public health is without authority of law and cannot form basis of claim against state.

6. States ⇐112

State is not answerable in damages to individual for injury resulting from alleged misconduct, negligence, or tortious acts of its officers or agents.

7. States ⇐66

Person dealing with state agency is chargeable with knowledge of extent of power of officers of such agency, of mode of its exercise, and that acts beyond scope of such power are void.

8. Eminent domain ⇐2(1)

In exercise of police power, use of property may be restricted or it may be destroyed, and no legal liability arises to compensate owner.

9. Animals ⇐36½

Burden is on person seeking indemnity for destruction of diseased stock by state to present convincing evidence that property destroyed was such as contemplated by statute (St.1931, p. 2392).

10. States ⇐119

Payment of indemnity by state for destruction of healthy cattle slaughtered with reacting animals under Bovine Tuberculosis Law *held* unconstitutional as a gift of public money to individual (St.1931, p. 2392; Const. art. 4, § 31).

11. States ⇐114

Expenditure of public funds must be for public as distinguished from private purpose.

12. States ⇐177

Persons having claims against state for which an appropriation has been made must comply with rules of state board of control before being entitled to payment (Pol.Code, §§ 664, 669).

13. Animals ⇐36½

Cattle owners failing to show compliance with restrictions of tuberculosis law regarding payment of indemnity, who presented no affidavit of officer responsible for indebtedness as required by rules of state board of control, and whose claim did not segregate diseased cattle from healthy ones which were slaughtered at same time, *held* not entitled to indemnity claimed, since claims were not presented in compliance with law (Pol.Code, §§ 664, 669; St.1931, p. 2394, § 9 (c) (g).

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Applications by A. Lertora and by Eugene Biggio for writs of mandate directed to Ray L. Riley, as state controller, and others to compel the state controller and state board of control to indemnify petitioners for the value of cattle slaughtered pursuant to the Bovine Tuberculosis Law. Judgments for petitioners, and the defendants appeal.

Reversed.

Prior opinion, 47 P.(2d) 546.

U. S. Webb, Atty. Gen., and Ralph O. Marron and Darwin Bryan, Deputy Attys. Gen., for appellants.

Arthur H. Barendt, J. R. Klawans, and James, Brann & Rowe, all of San Francisco, for respondents.

CURTIS, Justice.

[1-3] An order of transfer was made in these cases in order that we might give further consideration to the two questions which formed the basis of the opinion of the District Court of Appeal. The first of these questions was whether the state under the Bovine Tuberculosis Law (St. 1931, p. 2392) of the state is liable for animals, killed under the direction of its regularly and lawfully appointed officers, which did not react to the tuberculin test. The evidence in this case shows that a considerable number in the herd of each of the respondents did not respond to said test or were killed without the test being applied to them. After more mature consideration of this question, we are satisfied with the conclusion therein reached by the District Court of Appeal. The Bovine Tuberculosis Law expressly limits the recovery for slain animals to those which were infected with tuberculosis as determined by the application of the test hereinbefore mentioned. If the officials of the state wrongfully slaughter animals which did not respond to that test, they are guilty of a tort and are responsible to the owners of the animals illegally killed, but the state is not liable for the unauthorized act of its officers, unless expressly provided by statute, and neither the Bovine Tuberculosis Law nor any other statute to which our attention is called imposes such liability upon the state.

The second question which the District Court of Appeal holds to be decisive of respondents' right to recover in these actions relates to the presentation of their claims against the state. This question is discussed at length by the District Court of Appeal, and we are satisfied that its conclusion thereon is in harmony with the previous decisions of this court upon that question.

We therefore find ourselves in accord with the opinion of the District Court of Appeal, heretofore rendered in these actions, and we approve the same and adopt it with a slight deletion as the opinion of this court. It is as follows:

The trials of the two actions herein involved were consolidated. Separate findings were made by the court, but they are in all essentials the same except as to the amounts of money embraced in the claims of the respective petitioners who are respondents herein.

The trial court granted each of the respondents a peremptory writ of mandate commanding the state controller and the state board of control to proceed forthwith in the performance of all acts necessary to indemnify each of the respondents in a certain sum, being one-third of

the total appraised value of his cattle, as provided for the indemnity of owners of cattle condemned under the Bovine Tuberculosis Law. St.1931, p. 2392. The sum required to be paid in the case of respondent Lertora is $6,668.07, and in the case of respondent Biggio, the sum of $1,757.43, both with legal interest.

About November 15, 1932, in accordance with the provisions of the Bovine Tuberculosis Law, the director of agriculture of the state of California declared the county of Marin a tuberculosis control area. Respondents, during the year 1932, became the owners on separate ranches, but under similar conditions, of a large number of adult cattle, ostensibly for dairy purposes. Many of these were purchased at low prices, and were cattle which had been culled or rejected from other herds.

In December, 1932, veterinarians, representing the department of agriculture of the state of California and the bureau of animal industry in the department of agriculture of the United States government, went upon the lands of the respective petitioners and subjected a large number of cattle thereon to the tuberculin test prescribed by the Bovine Tuberculosis Law. From 85 per cent. to 90 per cent. of the Lertora herd of 506 cattle, and about 67 per cent. of the Biggio herd of 134 cattle reacted to the tuberculin test, which is a standard test recognized by veterinarians and by the California statute. Shortly after the tests were made, all of the adult cattle in the Lertora and Biggio herds were branded as tuberculous, and condemned, appraised, and slaughtered under the direction of agents of the department of agriculture. In addition to the adult cattle above, about 162 head of calves belonging to Lertora were branded as tuberculous and condemned and slaughtered. None of them were tested or given a physical examination for the purpose of determining whether or not they were tubercular, but apparently they were condemned and ordered slaughtered under some kind of an agreement or understanding between the veterinarian in charge of the testing operations and the petitioner Lertora that they should be sold for veal, and an indemnity of $12 per head should be paid, dependent upon whether or not the carcasses should show tubercular lesions upon a post mortem examination.

The petitioners and respondents filed separate claims for the respective amounts hereinabove stated with the state controller about July 22, 1933. These claims were rejected by the controller upon the ground that the respective claims did not comply with the rules and regulations of the state board of control governing the presentation and audit of claims against state funds and appropriations, and were not legal or proper demands against the state of California. Thereafter the claims were referred to the state board of control, which, on December 15, 1933, disallowed each of the claims.

To the verified petitions of the petitioners, the appellants filed unverified answers in which they denied generally and specifically all of the allegations of the petition. As a second defense, they charged a conspiracy between the petitioners and certain employees and officers of the department of agriculture of the state of California to defraud the state and the government of the United States. As a third defense, the respondents alleged that the claims as presented did not comply with rules 3 and 4 of the rules and regulations adopted by the state board of control, in that they were not accompanied by an affidavit of the officer directly responsible for the indebtedness, or approved by the state officer in the manner provided by rule 4 of such regulations.

The trial court found that all of the allegations of the respective petitions were true; that all of the allegations of the answers were untrue, with certain minor exceptions, and further found that R. E. Duckworth, veterinarian of the state department of agriculture, did test some of the cattle in the herds of petitioners, and did, without the knowledge of petitioners, subsequently brand substantially all of the cattle in said herds as reactors, although in fact a great number of the cattle in said herds so tested and branded failed to react to the tuberculin test so administered, and although in fact the tuberculin test was not administered to any of the calves of petitioner Lertora in his herd so branded.

[4] The trial court's finding as to the alleged conspiracy cannot be disturbed, but other questions are involved in the appeal which require more serious consideration. The appellants contend that the officers of the state of California are not

authorized to pay indemnity under the Bovine Tuberculosis Law for cattle which have not reacted to the tuberculin test, or which have not been adjudged tuberculous upon physical examination; that payment under such conditions would be a gift of public money contrary to the provisions of section 31 of article 4 of the Constitution; and, further, that the controller and the state board of control are prohibited by law from authorizing the payment of a claim against the state when the same has not been presented for payment in accordance with law and the rules and regulations of the board of control. These issues were properly before the trial court upon the answers of the appellants. The answer of an officer of the state of California to a complaint or petition need not be verified. Seckels v. Department of Industrial Relations, 98 Cal.App. 647, 277 P. 497.

The Bovine Tuberculosis Law provides, in part, as follows: "Sec. 9. * * * (c) *Disposition of reactors. Payment to owner of reactor.* Any bovine animal, in a tuberculosis control area, reacting positively to a tuberculin test conducted by a representative of the federal or state department of agriculture, or adjudged tuberculous upon physical examination by said representative, shall immediately be segregated from other bovine animals which are not reactors. Within thirty days after the appraisal of said reacting bovine animal, as provided for herein, it shall be slaughtered under the direction of the department of agriculture; and in consideration of the fact that the eradication of bovine tuberculosis is beneficial to public health and welfare, before said animal is slaughtered, its value shall be determined by appraisement by a representative of the said department of agriculture or a representative of the bureau of animal industry of the United States department of agriculture, and the owner or his agent. In case of failure to agree on the valuation, said reacting bovine animal shall be appraised by the chief appraiser of said department of agriculture or his representative. In either event, the value determined shall be final. Except as hereinafter provided, the State of California shall pay to the owner of any reacting bovine animal slaughtered under the provisions of this section one-third of the difference between the appraised value of such reacting bovine animal and the proceeds from the sale of the salvage, and the owner shall also receive the proceeds from the sale of the salvage, provided that in no case shall any payment by the State of California, hereunder, exceed thirty-five dollars ($35) for any grade animal or seventy dollars ($70) for any purebred animal, and no payment shall be made unless the owner has complied with all the provisions of this act relating to tuberculosis control areas and the regulations promulgated by the department of agriculture for its enforcement."

[5, 6] The repeated use of the words "reacting bovine animal" very certainly indicates that the Legislature did not contemplate the payment of indemnity for healthy animals. Contact with reacting animals or exposure to diseased animals is not defined or fixed by the act as a ground for condemning or for awarding indemnity for slaughtered animals. The wording of the law and considerations of public policy justify payment of indemnity only in cases of cattle which are found to be reactors or adjudged, after a physical examination, to be actually infected with tuberculosis, and the conclusion must be that the officers of the state are authorized to pay indemnity only for diseased, and not for sound animals. The weight of authority in other jurisdictions, involving the construction of similar laws, is that the destruction of sound or healthy cattle under color of police regulation, or for the benefit of public health, is without authority of law and cannot form the basis of a claim or action against the state. Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488, 73 N.W. 817. In Houston v. State, 98 Wis. 481, 74 N.W. 111, 113, 42 L.R.A. 39, the court said: "The law is well established that neither the state nor the United States is answerable in damages to an individual for an injury resulting from the alleged misconduct or negligence or tortious acts of its officers or agents." See, also, Miller v. Horton, 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 Am.St.Rep. 850. The Legislature of California did not authorize the misconduct of its officers who condemned the petitioners' cattle without test or examination. In Gibbons v. United States, 8 Wall. (75 U.S.) 269, 274, 19 L.Ed. 453, the Supreme Court of the United States said: "But it is not to be disguised that this case is an attempt, under the assump-

tion of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story, 'it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.'"

[7] The testimony of Dr. R. E. Duckworth was that he tested 134 head of cattle in the Biggio herd; that 89 reacted, and that he branded the remaining 45 as reactors without making a physical examination, and that such action was taken upon the instructions of a superior officer whose office was in Sacramento; that in the Lertora herd, 85 to 90 per cent. reacted, and all were branded, besides 160 to 170 calves which were not tested at all, and of which no physical examination was made. No testimony was offered, or is found in the record to rebut the statements of Duckworth as to the procedure adopted in testing and branding the cattle or Lertora calves, and the evidence does not support the finding of the court that all of the allegations of the petitioners' petitions are true. The point is made by petitioners and respondents that the trial court found the veterinarian's acts were done without the knowledge of the petitioners. Any person dealing with a state agency is chargeable with knowledge of all of the powers possessed or which may be legally exercised by the officers in charge of such agency, and all acts of such officers which go beyond the scope of the power vested in the officer exercising the functions of such agency are void, and knowledge must be presumed to be had, not only of the extent of the power, but also of the mode of its exercise. Bottoms v. Madera Irrigation District, 74 Cal.App. 681, 242 P. 100.

[8] In the exercise of the police power, the use of property may be restricted or it may be destroyed, and no legal liability arises to compensate the owner therefor. Patrick v. Riley, 209 Cal. 350, 287 P. 455, 457.

[9] "Any provision for the payment to the owner of certain sums on account of the destruction of diseased stock is a pure 'gratuity,' for 'the Legislature might have directed the destruction of such animals without any compensation under the police power.'" Patrick v. Riley, supra, quoting from Knox County v. Kreis, 145 Tenn. 340, 343, 236 S.W. 1, 2, and citing other cases. Under such circumstances, the burden is upon the person seeking indemnity to present clear evidence of convincing force that the property destroyed was such as is contemplated by the statute.

[10] The Bovine Tuberculosis Law provides for the immediate segregation of reacting animals, and not for the destruction of nonreactors or those coming in contact with reactors. The statute does not define the destruction of healthy animals as necessary for the preservation of the public health, and the destruction of such animals was not within the jurisdiction of the department of agriculture or its officers, and would not be for a public purpose as determined by the Legislature; consequently the payment of an indemnity for such purpose would fall within the inhibitions of section 31 of article 4 of the Constitution of California.

In Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 755, 21 L.R.A. 474, 37 Am.St.Rep. 17, the court said: "The legislature is to be regarded as holding the public moneys in trust for public purposes, and this limitation of the constitution is directed against its disposal of these funds except in accordance with such purposes. All those moral considerations or demands, resting merely upon some equitable consideration or idea of justice, which in an individual, acting in his own right, would be upheld, are insufficient as a basis for making an appropriation of public moneys. An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a 'gift,' within the meaning of that term, as used in this section; and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration."

[11] It is fundamental that the expenditure of public funds must be for a public as distinguished from a private purpose.

City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433; Patrick v. Riley, supra.

The claims of the respective petitioners were in substantially the same form, and were verified by the claimants, but were not accompanied by the affidavit of any officer of the department of agriculture, or approved by the director of agriculture or his deputy.

Section 9(g) of the Bovine Tuberculosis Law provides as follows: "Each claim against the state for payment in consideration for the slaughter of any reacting bovine animal shall be presented to the state controller, audited and paid out of appropriations or funds available therefor, in accordance with law."

Section 664 of the Political Code provides in substance that the board of control shall adopt general rules and regulations governing such matters as are specifically committed to the jurisdiction of said board, and governing the presentation and auditing of claims against the state, and in accordance with such general rules and regulations, the state controller shall audit such claims before drawing his warrant therefor as prescribed by law, and any person having a claim against the state for which an appropriation has been made may present the same to the state controller in the form and manner prescribed by such general rules and regulations.

It appears that in conformity with section 664, the board of control adopted certain rules, among which is rule 3, as follows: "*Affidavit.* Every claim, unless otherwise provided by law, must be accompanied by affidavit of the officer directly responsible for the indebtedness to the effect that the services were actually rendered, and the indebtedness incurred solely for the benefit of the state in accordance with the provisions of law"; and rule 4, which provides that each claim must be approved by the state officer or his chief deputy, or in the case of boards and commissions, by a majority of the members, or by a finance committee duly authorized to act by such board or commission, except as otherwise provided by law.

Section 669 of the Political Code provides in part as follows: "The controller must not draw his warrant for any claim until it has been audited by him in conformity with the general rules and regulations adopted by the board of control governing the presentation and audit of claims, and when hereafter, the controller is directed to draw his warrant for any purpose, this direction must be construed as subject to the provisions of this section, unless the direction is accompanied by a special provision exempting it from the operation of this section."

[12, 13] These sections of the Political Code have the effect of incorporating in the law of the state the rules of the board of control so far as they relate to matters specifically committed to the jurisdiction of that board. Section 9(g) of the Bovine Tuberculosis Law simply says that claims for indemnity shall be presented to the state controller, audited and paid out of appropriations available therefor in accordance with law. It provides no procedure for such payments, and the law governing the same is found in sections 664 and 669 of the Political Code, together with the rules of the state board of control. The legal force and standing of those rules cannot be ignored in the absence of a showing of capricious acts on the part of the state controller or the board of control, or in the absence of a showing of willful or unreasonable refusal on the part of the officers of the department of agriculture which had the duty of enforcing the Bovine Tuberculosis Law, to execute an affidavit. The wisdom of the requirement of the board of control expressed in its rules is demonstrated in the instant case. The tuberculosis law provides for various restrictions on the payment of indemnity. The animals destroyed must be reacting animals, or adjudged to be tuberculous upon physical examination; no indemnity shall be paid for animals brought into a tuberculosis control area which react to a tuberculin test applied within 30 to 90 days, or brought into such area contrary to any law, or the rules or regulations of the state or federal department of agriculture; or for any reacting animal until the premises where said animal had been kept have been cleaned and disinfected in a manner approved by the department of agriculture; or for any reacting animal which has not been slaughtered within 30 days. The respective claims presented by the petitioners neither negative nor affirm the existence of any of these conditions, or show their compliance with such conditions. Furthermore, it appears that as

to a large number of the calves condemned and slaughtered, there was an undefined agreement or understanding between the owner and the examining veterinarian that indemnity at the rate of $12 per head for the calves would be paid dependent upon whether or not the carcasses showed tubercular lesions upon a post mortem examination. Appraisal must be made before slaughter, and must be based upon the actual value of the animal at the time of appraisal and after a condemnation, and not upon its market value as a healthy animal. Assuming solely for the purposes of the case that such an agreement was made, and could form the basis of a legal claim, no report was returned in any form by the petitioners, or the officers of the department of agriculture of the result of such post mortem examination, if any was made. To hold that it was unnecessary to obtain an affidavit required by the rules of the board of control would be to open the way to the practice of fraud upon the state. The provision of the tuberculosis law that the value determined by the appraisal should be final means nothing more than that in the absence of fraud the decision of the appraisers as to the value of the animals condemned and slaughtered could not thereafter be disputed by the owners, or by the state or its officers. The finality of the appraisement cannot operate to foreclose the state or its officers from contesting irregularities involved in the proceedings which form the basis of the claim, or from disputing the legality of any matter involved therein other than the matter of valuation. In the claim presented to the controller, diseased cattle were not segregated from the healthy ones, and it was impossible for the officers to whom the claim was presented to make any segregation from any information contained in the respective claims. The burden is upon the claimant to present a claim in compliance with the law. The appellants properly rejected each claim, and the trial court erred in granting a peremptory writ of mandate.

In our opinion, it is unnecessary to discuss other minor points which have been presented in the various briefs.

The judgments are reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CONREY, J.; SEAWELL, J.

13 Cal.App.2d 559

PEOPLE v. STANLEY.

Cr. 2854.

District Court of Appeal, Second District, Division 2, California.

April 29, 1936.

Automobiles ⇐351

Information charging offense under statute declaring person guilty of a felony who while intoxicated drives a vehicle in an unlawful or negligent manner, causing injury to another, *held* not insufficient for failure to allege that act complained of was committed upon a public highway (St.1935, pp. 94, 174, §§ 7, 501).

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers and Frank M. Smith, Judges.

Paul D. Stanley was informed against for a violation of provision of Motor Vehicle Code declaring person guilty of a felony who while intoxicated drives a vehicle in an unlawful or negligent manner, causing injury to another, and from the judgment, he appeals.

Affirmed.

Harry T. Young, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Dep. Atty. Gen., for the People.

CRAIL, Presiding Justice.

Does an information state facts sufficient to constitute a public offense under section 501 of the Vehicle Code (St.1935, p. 174, § 501), where it is not alleged therein that the act was committed upon a public highway? This is the sole question which confronts us upon this appeal.

Section 501 of the Motor Vehicle Code reads as follows: "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony," etc. While the section limits its application to certain acts committed by a person while driving a vehicle, it does not on its face further limit its application to such acts committed upon a public highway, and the defendant

must look elsewhere than to the section itself to find support for his contention. Defendant relies upon In re Worthington, 21 Cal.App. 497, 132 Pa. 82, 83, and People v. Hoenschle, 132 Cal.App. 387, 22 P.(2d) 777, 779. The Worthington Case reads as follows: "It appearing to the court that the act which petitioner is charged with having violated is one entitled, 'An act governing the use of automobiles upon public highways,' and it not being averred in the complaint that the defendant used or operated his automobile upon a public highway, the complaint failed to state any public offense." In the case of People v. Hoenschle, 132 Cal.App. 387, at page 390, 22 P.(2d) 777, the court says: "The case at bar and the Worthington Case were based upon complaints filed under statutes governing the use of automobiles upon public highways," and again held that such an allegation was essential. The present Vehicle Code contains no such title as indicated in the Worthington Case, and if it did contain such a title the title would not now govern—for by direct provision of section 7 of said Code (St.1935, p. 94, § 7) it is declared that titles contained therein shall not be deemed to govern, limit, or in any manner affect the meaning or intent of any section thereof. A case which is more directly in point is the case of People v. Finley, 27 Cal.App. 291, 149 P. 779, where the court held that such an allegation was unnecessary. We see no merit in the defendant's contention.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



13 Cal.App.2d 641

KUHN v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10061.

District Court of Appeal, First District, Division 1, California.

May 2, 1936.

1. Street railroads ⇐117(23)

Pedestrian, crossing street in pedestrian zone with signal in her favor when struck by street car, *held* not contributorily negligent as matter of law in failing to see car, which was fully lighted, after looking toward it.

2. Street railroads ⇐117(23)

Contributory negligence of pedestrian, crossing street intersection in obedience to traffic signal, in failing to see approaching vehicle, such as street car, on looking toward it, is question for jury.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Margaret Kuhn against the City and County of San Francisco and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Henry Heidelberg and Edmond P. Bergerot, Deputy City Attys., all of San Francisco, for appellants.

Keyes & Erskine and Russell Ainsworth, all of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for respondent.

TYLER, Presiding Justice.

[1, 2] Negligence—personal injuries. The sole question involved in this appeal is whether or not plaintiff was guilty of contributory negligence as a matter of law. There was evidence to show that on November 14, 1931, at about 5:30 p. m. respondent, a woman some sixty-one years of age, was proceeding westerly on the northerly side of Broadway street in San Francisco. It was dark and a heavy rain was falling. When she reached the curb at Van Ness avenue the traffic signal was against her. She waited until the traffic light turned green in her favor before stepping from the curb. She noticed that certain cars to her right, traveling north on Van Ness avenue, had come to a stop. She looked to her right, from which direction the street car came, but noticed no automobiles or street cars. She then stepped down from the curb and proceeded westerly to cross Van Ness avenue, walking in the middle of the pedestrian zone. When she had proceeded approximately to the middle of Van Ness avenue she passed a man and a woman walking easterly. At about this time she reached the westerly car tracks and was struck by appellants'

street car which, without stopping, had run through the traffic light that was set against it. The front of appellants' car struck plaintiff as she was in the act of crossing said tracks. The motorman testified that the tracks were wet and in consequence the car made little or no noise. He also testified that he did not see plaintiff until after he had run into her. Plaintiff testified that she looked but did not see the street car.

It is appellants' contention that as plaintiff testified she had looked and did not see the car, which was fully lighted, her testimony that she looked was not worthy of belief, for to have looked was to have seen, and plaintiff was guilty of contributory negligence as a matter of law, for which reason the case should not have been submitted to the jury. There is no merit in the contention. It is admitted by appellants that plaintiff had the "Go" signal in her favor and that the street car went through the traffic signal without stopping, but they insist that this act did not excuse plaintiff from exercising care. This is undoubtedly true, but where one crosses a street intersection in obedience to a traffic signal the question of the pedestrian's contributory negligence in failing to see an approaching vehicle when she looked in its direction is a question for the jury. Welch v. Wirsching, 127 Cal.App. 725, 16 P.(2d) 691. In the case cited, the same contention was made as here. In Long v. Barbieri, 120 Cal.App. 207, 7 P.(2d) 1082, decided by this court, it was held that where a plaintiff was walking in an established pedestrian lane, with the green traffic signal in her favor, and engaged in the exercise of ordinary care for her own safety, she was proceeding along a path where she had a right to be; and when she testified that she looked as she started to cross, but admitted, as here, that she did not see defendant's car, she was not guilty of contributory negligence as a matter of law. Counsel for appellants have cited us to numerous cases from other jurisdictions which they argue support their contention. We do not deem a discussion of those cases to be necessary. It is clear that the appeal is devoid of merit. Respondent had the green light in her favor. She took the precaution of looking for approaching traffic. She had proceeded three-fourths of the way across the intersection when she was struck by a car that ran through the traffic light, set against it, without stopping and without warning. She had reasonable grounds, under the circumstances, to expect that her crossing could be made in safety. At all events, as above pointed out, the question as to whether plaintiff was guilty of contributory negligence was one for the jury.

No question is raised as to the amount of the verdict which was for the sum of $3,600, nor as to the nature of the injuries she suffered.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



13 Cal.App.2d 353

SCOTT v. SUN-MAID RAISIN GROWERS ASS'N et al.

Civ. 1393.

District Court of Appeal, Fourth District, California.

April 21, 1936.

Hearing Denied by Supreme Court June 19, 1936.

1. Appeal and error ⇐1008(3)

Construction placed upon ambiguous contract by trial court after hearing parol evidence, if appearing to be consistent with intent of parties, should not be disturbed by reviewing court, though another interpretation would seem equally tenable.

2. Appeal and error ⇐1010(1)
Contracts ⇐176(3)

When parol evidence is introduced in aid of interpretation of ambiguous contract, question of its meaning is one of fact, and finding of fact embodying interpretation of doubtful language must stand if not lacking in evidentiary support.

3. Contracts ⇐147(1)

Purpose and object of task of interpretation of contract is to discover intent of parties, and all rules of construction are established with this end in view.

4. Principal and agent ⇐41

Contract creating agency for sale of "all of the offal product intended for live stock feed consisting of STW Feed and Raisin Pulp,

produced by the Syrup Plant of Sun-Maid Raisin Growers Association" *held* under evidence construable to cover only feed manufactured by syrup plant of association and not all STW feed wherever produced by association and all offal consisting of raisin pulp produced by the syrup plant.

5. Principal and agent ⇐41

In action on contract construed to create agency for sale of STW stock feed, consisting of by-products of raisin growers association, evidence showing production of feed was small because of difficulties in preparing the by-products *held* admissible on issue of good faith, in view of fact contract did not specify definite amount of feed to be manufactured.

6. Principal and agent ⇐47

Where contract bound raisin growers association to furnish agent all stock feed produced at certain syrup plant to be sold by agent, association *held* not liable for agent's loss sustained because of failure of association, which acted in good faith, to provide more stock feed in view of fact contract did not specify amount to be provided.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by J. H. Scott, doing business under the name and style of J. H. Scott Company, against the Sun-Maid Raisin Growers Association and others. From an adverse judgment, the plaintiff appeals.

Affirmed.

Louis C. Levy, of Fresno, and James T. Boyd & Fernand de Journel, of Reno, Nev., for appellant.

Sutherland, Dearing & Jertberg, of Fresno, for respondents.

JENNINGS, Justice.

Plaintiff instituted this action for the purpose of recovering from the defendants damages alleged to have been sustained by him because of the breach by the defendants of a certain written contract entered into between plaintiff and the defendant Sunland Sales Co-operative Association. During the trial of the action, which took place before the court without a jury, it was stipulated that the contract which was introduced in evidence, although it was not executed by the defendants, Sun-Maid Raisin Growers Association and Sun-Maid Raisin Growers of California, was authorized by them and that it should therefore be considered as the contract of the three defendants. The trial resulted in the rendition of a judgment in favor of the defendants, from which plaintiff has prosecuted this appeal.

The contract for whose alleged breach the action was brought is in the following language:

"This agreement entered into this 22d day of October, 1925, by and between Sunland Sales Cooperative Association, a California Corporation, hereinafter called the First Party, and J. H. Scott, of San Francisco, hereinafter called the Second Party,

"Witnesseth:

"First party hereby appoints second party its exclusive agent to sell and second party hereby agrees to sell on behalf of first party all of the offal product intended for live stock feed consisting of STW Feed and raisin pulp, produced by the Syrup Plant of Sun-Maid Raisin Growers Association during the period from November 1st, 1925, to November 1st, 1926, inclusive. Such sales to be made under such terms and conditions as may be determined by First Party except such as may be hereinbelow specifically set forth. All sales shall be made f. o. b. Fresno plant of Sun-Maid Raisin Growers Association for shipment during the next succeeding five months. Payment to be made against drafts with documents attached. Sales to be made at such a rate as to keep the stocks of such products at a minimum, it being understood and agreed that if the undelivered amounts of such stocks shall at any time exceed Four Hundred (400) tons, or if the undelivered amounts of such stocks shall for an aggregate of thirty (30) days of the period from November 1st, 1925, to November 1st, 1926, inclusive, exceed three hundred (300) tons, first party may thereupon cancel this agreement by written notice to Second Party, it being understood that by undelivered stocks is meant manufactured stocks, sold or unsold, prior to the delivery date thereof.

"Second party agrees to devote his exclusive time to the extent necessary to fulfill contract.

"First party agrees to fill the orders taken by second party hereunder in accordance with the terms thereof and to use its best efforts to collect for the same and, after

deducting from the proceeds of each sale a sufficient amount to net first party twelve dollars and fifty cents ($12.50) per ton on each ton sold, to remit the balance of such proceeds to second party, it being understood that the failure of any buyer to make payment in accordance with the terms of this order, within thirty (30) days after second party has been advised in writing of buyer's failure to make payment, shall entitle first party to cancel this agreement by written notice to second party.

"This agreement shall not be assigned by either party without the written consent of the other.

"In witness whereof, the parties hereto have caused these presents to be duly executed the day and year first above written.

"Sunland Sales Cooperative Association
"(First Party).
"By Ellsworth Bryce
"(Second Party).
"By J. H. Scott."

Examination of the record discloses that the chief problem which is presented for solution involves the interpretation of the following language contained in the above-described agreement: "All of the offal product intended for live stock feed consisting of STW Feed and Raisin Pulp, produced by the Syrup Plant of Sun-Maid Raisin Growers Association."

The trial court interpreted the above-quoted language to mean that thereby the parties to the agreement intended and understood that the contract should cover only a product intended for and manufactured as a livestock feed at and by the syrup plant of Sun-Maid Raisin Growers Association during the term of the contract and that the product would consist of a certain residue resulting from the process of manufacturing raisins for human consumption, commonly known as STW, compounded and ground with raisin pulp, the residue resulting from the manufacture of raisin syrup by said association from raisins unfit for human consumption, including so-called off-grade raisins. From the interpretation thus placed by the court on the language of the contract, appellant vigorously dissents.

It is appellant's primary contention that the contract must be interpreted as being an agreement by respondents to sell to the appellant all the offal consisting of STW feed (wherever produced) and all the offal consisting of raisin pulp produced by the syrup plant. It is declared that this must be the proper construction of the language for the obvious reason that the syrup machinery could produce no offal other than raisin pulp and conversely no "syrup pulp" could be produced at any other place except the building where the syrup was manufactured. It is further urged that appellant's understanding that two different products were to be provided for him is correct and proper because of the reference in the agreement to "stocks and products" and to "amounts," the use of the plural being persuasive of the fact that more than one product was contemplated. It is also argued that the use of the word "all" in conjunction with the term "offal," which latter term is said to be plural in its nature, is indicative of an intent that more than one product was to be furnished to appellant to be sold by him. It is said that the words "intended for live stock feed" mean "useable for live stock feed." Various rules established for the interpretation of contracts whose terms are ambiguous are relied on by appellant in support of his contention that the trial court incorrectly construed the language of the agreement which forms the basis of the present dispute. Among these rules may be noted the familiar principle that in cases of ambiguity the language of an agreement is to be interpreted most strongly against the party who has caused the uncertainty to exist and the promisor is presumed to be such party. It is pointed out that the uncontradicted evidence showed that respondents prepared the agreement and it is urged that therefore the language of the instrument whose meaning is doubtful must be construed most favorably to appellant and most strongly against respondents. Another canon of construction relied on by appellant is that an interpretation which is reasonable, fair, and just is preferred to one which is unreasonable, unfair, and extraordinary. It is declared that, for numerous reasons, the construction which appellant insists is a proper construction is obviously reasonable, fair, and just and that it makes the agreement effective and operative, whereas the interpretation which was successfully urged by respondents is manifestly unfair to appellant, unreasonable in scope, and extraordinary in that it does not square with the plain language and grammatical construction of the contract and that its effect is to make the agreement noneffective and nonoperative.

In giving consideration to appellant's contention that the language of the agreement which he insists is ambiguous may only be interpreted in accordance with his views and that any other construction is unfair and unjust to him and does violence to the language and syntax of the instrument, certain undisputed facts must be borne in mind. In the first place, it must be noted that appellant prevailed in his insistence that the language is ambiguous. The record demonstrates that respondents strenuously contended throughout the lengthy trial of the action that there is no ambiguity and uncertainty in the phraseology of the instrument and that parol evidence was therefore unnecessary to aid the court in the task of construction. The court, however, accepted appellant's view and permitted to be admitted all evidence offered by appellant which tended to show the circumstances preceding the execution of the instrument as well as those which followed its execution. The trier of facts was therefore fully informed of all the circumstances and facts surrounding the making of the written agreement and its conclusion intelligently formed on so ample a showing may not lightly be dismissed.

[1, 2] In the second place, the construction placed upon the language by the trial court under the circumstances disclosed by the record herein, if it appears to be consistent with the intent of the parties, should not be disturbed by a reviewing court even though another interpretation would seem equally tenable from the facts developed by the evidence. Kautz v. Zurich General A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; Wilson v. Brown (Cal.Sup.) 55 P.(2d) 485; Serviss v. Jones, 133 Cal.App. 640, 642, 24 P.(2d) 881; Hale v. Harbor Petroleum Corporation, 139 Cal.App. 455, 462, 33 P.(2d) 1039. When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, the question of its meaning is one of fact and a finding of fact made by the trier of facts embodying his interpretation of the doubtful language must stand if not lacking in evidentiary support. Thomson v. Leak, 135 Cal.App. 544, 548, 27 P.(2d) 795; Gallatin v. Markowitz, 139 Cal.App. 10, 13, 33 P.(2d) 424; Coats v. General Motors Corporation, 3 Cal.App.(2d) 340, 356, 39 P.(2d) 838.

[3] Finally, it must be remembered that the purpose and object of the task of interpretation is to discover the intent of the parties and that all rules of construction are established with this end in view.

In its finding V the trial court incorporated its interpretation of the language of the contract which was maintained by appellant to be doubtful and ambiguous. It there found contrary to appellant's contention that it was the intention and understanding of the parties that the agreement should cover only a product intended for and manufactured as a livestock feed at and by the syrup plant of Sun-Maid Raisin Growers Association during the term of the contract and that this product would consist of certain residue resulting from the process of manufacturing raisins for human consumption, commonly known as STW, compounded and ground with raisin pulp, the residue resulting from the manufacture of raisin syrup from raisins unfit for human consumption by the above-mentioned association. The court further found that prior to and at the time the agreement was executed appellant knew that the livestock feed covered by the contract was to be manufactured and produced at the syrup plant of the respondent association and that no product intended to be used as livestock feed was being produced or was intended to be produced at any other plant than the syrup plant, and, further, that at no time during the term of the contract was any livestock feed produced at any place other than at the syrup plant. The court also specifically found that the word "all" was used in the contract solely for the purpose of indicating that the entire amount of livestock feed produced at the syrup plant would be available for sale by appellant and that the word had no reference to any estimates of capacity of production of such feed "it being expressly found that no such estimates were ever made by the defendants or any of the defendants."

[4] Examination of the bill of exceptions through whose medium this appeal is presented demonstrates the futility of appellant's contention that the interpretation thus drawn by the trial court is incorrect. The very phraseology and syntax of the particular portion of the agreement which appellant maintains is uncertain and ambiguous sustains the construction adopted by the trial court. Furthermore, the record contains ample evidence to support the court's interpretation.

Appellant was not justified in believing that there would be available for disposal

by him all offal or waste of any or all plants maintained by respondents. The language of the agreement fully informed him that there would be available an "offal product" and only such product as was intended for a single definite purpose, viz., feed for livestock, and further and more specifically, that this product would consist of "STW Feed and Raisin Pulp." Further, the evidence showed that at the time the agreement was made there was on hand available for sale at the plant operated by respondents a considerable quantity of a product which was called "STW Feed" which had been manufactured for the purpose of livestock feed and which respondents were anxious to sell. The use of the comma immediately following the word "pulp" would be enlightening if no evidence other than the language of the agreement had been available to aid the trial court in the task of interpretation. The punctuation thus employed would indicate that the language which immediately follows: "Produced by the Syrup Plant" modifies and was intended to qualify not only "Raisin Pulp," with which it is in juxtaposition, but also STW feed. Happily, however, the trial court did not restrict itself merely to the bare wording of the agreement and was not therefore limited to a study of phraseology and punctuation. Adopting appellant's contention that the language of the contract was uncertain and ambiguous, the court permitted the widest latitude in the reception of evidence so that it might be placed in the seats of the parties and perform the task of interpretation in the light of all facts and circumstances which preceded and followed the execution of the instrument. The evidence which was produced showed that the STW feed which was on hand when the agreement was entered into had been manufactured at an experimental plant known as the Pilot plant, that it contained raisin pulp, and that all feed which was produced after execution of the written contract and which was shipped in fulfillment of orders sent in by appellant was manufactured at the syrup plant and contained raisin pulp which was solely a by-product of syrup manufacturing. The evidence also showed that after the contract was executed appellant gave instructions covering shipment of the product covered by the agreement, which instructions required an analysis tag to be affixed to each sack of feed for the purpose of complying with the state law and that such a tag purporting to show a guaranteed analysis of "Scott's Raisin Pulp Feed" was furnished by the respondent, Sunland Sales Co-operative Association. The trade-name which was adopted by appellant as descriptive of the product which he was endeavoring to sell under the contract which he had made is significant in that it contains the words "Raisin Pulp" and indicates that appellant fully realized that one of the components of the product covered by his contract was raisin pulp.

It is extremely difficult to understand what evidentiary basis appellant has for his contention that the trial court erroneously found that there was no inducing representation that all of the STW and syrup pulp which would be produced during the term of the contract would amount to between 25,000 and 30,000 tons. While it is true that appellant himself on direct examination testified that inquiries made by him elicited the information from various named officers and employees that between 25,000 and 30,000 tons of the product would be available, he later admitted that no one told him that he would be furnished such an amount and the various individuals who were first mentioned by him as the source of his information and who were called as witnesses during the trial, with the single exception of Mr. L. R. Payne, who had died prior to the trial, denied that they had made any such representation. The witness Klein, for example, testified that at no time did he furnish to appellant any tonnage figures as to the quantity of stock feed which would be produced during the year beginning November 1, 1925, and that it would have been impossible to discuss any particular tonnage figures for the reason that the production of stock feed was on an experimental basis. The witness Paul, who was general manager of respondent Sun-Maid Raisin Growers Association during the time covered by the contract, testified that appellant asked him about the quantity of feed that might be produced, and that his reply to the inquiry was: "We have no exact knowledge. We don't know." The witness Williams, who was assistant to the general sales manager of respondent Sunland Sales Co-operative Association at the time the contract was made, testified that he did not recall making any personal representations to appellant as to the exact quantity of offal prod-

ucts to be furnished him, that he never had any definite knowledge of the capacity of the syrup plant or of the other departments of the manufacturing plant and was not therefore in a position to have communicated any figures to appellant as to anticipated production of stock feed. It is manifest, therefore, that the court's finding that no such representation was made to appellant is fully sustained by the evidence.

[5] The appellant contends that the trial court, over his objection, erroneously admitted evidence offered by respondents which tended to show that the production of a comparatively small amount of stock feed during the term of the contract was due to difficulties encountered in grinding the raisin stems and tailings and in drying the raisin pulp which was produced as a by-product in the manufacture of syrup. Appellant's complaint in this regard is twofold. He maintains, first, that the contract obligated respondents to furnish two different products, viz., STW feed and raisin pulp, that the pulp was not merely a component part of the STW feed, but an entirely different product, and that therefore evidence which tended to show difficulties encountered in drying the pulp could furnish no possible excuse for the failure to produce the product known as STW feed. He further contends that the contract called for the furnishing to him of all offal or waste from the plants of respondents which he was given to understand would amount to between 25,000 and 30,000 tons, and that difficulty or impossibility of production could not excuse performance.

In the final analysis, these contentions depend upon interpretation of the language of the agreement. The trial court, as above noted, arrived at the conclusion that the contract called for the manufacture by respondents of a single product, viz., STW feed, which was to be composed of ground raisin stems, tailings, and waste and raisin pulp and that it did not bind respondents to provide any definite amount of such feed, and, further, that it was not represented to appellant that any definite amount would be produced. As above indicated, it is our opinion that the court's interpretation is reasonable and proper and is fully sustained by the evidence. Since the agreement did not specify any definite amount of the product which was to be manufactured, but simply provided that appellant should be entitled to receive all of whatever amount that should be produced, it is evident that the factor of good faith on the part of respondents in providing the produce was not immaterial or irrelevant to the issues presented. Appellant maintained that, although the written agreement made no mention of any definite amount of the product which would be furnished to him for sale by respondents, nevertheless, he was led to believe that a very large tonnage would be available. The evidence produced by appellant showed that only 561¾ tons of the product were furnished, although appellant actually sold and sent to respondents orders for the shipment of 1,490 tons in addition to the above amount. Under these circumstances, we entertain the opinion that it was not error for the trial court to admit evidence which tended to show why the full amount of the feed which appellant had actually sold and for which he had obtained orders was not produced. Since the contract comprehended the entire output of a certain product, good faith on the part of respondents in its manufacture was required and the production of a comparatively small amount, particularly in view of the fact that appellant was insisting that he had been given to understand that between 25,000 and 30,000 tons would be available, at least justified a showing by respondents as to why a larger amount was not produced. Rosenberg Bros. & Co. v. Beales, 56 Cal.App. 212, 205 P. 18.

[6] Appellant maintains that since the undisputed evidence showed that he sent to respondents orders for the shipment of 1,490 tons of the product which were rejected and unfilled by respondents, he was entitled at least to recover the loss which he sustained by reason of the failure of respondents to fill these orders. In presenting this contention he relies particularly on the language of the contract by which respondent Sunland Sales Co-operative Association, for itself and as the agent of the other respondents, agreed "to fill the orders taken."

This contention also depends on the interpretation to be placed on the entire agreement. If the trial court's construction of the language of the agreement is correct, respondents simply agreed to furnish to appellant for sale by him the entire output of a certain designated waste product. Respondents did not agree or guarantee that there would be available for dis-

posal any definite amount of the product. If, as the evidence showed, only 561¾ tons of the feed were produced and this entire tonnage was shipped in conformity with orders taken for the same by appellant, the respondents are not obligated to compensate appellant for the loss sustained by him through their failure to provide a greater amount of the product in the absence of a showing that the failure was due to bad faith on respondents' part or that respondents having the ability to manufacture the product arbitrarily refused to do so. We have heretofore indicated our opinion that the trial court's interpretation of the agreement finds ample support in the evidence, and the failure to provide any larger amount of the product than was furnished is satisfactorily explained by evidence showing the mechanical difficulties encountered by respondents in attempting to manufacture the product.

Appellant's final contention is that the trial court erroneously failed to make findings with respect to a number of claimed issues of fact. No useful purpose would here be served in setting out these various issues and in discussing them. In our opinion, the findings of fact which the trial court made are ample to dispose of the material issues presented in the case and are fully supported by the evidence.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.



13 Cal.App.2d 650

WITTEKIND v. BUTLER.

Civ. 9873.

District Court of Appeal, Second District, Division 1, California.

May 4, 1936.

Mortgages ⇐330

Statute precluding deficiency judgment on trust deed obligation unless notice of breach and election to sell was recorded one year before sale *held* inapplicable where note and trust deed were executed prior to effective date of statute (Civ.Code, 2924½, as added by St.1933, p. 1674, § 8).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Gottfried F. Wittekind, trustee, against Jennie M. Butler. From an adverse judgment the plaintiff appeals.

Reversed.

Chotiner & Chotiner, of Los Angeles, for appellant.

James B. Ogg, of Alhambra, and Thomas W. Marchant, of Los Angeles, for respondent.

PER CURIAM.

The record herein discloses that in an action to recover a deficiency alleged to be due upon a promissory note secured by a deed of trust, after a sale of the real estate described therein by the trustee thereunder, a general demurrer was sustained to the complaint, without leave to amend; the only ground for such action appearing to be the failure of plaintiff to comply with section 2924½ of the Civil Code, as added by St. 1933, p. 1674, § 8, which provides that no judgment shall be rendered for the balance due in such case unless it shall affirmatively appear that the notice of breach and election to sell was recorded one year before the date of the trustee's sale. From the judgment thereafter entered, that he take nothing by his complaint, plaintiff has appealed.

The complaint alleges that the note and deed of trust were executed and delivered on November 25, 1932, prior to the effective date of section 2924½ of the Civil Code. Said section, therefore, cannot apply in this case. Brown v. Ferdon (Cal. Sup.) 54 P.(2d) 712.

The judgment is reversed.

13 Cal.App.2d 326

In re HILL.

JACOBS v. HILL.

Civ. 10169.

District Court of Appeal, Second District, Division 2, California.

April 21, 1936.

1. Deeds ⊂=196(3)

Confidential relationship existing between wife and husband to whom she executed deed as joint tenant did not require proof of independent advice to negative presumption of undue influence.

2. Witnesses ⊂=392(1)

In proceedings to terminate joint tenancy created by deed from deceased wife to husband, excluding prior will of wife offered to impeach testimony that wife had said she intended property to be held in joint tenancy *held* proper, since will was not prior statement of witness and so had no probative value to impeach testimony.

3. Evidence ⊂=472(8)

Where husband, and later his executrix, sought to terminate joint tenancy created by deceased wife's deed executed in hospital, sustaining petitioner's objection to asking wife's nurse whether nurse considered wife capable of reasoning on business proposition *held* proper.

4. Evidence ⊂=472(8)

Intimate acquaintance may give opinion upon question of sanity or insanity of person when such question is issue in case, but on other matters acquaintance's opinion evidence is inadmissible.

5. Witnesses ⊂=133

Where husband, and later his executrix, sought to terminate joint tenancy created by deceased wife's deed, testimony from husband's deposition relating to wife's executing deed *held* properly received in evidence (Code Civ.Proc. § 1880, subsec. 3).

6. Witnesses ⊂=133

Statute excluding testimony of claimant in action upon claim against estate of decedent is inapplicable where action is in nature of one to quiet title to land (Code Civ.Proc. § 1880, subsec. 3).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Proceedings in the matter of the petition of Sidney A. Hill to terminate a joint tenancy, to which objections were filed by Elsie Elliott Jacobs, as executrix of the estate of Hattie F. Hill, deceased wife of Sidney A. Hill. Upon the death of Sidney A. Hill, Maude S. Hill, executrix of his estate, was substituted as the petitioner, and both parties filed cross-complaints. From a judgment granting the petition, Elsie Elliott Jacobs appeals.

Affirmed.

Bicksler, Parke & Catlin, G. Everett Miller, and Solomon Rosenbaum, all of Los Angeles, for appellant.

Marshall Stimson and Noel Edwards, both of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent predicated upon the trial court's granting respondent's amended petition to terminate a joint tenancy to certain real property situated in the county of Los Angeles, state of California.

Viewing the evidence most favorable to respondent (Ah Gett v. Carr, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

Respondent's testator, Sidney A. Hill, and appellant's testatrix, Hattie F. Hill, were husband and wife. There was deeded to Mrs. Hill as her separate property a certain parcel of real estate located in the county of Los Angeles, state of California, herein designated as the Golden avenue property. Thereafter, when the wording of this deed was called to her attention, she expressed surprise, stating she understood the property was held in joint tenancy. Subsequently, Mrs. Hill suffered a paralytic stroke. September 3, 1930, while in the hospital, she executed and delivered to Mr. Hill a deed to the Golden avenue property in which they were named as joint tenants. At this time she was of sound mind and not operating under undue influence. Mrs. Hill died September 7, 1930. On January 31, 1931, Mr. Hill filed an amended petition to terminate the joint tenancy to the Golden avenue property theretofore existing between himself and his wife. An answer and objections to the granting of the prayer of the amended petition were filed by Mrs. Hill's executrix. Shortly thereafter Mr. Hill died, and his executrix was substituted in his place and stead as petitioner in the amended petition to terminate the joint tenancy.

Appellant relies for reversal of the judgment on these propositions:

First: The evidence was insufficient to support the findings of fact.

Second: A confidential relationship existing between a grantor and grantee, the presumption of undue influence can only be overcome by evidence that the grantor had independent advice.

Third: The trial court committed prejudicial error in (a) sustaining respondent's objection to the introduction in evidence of a prior will of Mrs. Hill's; (b) sustaining respondent's objection to the following question asked a trained nurse who had attended Mrs. Hill while she was in the hospital: "Miss Wall, do you consider that Mrs. Hattie F. Ladwig Hill on September 3, 1930, or at any time that she was in the hospital under your observation, was she capable of reasoning upon a business proposition?" (c) receiving in evidence certain testimony from the deposition of Mr. Hill relating to an occurrence at the time of the execution of the joint tenancy deed over appellant's objection that such evidence was inadmissible under section 1880, subsection 3, of the Code of Civil Procedure. The evidence was this: "Q. And then what happened? A. She nodded her head and said that was all right; and the doctor says to her, 'You understand, Mrs. Hill, everything in that question?' She says 'Yes,' and she nodded her head, looked right at him and tried to swing her head—he was on one side, and he asked if it was all satisfactory, and she nodded her head, 'Yes, sir,' and was pleased afterwards."

As to appellant's first proposition, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgment in favor of respondent was necessarily predicated. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Thatch v. Livingston (Cal. App.) 56 P.(2d) 549.

[1] Appellant's second claim is untenable. Where a confidential relationship is shown to have existed between a grantor and grantee, proof of independent advice is not indispensable to negative the presumption of undue influence. Smith v. Lombard, 201 Cal. 518, 524, 258 P. 55; Brown v. Canadian Industrial Alcohol Co., 209 Cal. 596, 599, 289 P. 613. In Brown v. Canadian Industrial Alcohol Co., supra, 209 Cal. 596, at page 599, 289 P. 613, 614, Mr. Justice Richards correctly states the rule thus: "Where a fiduciary relationship exists between the donor and donee, the absence of independent advice is a circumstance to be considered in determining whether the gift should be avoided because of alleged undue influence or fraud, *but its nonexistence alone does not authorize the court to avoid the gift.* All utterances to the contrary have been squarely repudiated by this court." (Italics ours.)

[2] The ruling of the trial court excluding the evidence set forth in paragraph (a) of appellant's third proposition, was correct. The prior will of Mrs. Hill was offered for the purpose of impeaching testimony of a witness to the effect that Mrs. Hill had previously stated that the Golden avenue property was intended by her to be held in joint tenancy. The offered evidence was not a prior statement of the witness, and therefore had no probative value as tending to impeach his testimony.

[3, 4] The ruling sustaining the objection to the question set forth in paragraph (b) of appellant's third proposition was accurate. It is well settled that an intimate acquaintance is permitted to testify and give an opinion upon the question of *sanity* or *insanity* of a person, when such question is one of the issues in the case, but on other matters such acquaintance's opinion evidence is inadmissible. Estate of Martin, 170 Cal. 657, 668, 151 P. 138. In Estate of Martin, supra, our Supreme Court held that it was error to permit an intimate acquaintance to answer a question almost identical with the one asked in the instant case.

[5, 6] The testimony set forth in paragraph (c) of appellant's third proposition was properly received in evidence. Section 1880, subsection 3, Code of Civil Procedure, excludes only the testimony of a claimant in an action upon a claim against the estate of a decedent and is inapplicable where the action is, as in the case before us, in the nature of one to quiet title to land. Poulson v. Stanely, 122 Cal. 655, 658, 55 P. 605, 68 Am.St.Rep. 73; Monnette v. Title Insurance, etc., Co., 107 Cal.App. 313, 319, 290 P. 668; 11a Cal.Jur. 893, § 634.

An examination of the record discloses that the learned trial judge's rulings were entirely accurate and correct.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

SHERER et al. v. CITY OF LAGUNA BEACH.

Civ. 1557.

District Court of Appeal, Fourth District, California.

April 23, 1936.

Hearing Denied by Supreme Court June 22, 1936.

1. Appeal and error ⇐766

District Court of Appeal would not refuse to consider arguments in opening brief for failure to comply with court rules requiring printing of parts of typewritten record or statement of substance thereof where deficiency was corrected in reply brief and court was not inconvenienced thereby (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 3).

2. Appeal and error ⇐544(3)

Objection that appeal is on judgment roll alone is unavailing where findings of fact and conclusions of law and judgment are sufficient, without reporter's transcript, to enable reviewing court to understand and decide questions presented.

3. Statutes ⇐123(4)

Statute entitled, "An act to provide * * * for establishing and changing the grades of any such public streets, avenues, lanes, alleys, courts, places, sidewalks, highways, roads, properties or rights of way * * *," *held* not unconstitutional on ground that title gave insufficient notice of provisions of act relating to establishment and changing of grades (St.1931, p. 1568; Const. art. 4, § 24).

4. Constitutional law ⇐281

Statute barring damages caused by establishing grade or making change of grade except where owner files protest *held* not unconstitutional denial of due process of law on ground that no power was conferred by statute to hear protest or fix or award damages, since after making protest owner was entitled to seek damages in court of law (Gen.Laws 1931, Act 8199, § 3).

5. Constitutional law ⇐305

"Due process of law" does not entitle person to have hearing before any particular board, tribunal, or court, but is satisfied if person is given fair hearing on reasonable notice before board, tribunal, or court having jurisdiction of proceedings and parties, "due process of law" being that kind of procedure which is suitable and proper to nature of case and sanctioned by established customs and usages of courts (Const.Cal. art. 1, § 14; Const.U.S. Amend. 14).

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

6. Constitutional law ⇐228, 281
Eminent domain ⇐2(1)

Taking of private property for public use without compensation to owner is insufficient to establish unconstitutional taking or damaging of private property for public use without due compensation or denial of equal protection of laws, since owner may seek just compensation by following procedure established by law (Const.Cal. art. 1, § 14; Const. U.S. Amend. 14).

7. Constitutional law ⇐228, 281
Eminent domain ⇐2(6)

Requirement that owner to recover compensation for damaging of his property in changing grade of street must appear before city council and object to proposed grade *held* not so unreasonable as to constitute denial of due process of law, or unconstitutional taking or damaging of property for public use without due compensation or denial of equal protection of laws (Gen.Laws 1931, Act 8199, § 3; Const.Cal. art. 1, § 14; Const.U.S. Amend. 14).

8. Eminent domain ⇐79, 80

Owner failing to protest change in grade of street abutting property before city council as required by statute *held* to have waived claim for damage arising from change in grade and to be deemed as having donated property or its damage to public (Gen.Laws 1931, Act 8199, § 3; Const.Cal. art. 1, § 14; Const.U.S. Amend. 14).

9. Damages ⇐65

Damages once suffered and waived must be held to be waived for all purposes and cannot be recovered under another guise, name, or form.

10. Eminent domain ⇐79, 80

Property owner *held* not entitled to compensation for damage to lots not abutting highway caused by destruction of means of ingress and egress to lot abutting city street where damage to abutting lot had been waived notwithstanding that nonabutting lots were outside boundaries of assessment district and city (Gen.Laws 1931, Act 8199, § 3; Const. Cal. art. 1, § 14; Const.U.S. Amend. 14).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by S. J. Sherer and another against the City of Laguna Beach. Judgment for plaintiffs, and defendant appeals.

Reversed.

Milburn G. Harvey, of Santa Ana, for appellant.

William J. Locke, of Alameda, Kirkbride, Wilson & Brooks, of San Mateo, and Leslie F. Kimmell, of Laguna Beach, for respondents.

MARKS, Justice.

This is an action to recover damages suffered by plaintiffs by reason of the establishment of the grade on High drive in the defendant city and the lowering of the level of the roadway from 3 to 8 feet in front of their property. Plaintiffs had judgment, and defendant has appealed.

Defendant is a municipal corporation of the sixth class. High drive is a public street of that city. Between October 15, 1931, and March 15, 1932, defendant instituted and carried through to completion a proceeding under the Improvement Act of 1911, as amended (Stats.1931, p. 1568, Act No. 8199, Deering's Gen.Laws, 1931), to establish the official grade on, and to grade and improve High drive in front of plaintiffs' property. The resolution of intention specifically referred to the grades to which the work was to be done and directed attention to the plans, profiles, and cross-sections showing the grades upon which the improvements were to be constructed. The notice giving the time and place of hearing of objections or protests also specifically specified objections "to the proposed grades." No question is raised as to the sufficiency or legality of any part of the proceedings in so far as they affected property within the improvement district and within the city so we will assume their correctness.

Plaintiffs did not file or make any written or oral protest to the improvement or the grades upon which it was to be constructed at any time before the completion of the work. Their first objection to any part of it was in the form of a claim or demand against the defendant, probably in March, 1932, whereby they claimed damages to the portion of their property lying outside the improvement district and outside the city limits. The claim was rejected and this action followed.

At the time of the improvement, plaintiffs owned three lots, two of which they maintain were affected by the grades established for High drive. For the purpose of convenience, these lots were designated at the trial by the numbers 1, 2, and 3. We will use the same numbers in our discussion of the case. Lot 1 had an easterly and westerly frontage of 55 feet and a depth of 122.28 feet. Lot 2 adjoined lot 1 on the west and had dimensions of 100 by 100 feet. These lots were outside the exterior boundaries of the improvement district and the boundaries of the city. Lot 3 adjoined lot 1 on its southerly side and connected it with High drive. The length of its westerly boundary is 25.74 feet. Its southerly boundary corresponded with the northerly line of High drive. It furnished plaintiffs with their only means of ingress and egress to and from lot 1, upon which was situated their residence and garage. and lot 2 which was the site of their garden. Prior to the improvement of High drive, plaintiffs maintained a driveway which led from High drive northerly to within a few feet of the northerly line of lot 3. A turntable was constructed at the northerly end of this driveway principally in the southwesterly corner of lot 1 with its southerly edge projecting slightly over onto lot 3. They also maintained a stairway leading across lot 3 from lot 1 to High drive. When the grade of High drive was established several feet below the former level of the roadway, it became necessary to abandon the driveway we have just described as its increased grade rendered it too steep for safe travel. The stairway was also abandoned or reconstructed. Plaintiffs purchased lot 4. This lot is between the easterly half of lot 2 and High drive with its easterly boundary joining lot 3. They constructed a new driveway over lot 4, a new stairway to High drive, and a retaining wall along the southerly edge of their properties. In fixing the amount of their damage, the trial court awarded them the cost of lot 4 and of these improvements.

[1] Plaintiffs contend that we should not consider the arguments made by defendant in its opening brief in that it failed to print any parts of the typewritten record, or to state "the substance of such record, parenthetically referring to the line and page of the typewritten transcript for verification." Section 3, rule VIII, Rules of the Supreme Court and District Courts of Appeal. This deficiency was corrected in the reply brief

and we have not been inconvenienced by it. For that reason, we do not regard the omission as a serious defect.

[2] The appeal is upon the judgment roll alone. Plaintiffs urge that in the absence of the reporter's transcript we can neither understand nor decide the questions presented here. We have found the findings of fact and conclusions of law and judgment sufficient for that purpose. That being true, it was unnecessary to bring up the reporter's transcript.

[3] Plaintiffs urged that the provisions of section 3 of the Improvement Act of 1911 should be held unconstitutional as violating the provisions of section 24 of article 4 of the State Constitution. The title to the act was amended in 1931 (Stats.1931, p. 1568). As amended, it was entitled, "An act to provide * * * for establishing and changing the grades of any such public streets, avenues, lanes, alleys, courts, places, sidewalks, highways, roads, properties or rights of way." This title gives sufficient notice of the provisions of the act relating to the establishment and changing of grades to satisfy the requirements of the Constitution. See 23 Cal.Jur. 653 et seq., and cases cited.

At the time of the improvement of High drive, section 3 of the Improvement Act of 1911 (Gen.Laws 1931, Act 8199) provided in part as follows:

"*Grade. Objections.* The grade to which any work shall be done or improvement made shall be such as may be shown on the plans or profiles therefor or it may be done on such a grade as may have been formally established by the city council. If any official grade has already been adopted or established for any of the streets, avenues, or other places or property, proposed to be improved, it shall be lawful for the resolution of intention to provide that said work shall be done to new grades or grades different from those so established or adopted, and shall refer to plans, profiles or specifications for the description of the grade at which the work is to be done. Any property owner whose property is to be assessed to pay the costs and expenses of the proposed improvement may at the time fixed in the resolution of intention for hearing of objections to the proposed work and improvement, appear before the city council and make objection to the proposed grade or proposed modification of grade. A failure to make objection at such time shall be deemed to be a waiver of all objections to the proposed grade or proposed change or modification of grade and shall operate as a bar to any claim for damages or any subsequent action looking to the prevention of the work or the recovery of damages on account of the performance of the work to such grade or changed grade. The provisions of this section relative to grades are alternative and shall not repeal other provisions of this act or other statutes relative to change of grade." (Amendment approved June 14, 1929; Stats.1929, p. 1652.)

As we have observed, plaintiffs failed to object or protest to any of the improvement proceedings although notice was given of the grade upon which the proposed work was to be constructed. Under facts paralleling those of the instant case, numerous questions argued by counsel have been settled by the recent case of Snoffer v. City of Los Angeles, 6 Cal.App.(2d) 14, 43 P.(2d) 852, 854, where it is said: "Notice of the proposed improvement being sufficient, plaintiff's claims were barred by his failure to make objection within the time fixed in the ordinance of intention. A city in initiating a proceeding under the Improvement Act in question does so upon the condition expressly stated in the law, that any property owner who intends to claim damages on account of the improvement will make that fact known. If no objections are received, the city has a right to proceed upon the assumption that no claims for damages can thereafter be made. The purpose of requiring objections before any work is actually done is to enable the city to determine what damages, if any, will have to be paid by reason of the improvement. When objections are filed, the city then has an opportunity to determine whether to proceed with the improvement or to abandon it. If property owners were allowed to wait until after the work was completed before they were required to make their claims known, a city might be faced with demands for such amounts as, had they been known before, would have justified the abandonment of the proposed improvement. The fact that no claims for damages can be made against the city other than those preserved by means of objections filed within the time fixed by the ordinance of intention is certainly one of the important things for the city council to know in determining whether or not to go on with the proposed work. While a city cannot damage property without compensation to the owner, it may limit the time

within which and the place where claims against it must be presented. Sala v. City of Pasadena, 162 Cal. 714, 718, 124 P. 539. Upon both reason and authority it must be held that the claims of the plaintiff became barred by reason of his failure to object to the grade fixed, within the time specified in the ordinance of intention." See, also, Blake v. City of Eureka, 201 Cal. 643, 258 P. 945; Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539; Musto-Keenan Co. v. City of Los Angeles, 139 Cal.App. 506, 34 P. (2d) 506.

[4] Plaintiffs maintain that the provisions of the Improvement Act of 1911 must be held unconstitutional and void in so far as they purport to bar damages caused by establishing a grade or making a change of grade because the act provides for nothing more than the making of the protest without any power given to any board or city authority to hear it or fix or award damages. This may be so, but that alone does not deprive the protesting owner of the due process of law or enable the city to take his property for a public use without compensation because if the owner makes his protest he can seek his damages in a court of law.

[5] Due process of law does not entitle a person to have a hearing before any particular board, tribunal, or court. It is satisfied if he be given a fair hearing upon reasonable notice before a board, tribunal, or court having jurisdiction of the proceedings and the parties. As was said in Ex parte Wall, 107 U.S. 265, 2 S.Ct. 569, 589, 27 L.Ed. 552: "Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. * * * In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."' Cooley, Const.Lim. 353. The question, what constitutes due process of law within the meaning of the constitution, was much considered in this court in the case of Davidson v. New Orleans, 96 U.S. 97 [24 L.Ed. 616]; and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the state a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.'" See, also, City of Seattle v. Kelleher, 195 U.S. 351, 25 S.Ct. 44, 49 L. Ed. 232.

[6-8] The fact that private property is actually taken for a public use without compensation to the owner does not of itself establish a violation of the provisions of section 14 of article 1 of the State Constitution, or of the Fourteenth Amendment to our Federal Constitution, the first of which prohibits the taking or damaging of private property for public use without due compensation to the owner, and the latter of which prohibits a state from denying to any person within its jurisdiction the equal protection of its laws. The owner may seek his just compensation if he follows the procedure established by law. As a first step towards obtaining this compensation in a proceeding such as we have here, he must protest the establishment or change of grade. Thus he gives notice to those interested that he may be damaged and may claim compensation for such damage. This is not an unreasonable or unduly onerous burden to be placed upon him. If he fails to protest and give this notice, he should be held to have waived his claim for damage and his conduct should be considered as tantamount to his donation of his property or its damage to the public for use.

The trial court found that plaintiffs were damaged by having the grade of High drive lowered in front of their property thereby destroying their means of ingress to and egress from their property, and determined as a matter of law that they had waived all damage to lot 3, which was within the assessment district, by not protesting the establishment of the grade. The correctness of this finding and conclusion cannot be questioned. Snoffer v. City of Los Angeles, supra.

The trial court further found that plaintiff had been damaged in their ownership of lots 1 and 2 by the grade and that as those lots were neither within the assessment district nor the city limits, concluded

that they had not waived their damages affecting them. This finding and conclusion furnishes the basis of the judgment.

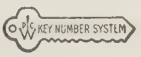
[9, 10] It is apparent that if the damages suffered were solely caused by destroying the use of lot 3, and were waived by the failure to protest, the same damages cannot be attached to other property and recovered. Damages once suffered and waived must be held to be waived for all purposes and cannot be recovered under another guise, name, or form.

According to the findings of fact, the damage suffered by plaintiffs arose through the destruction of their means of ingress and egress to their residence. The ways of ingress and egress were entirely on lot 3. No part was on either lots 1 or 2. These lots were not affected in any way except through the damage to lot 3. Had plaintiffs protested the grade, they would have placed themselves in a position to recover their full damage caused by the destruction of their ways over lot 3 and would have had no occasion to assert any further damage by reason of their ownership of lots 1 and 2. They could not have done so because when they were compensated for the damage to their roadway and stairway on lot 3, which would have included the cost of acquiring and constructing a new roadway and stairway and protecting the face of the cut made along the front of their property, they would have been fully compensated for all damage suffered by them. These damages were all suffered by reason of the ownership of lot 3. No other or further damage was suffered by reason of the ownership of lots 1 or 2. Because of these facts found, the trial court should not have awarded plaintiffs judgment for these identical damages after finding that they had been waived by reason of the failure to protest the grade. It follows that the judgment cannot be sustained as it is not supported by the findings of fact and conclusions of law as damages once waived must be considered waived for all purposes.

Counsel for plaintiffs argue at length that as lots 1 and 2 were outside the boundaries of the assessment district and the city, the plaintiffs were not required to protest the damage to those lots and cannot be held to have waived them. This argument cannot avail because all the damages suffered were caused by reason of the effect of the new grade on lot 3. Having waived those damages by failure to protest, they cannot recover them.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 600

SNAVELY v. WALLS et al.

Civ. 5467.

District Court of Appeal, Third District, California.

April 30, 1936.

1. Joint adventures ⇦1

Whether relationship is that of debtor and creditor or one of joint liability is determined, as between parties, from letter of contract and conduct of parties thereunder, but where rights of third parties are involved, fundamental question is what third parties had right to believe from language of contract and conduct of parties as it affected them.

2. Joint adventures ⇦1

Evidence *held* sufficient to support judgment against two defendants for balance due on open book account for lumber sold defendants on ground that defendants were engaged in joint venture (Civ.Code, § 2410).

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Guy H. Snavely against T. A. Walls and another. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

C. S. Baldwin, of Alturas, for appellant.

Glenn D. Newton, of Redding, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment awarding plaintiff the amount sued for, which arose out of an obligation upon a balance due on an open book account for lumber sold defendants. The question here presented is whether the evidence is sufficient to justify

the finding that the dealings between the parties constituted a joint venture of Walls and De Katz. De Katz defaulted and did not appear at the trial.

The facts as gathered from the testimony reveal that plaintiff operated a sawmill in Shasta county, and during the fall of 1933 was visited by defendants Walls and De Katz to examine his lumber and arrange for the purchaser thereof. The testimony of Mr. Walls adduced under section 2055 of the Code of Civil Procedure revealed that he accompanied De Katz to the mill of plaintiff. He admitted that certain quantities of lumber were thereafter purchased from Mr. Snavely and that he paid for the same with his personal checks made payable to Snavely, upon which was a notation in the lower left-hand corner, "Acct. A. De Katz." Walls claimed he was merely financing De Katz, taking the invoice for the lumber in his name and the transaction was closed. This arrangement had been going on between these two men for some time, they having purchased and sold the product of many of the smaller mills in their vicinity.

Mr. Snavely testified, upon the day in question Walls and De Katz called upon him and Mr. Walls told him they were there to see about buying lumber. It was stated either by Walls or De Katz, but in the presence of the three, that they would pay 80 per cent. when the lumber was loaded upon the cars and the balance when the lumber was delivered to the purchaser. Mr. De Katz stated he had brought Mr. Walls down to inspect the lumber and were considering the purchase of the same. The witness said that either Walls or De Katz used the word "we" when stating they were out buying lumber. A sale of the Snavely lumber was agreed upon, and subsequently checks were received from Mr. Walls in payment thereof. The balance, however, remained unpaid, which is the subject of this litigation. The business of buying the lumber was carried on in the name of Alturas Manufacturing Company, and the invoice and bills of lading were so designated. Also Mr. Snavely carried the account in his books under the name of "Alturas Manufacturing Company, T. A. Walls and Alphonse De Katz." The only time Mr. Snavely talked to Mr. Walls was at the time above referred to. All the transactions were with Mr. De Katz, except in regard to the payments which were made by check by Mr. Walls, and the one meeting hereinabove narrated.

[1] Under the foregoing facts, appellant claims the relationship of debtor and creditor arose, and respondent contends that Walls and De Katz were jointly liable. Whether the relationship is that of debtor and creditor or one of joint liability is sometimes difficult to determine. The test, however, is expressed in Westcott v. Gilman, 170 Cal. 562, 150 P. 777, Ann.Cas. 1916E, 437, where the court held that as between the parties the difference between a partnership and a joint account is one of determination merely upon the letter of the contract, and the conduct of the parties under it, but where the rights of third parties are involved, then the fundamental question becomes: What had these third parties the right to believe from the language of the contract and the conduct of the parties, not as it affected the original makers but as it affected the third parties?

[2] Accepting that test, we find De Katz and Walls together calling upon Snavely and discussing with him the purchase of lumber; the manner of payment was there agreed upon; the use of the word "we" was frequently used in their conversation; the lumber was purchased by Alturas Manufacturing Company, which did not reveal the real names of the members thereof; three payments for lumber so ordered and delivered were paid for with checks of Walls. From these circumstances Snavely had the right to believe that Walls was jointly interested with De Katz in the venture, and the trial court so found.

The facts in this case bring it within the rule laid down in section 2410 of the Civil Code, which imposes a liability upon one who by word or conduct consents to another representing him to any one as a partner in an existing business.

The judgment appealed from is affirmed.

I concur: THOMPSON, J.

13 Cal.App.2d 602

KIMBALL et al. v. LEDFORD et al.

LEDFORD v. THARP et al.

Civ. 5478.

District Court of Appeal, Third District, California.

April 30, 1936.

Assignments ⇐15

Public school teachers are contractual employees, not public officers, and hence may assign salaries to be earned by them in future for necessities of life (Civ.Code, § 955; School Code, § 5.400 et seq.).

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action in interpleader by C. B. Kimball and others against J. H. Ledford, Blanche Tharp, I. S. Loveless and others. From a judgment for defendants Loveless and others, defendant Ledford appeals.

Affirmed.

Frank B. Graves, of Yuba City, for appellant.

Ivan C. Sperbeck, of Marysville, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Blanche Tharp is a teacher in the public schools of this state. J. H. Ledford holds an unsatisfied judgment against her. Shortly after obtaining this judgment Blanche Tharp executed an assignment of her teacher's salary earned, and to be earned in the future, to certain designated firms and individuals to whom she was indebted, for the necessities of life. Thereafter Ledford filed with the proper officers a duly authenticated abstract of judgment together with an affidavit setting forth the exact amount then due as required by section 710 of the Code of Civil Procedure.

Plaintiffs are the officers of the school district whose duty it is to draw the salary warrant of Blanche Tharp, and claims having been made upon them both by the judgment creditor and by the assignees, have brought this action in interpleader asking that they be permitted to pay the amount due into court and that the court determine to whom the money shall be awarded. The order for interpleader was made, and after a trial upon the issues, the trial court held the assignments made by Blanche Tharp were valid, and gave judgment in favor of the various assignees and against the judgment creditor.

This appeal presents the sole question of whether a teacher employed in the public schools may, under section 955 of the Civil Code, assign salary to be earned in the future. This section provides for the assignment of wages or salary and permits such assignments of future earnings if for necessities of life.

It was early held in California, however, in Bangs v. Dunn, 66 Cal. 72, 4 P. 963, that the assignment of a salary by a public officer before it became due was contrary to public policy and void. This rule has been adopted and followed in a number of subsequent cases, as Wilkes v. Sievers, 8 Cal. App. 659, 97 P. 677; Trow v. Moody, 27 Cal.App. 403, 150 P. 77; Walker v. Rich, 79 Cal.App. 139, 249 P. 56. We refer also to 23 Cal.Jur. 119, both to the text and cases cited in support thereof.

This restriction is not for the protection or benefit of the individual office holder, but is based upon the ground of public policy in that it might tend to impair the efficiency of the public service to permit such assignment. No such inhibition applies, however, to a person in private life, and a solution of the question here presented turns upon the determination of whether a teacher in the public schools of California holds a public office. This question was considered by the court in Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858, where an instructor in a high school was elected a member of the state Legislature. Section 19, article 4 of the Constitution provides, "No Senator or member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State." We will not repeat the reason nor citations set forth in Leymel v. Johnson, supra, but the court held a high school teacher is not holding an office "under this state."

In Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, it was held a teacher was an employee and not an officer, and therefore the doctrine that mandamus cannot be used to regain an office was not applicable. That a teacher is an employee is also definitely established by the provisions of section 5.400 et seq. of the School Code.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Walker v. Rich, 79 Cal.App. 139, 249 P. 56, 59, the question is there presented whether or not an employee of a county employed to work with his teams, wagons, and scrapers, upon the roads of the county, could make an assignment of his future earnings, under section 955 of the Civil Code. The court said: "The employment merely involved a contract between him and the county, acting through its governing board, whereby he agreed to and did perform certain labor, which in no sense was concerned or connected with the exercise or administration of the sovereign powers of the government, except insofar as his employment for the purpose indicated involved the exercise by the board of supervisors itself of the general sovereign powers conferred upon it by law. There was neither expressly nor by implication the delegation of any of the sovereign powers of the government to Smith by virtue of the contract of employment."

Similarly in the case of Pacific Finance Corporation v. City of Lynwood, 114 Cal. App. 509, 300 P. 50, 52, 1 P.(2d) 520, the question was whether an engineer employed on street improvement projects could assign unearned compensation for his services, and the court said: "It is our conclusion that the contract did not operate to make Schwabland a public official. It would be futile to attempt to reconcile the many definitions and illustrations of 'public officer.' This much is certain. To have a public officer you must first have a public office, created by the Constitution, Legislature, or some legislative body with delegated authority; an office that exists independently of the presence of a person in it. [Citing numerous authorities.] We are not attempting to rely upon the distinction which may be made between 'public office' and 'public position,' both of which are the result of legislative creation, but which may be said to differ one from the other depending upon the presence or absence of duties partaking of sovereignty. A contractual relation differs from either. Miller v. Boyle (1919) 43 Cal.App. 39, 184 P. 421, deals with the distinction to be made between a person employed by contract and one appointed to a public position." It appears, therefore, that teachers are employed by contract and their position has none of the attributes of a public office.

We therefore find nothing to prohibit a school teacher employed in the public schools of this state from making a valid assignment of future earnings, and the judgment appealed from is affirmed.

I concur: THOMPSON, J.



13 Cal.App.2d 538

MORTGAGE GUARANTEE CO. v. HAMMOND LUMBER CO. et al.

Civ. 10932.

District Court of Appeal, Second District, Division 2, California.

April 28, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Quieting title ⇐47(2)

Where mortgagor had agreed with mortgagee to complete building clear of mechanic's liens, in mortgagee's action to quiet title against lien claimants, finding that mortgagor did not fail to complete building in accordance with loan contract imported completion in accordance with plans and specifications attached to loan contract, and was not in conflict with finding that there were liens.

2. Appeal and error ⇐843(2)

Where mortgagee, who made loan of $25,000, sued to quiet title against lien claimants, mortgagee's contention on appeal that court erred in declaring mortgage a first lien for $18,000 and claimants' liens second liens superior to remaining $7,000 of mortgage became moot question, where stipulation showed that after appeal was taken property was sold on foreclosure for less than $18,000.

3. Mechanics' liens ⇐303(1)

Where mortgagee assigned and paid out to bonding company as trust fund entire loan provided for constructing building before mechanic's lienholders had furnished any materials, lienholders *held* not entitled to money judgment against mortgagee, since there was no privity of contract between lienholders and mortgagee and no unjust enrichment in mortgagee.

4. Mortgages ⇐151(3)

Mechanic's lienholders had no claim on sum properly retained by mortgagee for bonus, interest, title fees, and other legal purposes when making loan for constructing

building, where loan contract was made long before lienholders had any interest in transaction.

Appeal from Superior Court, Los Angeles county; Stanley Murray, Judge.

Action by the Mortgage Guarantee Company, a corporation, against the Hammond Lumber Company, a corporation, and others, wherein defendants filed cross-complaints against plaintiff and against each other. From the judgment, plaintiff appeals.

Modified and, as modified, affirmed.

Alvan M. Palmer, of Los Angeles, for appellant.

H. E. Gleason, of Los Angeles, for respondent F. H. Wise.

Black, Hammack & McWilliams, of Los Angeles (Joseph T. Enright, of Los Angeles, of counsel), for respondent Woodstock Materials Co.

CRAIL, Presiding Justice.

The plaintiff, as beneficiary under a trust deed, brought an equitable action to quiet title against the defendants, who were mechanic's lien claimants and one of them the holder of an attachment lien. The defendants on their part filed cross-complaints against the plaintiff and against each other. It is not necessary to set forth the pleadings at greater length for the reason that no contention is made on appeal with regard to them.

The trial court after a painstaking trial found as follows:

The plaintiff is the beneficiary under a trust deed covering certain property in Los Angeles executed by Fair Park Court, Inc., Ltd., hereinafter called the borrower, on December 23, 1929, to secure a note in the sum of $25,000. The borrower on February 22, 1930, entered into a contract with Denman Company for the construction of a building upon the property, and notice of completion thereon was recorded on June 30, 1930. On February 20, 1930, the borrower and Denman Company entered into a contract with defendant Woodstock Materials Company whereby said company was to furnish materials to be used in the construction of said building, and under which Woodstock actually furnished said materials of the reasonable value of the sums hereinafter stated. The agreement between said defendants further provided that if the materials were not paid for when due the borrower and Denman Company would withhold sufficient moneys for the payment in full from the last $5,000 payment which was to be made by the plaintiff out of the $25,000 upon notice of completion being filed on said job. Woodstock on July 30, 1930, duly filed its claim of lien for the materials in the sum of $2,440.56, and thereafter obtained judgment against the borrower for said sum and established its lien upon the property. Similar findings were had with regard to F. H. Wise, another mechanic's lien claimant, and Metz Products Company, which company thereafter assigned its claim to F. H. Wise; the total lien of Wise being for $1,658.15.

At the time the borrower applied for the said loan an agreement was made between the plaintiff and the borrower under the terms of which it was provided that the borrower would at the option of the plaintiff furnish a lien-and-completion bond, the condition of which would be that the borrower would fully complete the building free and clear of all claims of mechanic's liens. The borrower on its part agreed that it would use the entire proceeds of said loan in payment of the construction and completion of the building and for no other purpose, and that at the option of the plaintiff any portion of the proceeds of the loan might at any time be paid by the plaintiff to the bonding company, which would furnish the lien-and-completion bond, as a trust fund for the purpose aforesaid. The agreement also provided that the proceeds of the loan would be advanced to the borrower from time to time as the work progressed in such amounts as the appraiser for the plaintiff might recommend, and that one-fifth of the total sum might be retained by the plaintiff until the building had been completed and time for filing mechanic's liens had elapsed, and thereupon if no mechanic's liens had been filed, the same should be paid to the borrower or its order; but in the event that any such mechanic's liens should be filed, the plaintiff should be authorized to apply any part of said sum in payment of such liens or at its option it might credit such retained sum upon any indebtedness which the borrower owed the plaintiff.

The building was completed on June 27, 1930, and on August 4, 1930, Wise served notice in writing upon the plaintiff that he had furnished the material above referred to and had not been paid and that the unpaid balance amounted to $1,655.90, and demanded that the plaintiff refrain from

paying out to any other party and to hold for said Wise any balance in its hands which it had not paid out on said loan in a sum sufficient to pay his claim. On said date the plaintiff had not paid out or expended the last $5,000 of said building loan. A similar notice was given by Woodstock on August 8, 1930. The latter's claim was in the sum of $2,439.06.

At the time the materialmen entered into their agreements with the borrower, the borrower owned no other property of any kind or description and had no other means or way of paying for the labor or material to be used in the construction of said building except the money obtained from the plaintiff. These facts were known by the materialmen, and they relied upon said funds to be advanced on said loan by the plaintiff as a means and source from which they should receive compensation for labor and material to be furnished by them, and they were so informed by the borrower (not the plaintiff), and if they had not been so informed and had not so believed, they would not have extended credit for their materials.

At the time the agreement was made by the plaintiff and the borrower for said building loan, the Commercial Casualty Insurance Company, one of the defendants, executed its lien-and-completion bond in favor of the plaintiff on behalf of the borrower, wherein said bonding company guaranteed the construction and completion of the building.

On the date the note and trust deed were executed, the plaintiff retained and appropriated as a bonus to itself for making said loan, for interest, title fees, and other legal purposes, the sum of $2,000. Between that date and August 15, 1930, the plaintiff paid out and advanced for the purpose of constructing said building an additional $18,000. Between the latter date and August 21, 1930, the plaintiff paid out for the purpose of constructing said building the sum of $3,917.60. On August 22, 1930, the plaintiff retained and appropriated to itself out of said funds for interest on said promissory note $447.12, and on November 18, 1930, the plaintiff deposited with the bonding company the remainder of said fund in the sum of $635.28 in accordance with the terms of the agreement by the borrower and the plaintiff as a trust fund for the purpose of paying for the construction of said building.

As early as December 31, 1929, the borrower executed an instrument in writing assigning and conveying to the bonding company all its right, title, and interest to all the cash-deferred payments to be made under the terms of said loan to be held by said bonding company in trust as a trust fund for the purpose of constructing said building. (End of findings.)

It is not necessary for the purposes of this appeal to set forth findings with regard to the interests of Bank of America National Trust & Savings Association or I. W. Fuquay, as receiver, or the Hammond Lumber Company.

From the findings set forth the court concluded that the plaintiff was entitled to a first lien on the property in the sum of $18,000; that defendants Wise and Woodstock were entitled to second liens for the respective sums due them; that the plaintiff had a third lien for the sum of $7,000; that the other mechanic's lien claimants had a fourth lien for the respective sums due them; and that other defendants, not herein necessary to specify, had liens inferior to all of the above. Judgment was entered against the bonding company in favor of defendant Wise for $261.75, and in favor of Woodstock for $420.63; judgment was entered against the plaintiff in favor of Wise for the remainder of his claim totaling $1,255.70, and judgment was entered against the plaintiff in favor of Woodstock for the balance of its claim totaling $2,019.93. The appeal is taken from the judgment.

The plaintiff's first contention is that the court erred in admitting hearsay testimony and its second that the court erred in excluding certain testimony offered by the plaintiff. There is no merit in either of these contentions. The so-called hearsay testimony was not hearsay testimony. The evidence was not admitted as proof of the facts therein contained, but for the purpose of bringing home notice of information to one of the parties. The evidence which the plaintiff claims the court erroneously excluded was admitted elsewhere. We have read the record, and we observe therefrom the use of experience on the part of the trial judge gained by long years of trial work.

[1] Plaintiff's next contention is that the court erred "in finding that it was not true that Fairpark Court or Denman failed to complete the building in accordance with the loan contract." If this finding is to be construed as meaning what plaintiff con-

tends it means, i. e., that there were no mechanic's liens, then it is in conflict with the other findings. Plaintiff says: "The existence of this litigation over mechanic's liens is sufficient evidence of the complete disregard of this finding for the facts of the case and no further comment seems necessary." The conflict is easily reconciled. The import of the finding as we understand it is that the building was completed "in accordance with the terms of [the plans and specifications attached to] the loan contract." There is no reversible error in this obvious inadvertence.

[2] Plaintiff next contends that the trial court erred in its conclusion that appellant's trust deed was only a lien for $18,000 and that the defendants had second liens which were superior to the remaining $7,000 of the trust deed. By stipulation of the plaintiff, however, this contention has become merely a moot question for the reason that since the appeal was taken the property has been sold at foreclosure sale for less than $18,000.

[3] The final contention of the plaintiff is that it was error to grant the money judgment against the plaintiff in favor of defendant Wise and defendant Woodstock. These money judgments, if sustained, would compel the plaintiff to pay out an additional sum of $3,275.63 over and above the $25,000 contracted for and actually paid out. We have set out the findings in condensed form above. There was no privity of contract between the plaintiff and the two defendants in whose favor these judgments were entered. The judgments, if sustained at all, must be upon the theory of an equitable lien. In this behalf the defendants rely upon Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898; Community Lumber Co. v. Chute, 215 Cal. 268, 10 P.(2d) 57; Community Lumber Co. v. California Publishing Co., 215 Cal. 274, 10 P.(2d) 60; Pacific Ready Cut Homes v. Title Insurance & Trust Co., 216 Cal. 447, 14 P.(2d) 510; San Mateo Planing Mill Co. v. Davenport Realty Co., 218 Cal. 702, 24 P. (2d) 787; Blinn Co. v. Pioneer Drainage District, 50 Cal.App. 364, 195 P. 750. But the foundational theory of liens in these cases is equity and good conscience, and the object is to prevent unconscionable and inequitable assertion of rights resulting in unjust enrichment.

In this case the last $5,000 which was advanced after the stop notices were given admittedly and uncontradictedly was paid out in the completion of the building, unless it be the item for interest accruing during the construction period. There is no finding and no substantial evidence upon which to find that such items of interest are not a legitimate and ordinary part of the costs of construction.

Furthermore, the money was paid out upon instructions from the bonding company, which company had an assignment of the funds given long prior to the notices of defendants. At the beginning of the transaction, long before the defendants had furnished any material, or had any lien, the bonding company had given its lien-and-completion bond. At that time and while the parties had a right to do as they did, the assignment of the funds was made to the bonding company as a part of the consideration for issuing its bond and to protect it. The assignment was made to the bonding company in trust as a trust fund for the purpose of constructing said building. The personal judgment, however, is against the plaintiff and not against the bonding company, except as to the small sum of $682.38, which latter sum is not contested. The assignment had become final and stop notices could not be effective to protect subsequently accruing rights. First National Bank v. Perris Irrigation District, 107 Cal. 55, 62, 40 P. 45; Miles v. Ryan, 172 Cal. 205, 209, 157 P. 5; Southern California Electric Co. v. McDonald, 178 Cal. 386, 390, 173 P. 760. Furthermore, in this case there has been no unjust enrichment. The rule as to equitable liens should not be enlarged and extended so as to be available under the facts of this case.

[4] With regard to the $2,000 which was advanced at the time the contract was entered into, the defendants had no just claim on this sum or any part of it. It was made between the parties long before the defendants had any interest in the transaction. Furthermore, such items were legitimate demands of the plaintiff and such demands have been recognized as obligatory advancements properly deductible. Community Lumber Co. v. Chute, 215 Cal. 268, 273, 10 P.(2d) 57.

For the reasons stated the judgment is affirmed, except it is modified by striking therefrom the money judgments against the plaintiff in favor of Wise and Woodstock.

We concur: WOOD, J.; GOULD, Justice pro tem.

13 Cal.App.2d 606

PEOPLE v. BEST.

Cr. 1467.

District Court of Appeal, Third District, California.

April 30, 1936.

Rehearing Denied May 28, 1936.

1. Homicide ⇐39

Where malice is lacking and mortal blow is struck in heat of passion excited by quarrel, sudden, and of sufficient violence to amount to adequate provocation, offense is reduced to "manslaughter."

[Ed. Note.—For other definitions of "Manslaughter," see Words & Phrases.]

2. Homicide ⇐116(4)

Distinction between "self-defense" and "manslaughter" lies in existence of reasonably founded belief of imminent peril to life or great bodily harm, as distinguished from influence of uncontrollable fear or terror conceivable as existing but not reasonably justified by immediate circumstances.

[Ed. Note.—For other definitions of "Self-defense," see Words & Phrases.]

3. Homicide ⇐309(4)

In murder prosecution wherein defendant relied upon plea of self-defense, evidence *held* sufficient to warrant finding that defendant was guilty of manslaughter, so that failure to instruct jury on manslaughter was reversible error where proper instruction defining manslaughter was submitted by district attorney.

4. Criminal law ⇐1038(3)

Defendant in murder prosecution *held* not precluded from complaining that proper instruction defining manslaughter was not given because such instruction was not offered by him, where proper instruction was offered by district attorney.

5. Criminal law ⇐824(1)

In criminal case, court has duty to give of its own motion instructions on general principles of law pertinent to case where not proposed or presented in writing by parties themselves.

6. Indictment and information ⇐10

Murder indictment *held* not subject to motion to quash on ground that district attorney and official phonographic reporter gave unsworn testimony before grand jury in proceedings leading up to voting of indictment (Pen.Code, §§ 925, 995).

7. Criminal law ⇐878(3)

Verdict of manslaughter is equivalent to acquittal of charge of murder.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Elijah C. Best was convicted of manslaughter, and he appeals.

Reversed.

George R. Freeman, Elmer Laine, and Milton M. Hogle, all of Willows, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Dep. Atty. Gen., and W. T. Belieu, Dist. Atty., of Willows, for the People.

LEMMON, Justice pro tem., delivered the opinion of the court.

An indictment was returned against the defendant charging him with the murder of one Ernest B. Hanks. From a judgment of conviction of manslaughter and from an order denying his motion for a new trial, this appeal was taken.

Hanks and the defendant had been friends and neighbors for some period of time. In April of 1935, the two men entered into a contract to cut hay upon what is known as the "old Crawford Ranch" near Willows, in Glenn county. The defendant, Best, did not, but Hanks did, have a team of horses, and therefore Hanks suggested that they borrow a team from a Mr. Aleck Holman, and at the same time stated that the Holman team could be purchased for $50. This team was borrowed and the men entered upon the work. When the work had progressed for a few days, defendant became apprehensive that Hanks might charge him for the use of the borrowed team, and so, unknown to Hanks, Best purchased the Holman team. Thereafter, and on the evening of May 13th, Best observed that one of the Holman horses which Hanks had been using was all "fagged out" and had a raw spot on her shoulder, and her neck was chafed. These facts Best called to Hanks' attention, and received the reply, "She is all right." During the following day Best concluded that he would gain possession of this horse in order to see that she was cared for and not overworked. That evening at the end of the work day Hanks hitched the team he had been working to a wagon and tied the other team on be-

hind, for the reason that he intended to take the team Best had been working home that night to shoe them. As Best passed Hanks he called Hanks and jokingly commented about his wagon, and then said, "How will you trade horses, or aren't you a horse trader?" To this Hanks replied, "Nothing doing." "Well," Best said, "you have got the good team the biggest part of the job; don't you think you ought to change with me and let me have them the rest of the job? I am getting kind of tired driving old Pete." Hanks countered with, "Nothing doing." Best then said, "Ernest, I have a little surprise for you. I have bought this team." This provoked Hanks, and he used profanity in expressing his anger toward Best. Hanks went around the front of the team hitched to the wagon, while Best went to the rear to unfasten a halter strap of the team tied to the back of the wagon. Hanks mounted the wagon, took up a neckyoke, and said, "Best, God damn you old son-of-a-bitch, I could beat your brains out with this neck-yoke," and "yes, God damn you, I will hit you with it." Best moved over to where his hayfork was, and from there to the place where the men were in the habit of getting hay to take home for Best's cows. Hanks laid the yoke down and followed Best, driving the team. Hanks continued talking, but, between Best's deafness and the noise of the wagon, Best was unable to hear what was said. When they reached the hay Best asked Hanks not to shoe his horse. Hanks was adamant, and Best said, "Remember, Ernest, I have told you that the horse is mine, and if you shoe him you will have to shoe him at your own expense." Hanks again profanely expressed himself about Best. Best placed a small forkfull of hay on the wagon, and turned his back to get another forkfull, when Hanks jumped from the wagon onto Best's back. Best was knocked to the ground; he rolled over on his back and, as Hanks came toward him, Best raised up his feet, caught Hanks in the stomach or groin, and Hanks' momentum carried him over Best's head. Best jumped to his feet and grabbed the pitchfork. Hanks started for Best a second time, and Best hit him on the top of the head with the fork. Hanks came after Best a third time, and Best hit Hanks on the side of the head. Hanks expired later the same evening. The autopsy revealed an incised wound on the top of the head about one and one-half inches long, a bruise on the left side of the head just above the ear. The ear had been about half torn off. After removing the scalp, a fine linear fracture was found in the left temple bone perpendicular to the top of the head. Death was caused through the presence of a clot on the brain, the clot resulting from a severed artery.

The foregoing recital of facts in connection with the fatal affray is taken from the testimony of the defendant. The only other eye-witness to the homicide was a Mrs. Adams. Her testimony is relatively unimportant. It is at variance with demonstrated facts, and indicates that she is of feeble mentality.

Best was of the age of 67 years and weighed 165 pounds. Hanks was twenty-three years his junior, and weighed from twenty to twenty-five pounds less than his assailant. Best had suffered an acute heart attack two years before the fatal affray. The attack had left his heart in a weakened condition, and he found it necessary to have on hand medicine to stimulate his heart whenever needed.

The court instructed the jury that the crime of manslaughter was included in the charge of murder. A form of a verdict of manslaughter was handed to the jury upon their retirement, together with the usual forms in a murder trial. The court, however, failed to instruct the jury as to the definition of manslaughter, or as to what facts must be found by them before they could convict of the lesser offense.

At the trial the defendant relied upon the plea of self-defense. This is indicated, not only by the evidence offered by him, but also by the instructions which he submitted. His brief upon this appeal, as well as the oral argument of his counsel, show clearly that the case was tried on the theory that the crime of manslaughter was not involved.

[1, 2] "On the facts of the immediate case it is sometimes difficult to draw the exact line between homicide in self-defense and manslaughter. Nevertheless, the law distinguishes between the two, and a statute stating elements of manslaughter is inapplicable to a plea of self-defense. Conversely, self-defense has no place in a definition of manslaughter or any other degree of homicide, as it excuses, rather than fixes the degree of the homicide and entitles accused to a full acquittal." 30 C.J. p. 45. However, the evidence and the inferences reasonably to be drawn therefrom may be sufficient to warrant the jury in conclud-

ing that, though the killing was not justifiable under a plea of self-defense, it was done under such circumstances as to reduce the offense to voluntary manslaughter. If malice is lacking and the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the offense is reduced to manslaughter. People v. Freel, 48 Cal. 436. "The dividing line between self-defense and this character of manslaughter seems to be the existence, as the moving force, of a reasonably founded belief of imminent peril to life or great bodily harm, as distinguished from the influence of an uncontrollable fear or terror, conceivable as existing, but not reasonably justified by the immediate circumstances. If the circumstances are both adequate to raise, and sufficient to justify, a belief in the necessity to take life in order to save oneself from such a danger, where the belief exists and is acted upon, the homicide is excusable upon the theory of self-defense (Com. v. McGowan, 189 Pa. 641, 42 A. 365, 69 Am. St.Rep. 836), while, if the act committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter." Com. v. Colandro, 231 Pa. 343, 80 A. 571, 574.

[3-5] It is our conclusion the evidence in this case warranted the jury in deciding that the killing was not justifiable under the self-defense plea, but that under the authorities cited, the accused was guilty of the crime of manslaughter.

Respondent makes the point, however, that appellant did not offer any instruction upon the subject of manslaughter, and that the instructions which he did submit disclosed a deliberate purpose to rest his defense upon the proposition that he was either guilty of murder or was innocent of any crime. The case of People v. Wright, 167 Cal. 1, 138 P. 349, is cited to sustain the trial court. In that case the trial court refused instructions submitted by the defendant upon the subject of manslaughter in a case where the evidence would have justified a verdict of involuntary manslaughter. The action of the trial court was approved partly because those instructions were offered after the defendant had submitted instructions which showed that he took the position that he was either innocent or guilty of murder in the second degree. Had the trial court in the instant case refused to give the instruction, and the form of verdict which it did give upon the subject of manslaughter, and had the verdict of the jury been murder, as in the case of People v. Wright, that case might appropriately be cited as authority for respondent's position.

It is important to note that the district attorney submitted an instruction which did define manslaughter. It was disallowed by the trial judge. It cannot be said that appellant is precluded from complaining that a proper instruction defining manslaughter was not given because such an instruction was not offered by him. It is the duty of the court in a criminal case to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. 8 Cal.Juris. p. 309. Also, appellant was privileged to rely upon the instruction presented by the district attorney. It would have been an idle act for him to have submitted an instruction in substance the same as that offered by the prosecution.

Respondent has cited a number of cases in which judgments of conviction of the crime of manslaughter have been affirmed where the charge was murder and the evidence did not justify a verdict of manslaughter, and in which cases the court instructed the jury as to the essential elements of the lesser crime. In those cases a conviction of the crime charged would have been sustainable under the evidence. Obviously, they have no application to a situation where, as here, it was proper that the jury be instructed as to the definition and essential elements of manslaughter and where the jury returned a verdict of guilty of that offense without being previously properly instructed thereon.

[6] Appellant complains that the trial court should have granted a motion which he made to quash the indictment. The motion was predicated upon the fact that the district attorney and the official phonographic reporter gave unsworn testimony before the grand jury in the proceedings leading up to the voting of the indictment. That these two officials may be present at the sessions of the grand jury cannot be questioned. Section 925, Pen.Code. The grounds upon which an indictment may be set aside on motion are enumer-

ated in section 995 of the same Code. Hearsay or illegal evidence received by the grand jury is not embraced therein. As a basis for such a motion: Borello v. Superior Court, 8 Cal.App. 215, 96 P. 404; People v. Collins, 60 Cal.App. 263, 212 P. 701; People v. Schmidt, 33 Cal.App. 426, 165 P. 555.

[7] It is claimed that prejudicial error was committed by the trial court in refusing to give certain instructions offered by appellant, and in giving another instruction on the court's own motion. These instructions related to self-defense. The verdict of manslaughter is equivalent to an acquittal of the charge of murder. People v. Muhlner, 115 Cal. 303, 47 P. 128; People v. Smith, 134 Cal. 453, 66 P. 669; People v. Gilmore, 4 Cal. 376, 380, 60 Am.Dec. 620.

It is unnecessary to consider these instructions, because on a retrial there should be no occasion to instruct upon self-defense.

The judgment and the order are reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



13 Cal.App.2d 596

KRAFT v. LAMPTON.

Civ. 10918.

District Court of Appeal, Second District, Division 2, California.

April 30, 1936.

Hearing Denied by Supreme Court June 29, 1936.

1. New trial ⊜155

Where written notice of entry of judgment was served on movant for new trial on December 21, time within which court had jurisdiction to grant motion for new trial expired on following February 19 (Code Civ. Proc § 660).

2. New trial ⊜155

Where trial judge by letter dated after time within which court had jurisdiction to grant new trial advised clerk that motion for new trial was "hereby" granted and subsequently filed order stating that, whereas motion had been granted on timely date prior to date of letter, clerk should enter order granting motion nunc pro tunc, letter and order *held* ineffective to grant new trial (Code Civ. Proc. § 660).

3. New trial ⊜163(1)

Order granting new trial may be rendered either by pronouncement in open court or by filing with clerk of written order of court signed by judge.

4. Motions ⊜54

Order nunc pro tunc cannot give force to judgment or order void for want of jurisdiction.

5. Mandamus ⊜55

Where court did not grant new trial until after period during which court had jurisdiction to do so, holder of judgment was entitled to mandate to compel court to issue writ of execution (Code Civ.Proc. § 660).

Petition by Klyde Kraft for a writ of mandate to compel L. E. Lampton, county clerk of Los Angeles County, to issue a writ of execution in an action in which petitioner obtained judgment against Daniel W. Briggs.

Peremptory writ of mandate granted.

H. Landon Morris, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, and David R. Faries, by Don F. Tyler, all of Los Angeles, for respondent.

WOOD, Justice.

Petitioner seeks by a writ of mandate to compel the county clerk of Los Angeles county to issue a writ of execution in an action in which he obtained judgment against Daniel W. Briggs. Following a jury's verdict, judgment for $5,000 was entered on December 19, 1935, in favor of petitioner. Written notice of the entry of the judgment was served on Briggs on December 21, 1935. A motion for new trial came on for argument on January 22, 1936, and it was stipulated that the matter be submitted on briefs. Judge Stanley Murray of Madera county was the trial judge. Upon his return to Madera county the briefs were forwarded to him.

Respondent county clerk received and filed on February 24, 1936, a letter from

Judge Murray written in Madera and dated February 21, 1936, stating in part: "Referring to Motion for New Trial (Action No. 390171) in the case of Klyde Kraft, Plaintiff, v. Daniel W. Briggs et al., Defendants, please be advised that said motion is hereby granted upon the grounds of the insufficiency of the evidence to sustain the verdict. Please make proper minute entry and notify respective parties in accordance herewith." On April 7, 1936, the presiding judge of the superior court of Los Angeles county ordered the issuance of a writ of execution. Thereupon and under date of April 7, 1936, Judge Murray filed an order in part as follows: "Whereas, the opening and closing briefs of the defendant in support of said motion and the brief of the plaintiff in opposition thereto were duly considered and good cause appeared therefor, the undersigned did upon the 14th day of February, 1936 grant said motion of the defendant upon the grounds of the insufficiency of the evidence to sustain the verdict, and whereas, the undersigned by letter addressed to the Clerk of the above entitled court and dated February 21, 1936 did inform said Clerk of the granting of said motion upon said grounds but did not state therein the day upon which said order granting said motion was made. Now therefore it is hereby ordered that the Clerk of the above entitled court cause to be entered in the minutes, files and records of the above entitled case the order of the undersigned granting said motion upon the grounds of the insufficiency of the evidence to sustain the verdict as of the 14th day of February, 1936, the date upon which said order was made." Thereupon the presiding judge made an order recalling the writ of execution which had theretofore been issued.

[1, 2] The time within which the court had jurisdiction to grant the motion for new trial expired on February 19, 1936. Code Civ.Proc. § 660; Payne v. Hunt, 214 Cal. 605, 7 P.(2d) 302. The orders made February 21, 1936, and April 7, 1936, were both void in so far as they purported to grant a new trial. Respondent takes the position that the order granting a new trial was actually made February 14 and that the order of April 7 serves as a nunc pro tunc order to correct the record to "conform to the actual facts." It is only necessary to read the two orders above mentioned to be convinced of the weakness of respondent's position. In McKannay v. McKannay, 68 Cal.App. 709, 230 P. 218, 220, the court said: "The fact that the trial court declared, in the order appealed from, that the error sought to be corrected was a clerical misprision, does not help matters for the simple reason that the situation upon its face shows that the error was nothing of the sort." In the case before us the judge made no claim that a clerical misprision was being corrected, but merely recited after the word "whereas" that the motion had been granted on February 14. After the next "whereas" the order refers to the letter of February 21 as giving information to the clerk, but fails to refer to that part of the letter containing the language, "said motion is hereby granted * * * please make proper minute entry."

[3] The methods by which a motion for new trial may be granted are clearly stated in United Railroads v. Superior Court, 197 Cal. 687, 242 P. 701, 703: "While petitioner's counsel have not said so in so many words, the conclusion is implicit in their argument that, in order to render a lawful order of court granting or denying the motion for new trial under those circumstances, it was necessary for the respondent judge to betake himself to the courtroom in which the hearing had been had and there mount the bench and formally and audibly pronounce an order granting the motion for a new trial, and that by no other method could such an order be lawfully rendered. We do not subscribe to this view. We are of the opinion that, when all of the elements antecedent to such an order have been duly performed, and when the issue after a hearing thereon duly had has been submitted to the court for its decision, the order of the court thereon may be rendered in either one of two ways: (1) By the pronouncement thereof in open court in the manner above suggested; or (2) by the filing with the clerk in the action of a written order of court signed by the judge." See, also, Barnett Rosenburg, Inc., v. Superior Court, 93 Cal.App. 276, 269 P. 730. In the present case neither of these methods was followed. No pronouncement was made in open court and no written order was signed by the judge within the statutory period. As stated in Haynes v. Los Angeles Railroad Corporation, 80 Cal.App. 776, 252 P. 1072, 1074: "It is equally well established that the court in the exercise of this power is not authorized to do more than to make its

records conform to the actual facts, and cannot, under the form of amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given." In the case of Shepherd v. Superior Court, 54 Cal.App. 673, 202 P. 466, the power of the court to grant the motion expired at noon on Saturday, April 2. In the afternoon of that day the judge telephoned to the clerk to enter an order granting the motion for new trial. The case was referred to in United Railroads v. Superior Court, supra, where it was pointed out that an order granting a new trial was never rendered and that the matter still remained "in the breast of the court."

[4, 5] An order nunc pro tunc cannot give force to a judgment or order void for want of jurisdiction. Jackson v. Dolan, 58 Cal.App. 372, 208 P. 315. The record before us discloses that no order was made granting a new trial within the time in which the court was empowered to act. Until and including February 19, 1936, the matter remained "in the breast of the court." After that time, the court was powerless to act in the premises.

Let a peremptory writ of mandate issue.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



13 Cal.App.2d 561

BERKOWITZ v. TYDERKO, LIMITED, et al.

Civ. 10921.

District Court of Appeal, Second District, Division 2, California.

April 29, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Appeal and error ⇐1010(1)

Trial court's finding supported by substantial evidence is binding on appeal.

2. Principal and surety ⇐108(1)

Vendor's subsequent letter extending time to pay balance of price *held* not to modify purchaser's original obligation so as to release surety, notwithstanding executory nature of land contract, since letter was not supported by separate consideration.

3. Principal and surety ⇐108(1)

On question whether vendor's subsequent letter extending time for payment was supported by separate consideration so as to release surety of purchaser under land contract, writing itself carried presumption of consideration, though presumption could be overcome by contrary testimony.

4. Mortgages ⇐25(2)

Third persons' notes secured by trust deeds given to vendor *held* supported by consideration, in view of agreement reciting that notes and deeds were given not only to secure payment under land contract but also to induce vendor to make sale.

5. Witnesses ⇐205

Client's communication to attorney *held* not privileged where not intended to be confidential.

6. Appeal and error ⇐1058(1)

Erroneous exclusion of communications to attorney because privileged *held* harmless where same matters were otherwise elicited.

7. Appeal and error ⇐1071(5)

That certain findings might be unsupported, contradictory, inconsistent, or immaterial *held* not ground for reversal; it being sufficient that record disclosed findings, warranted by substantial evidence, on all material matters sufficient to support judgment.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Esther Berkowitz against Tyderko, Limited, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Burnett Wolfson and Earl I. Swetow, both of Los Angeles, for appellant.

Thatcher J. Kemp, of Los Angeles, for respondent Tyderko, Ltd.

GOULD, Justice pro tem.

By instruments dated September 30, 1930, defendant Tykerdo, Limited, sold to one Braunstein certain real property for $30,800, the purchase price payable on or before one year. The purchaser gave back a third deed of trust upon the property sold for the full amount of the purchase price,

and as further security for the payment by Braunstein of the purchase price plaintiff and her husband, the latter since deceased, gave to the vendor two notes in the aggregate sum of $30,800, secured by deeds of trust upon real property. The agreement signed by plaintiff recited that the note and deeds of trust were given "not only as security for the payment * * * of the purchase price of $30,800 * * * but also as an inducement for [Tyderko, Ltd.] * * * to make said sale to the said * * * Braunstein." When the purchaser failed to make payment upon the principal obligation, defendant vendor initiated proceedings for the sale of the properties under the Berkowitz deeds of trust. This action to enjoin the sale, for cancellation of the Berkowitz deeds of trust and notes, and to quiet plaintiff's title to the real property described in the deeds of trust followed. Judgment went for defendants, and plaintiff appeals.

The entire controversy arises from a letter dated October 6, 1930, given by the president of Tykerdo, Limited, to the purchaser, Braunstein, in which the latter was informed that if a payment of $5,000 on account of the purchase price of $30,800 was made on or before one year after September 30, 1930, and no other defaults existed, then a "grace period" of six months from and after September 30, 1931, would be allowed for payment of the balance of the purchase price principal. By granting this six months' extension in the payment of the principal obligation without her consent or knowledge, appellant claims that she as surety was thereby released.

[1-3] The trial court found that the transactions between the parties represented by the various instruments dated September 30, 1930, became fully operative and binding before the letter of October 6. There was substantial evidence in support of this finding, the September 30th papers all having been signed before October 6, and according to the testimony of at least one witness having been delivered and placed in escrow several hours before the writing and delivery of the letter of October 6. The determination of this fact being binding upon appeal, it follows that the letter of October 6 was not a part of the original transaction of sale, and to constitute an alteration of the original agreement so as to relieve the surety would have to be supported by a separate consideration. The writing itself carries the presumption of a consideration, but this presumption may be overcome by testimony to the contrary. Braun v. Crew, 183 Cal. 728, 192 P. 531. In the case before us the testimony was positive and undisputed that no consideration of any kind passed to Tykerdo, Limited, for the extension of time granted by the letter of October 6, and the court so found. The conclusion inescapably follows that there could be no enforcement of the extension granted, that the original Braunstein obligation was not altered or modified, and that consequently appellant as surety upon that obligation was not released or discharged. Stroud v. Thomas, 139 Cal. 274, 72 P. 1008, 96 Am.St.Rep. 111.

Appellant insists that because the contract between Braunstein and respondent, Tykerdo, Limited, was executory only, and because no default had occurred and no part of the debt was then due, no consideration was necessary for the modification in the terms of payment as set forth in the letter of October 6, that the modification was enforceable without consideration, and that by reason of these facts appellant was released and discharged. Cases such as Moore v. Markel, 112 Neb. 743, 201 N.W. 147, are cited in support of the contention that no new consideration is necessary to support a modification of an executory contract. We are constrained to hold, however, that the decisions of this state do not sustain appellant's position, the law as it stands being expressed typically in Main Street, etc., Co. v. Los Angeles Traction Co., 129 Cal. 301, 61 P. 937, which holds that an agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it. It is obvious that the letter of October 6 added "new and onerous terms" to the agreement of September 30, to wit, that respondent forbear for a period of six months the collection of the sum of $25,800. The law of this state recognizing no distinction in favor of executory contracts in this regard, and the trial court having determined upon substantial evidence that the letter of October 6 constituted no part of the agreement of September 30, appellant may not thereby be relieved of her contract.

While many other points are discussed by counsel in their several hundred pages of briefs, both sides agree that the "crux of the litigation" is the effect to be given to the letter of October 6, and other matters are of minor moment.

[4] It is apparent without citation of authority that there was consideration for the Berkowitz notes and deeds of trust. Reference to the recital in the agreement that they were given "not only as security * * * but also as an inducement" for the sale to Braunstein suffices to answer the contention as to consideration.

[5, 6] It is contended that error was committed in excusing the witness Kemp, an attorney at law, from testifying upon the ground that the matters sought to be elicited were privileged as being confidential communications from a client. We agree with appellant that the protection of privilege should not have been granted as to the particular testimony involved, because it appears that the communication to the attorney in this instance was not intended to be confidential and therefore could not be withheld upon the ground of privilege. Sharon v. Sharon, 79 Cal. 633, 22 P. 26, 131. But even if erroneous, the ruling was harmless, because the same matters were otherwise elicited. It is apparent that appellant suffered no prejudice and that the rulings complained of resulted in no miscarriage of justice.

[7] There is lengthy discussion by appellant of findings alleged to be unsupported by evidence or contradictory, inconsistent, or immaterial. No useful object would be served by reviewing all these matters in detail. It is enough that the record discloses findings on all material matters sufficient to support the judgment, and that these findings in turn derive their support from substantial evidence. Wheat v. Bank of California, 119 Cal. 4, 50 P. 842, 51 P. 47.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 582

HORN v. VOLKO et al.

Civ. 9887.

District Court of Appeal, First District, Division 1, California.

April 30, 1936.

1. Automobiles ⇐245(24)

Evidence that truck driver, traveling from 30 to 38 miles an hour in outer lane of four-lane highway, neither swerved nor applied brakes when vehicle ahead suddenly stopped without apparent reason, causing rear-end collision, *held* insufficient for jury on question of "willful misconduct" within guest statute (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇐181(1)

"Willful misconduct" within automobile guest statute means more than negligence or gross negligence, and implies at least intentional act with knowledge that serious injury is probable result, or with wanton and reckless disregard of possible result (St.1931, p. 1693, § 141¾).

Appeal from Superior Court, San Mateo County; A. Caminetti, Jr., Judge.

Action by Max Horn against Michael Volko and others. From an order granting a nonsuit as to defendant named, plaintiff appeals.

Affirmed.

J. E. McCurdy and F. E. Hoffmann, both of San Mateo, for appellant.

Ross & Ross, of Redwood City, for respondent.

TYLER, Presiding Justice.

Appeal from an order granting a nonsuit in an action for damages, alleged to have been suffered in an automobile collision, by a guest against his host, based upon a claim of willful misconduct. Plaintiff was injured in a rear-end collision between two Ford trucks, one being driven by respondent Volko, the other by defendant Filippi. During the trial a motion for nonsuit on behalf of Volko was granted. He was the driver of the automobile in which plaintiff was riding as a guest. Following the order granting the nonsuit, the case proceeded against defendant Filippi alone and went to the jury on the issue of his negligence. The jury returned a verdict in favor of Filippi and against the plaintiff. As above stated, this appeal is from the order granting a nonsuit on behalf of Volko. Defendant Filippi is not a party to the appeal. There is little or no conflict concerning the facts. The three parties to the action were the only witnesses. The accident happened on the Bayshore highway, a little south of Redwood City. At this point the highway has four lanes, two for southbound traffic, the

other two for northbound traffic. The Ford truck driven by defendant Filippi was proceeding southerly and wholly within the outer or slow lane of traffic at a speed estimated at from 18 to 20 miles per hour. Plaintiff and appellant, as a passenger guest of defendant and respondent Volko, was riding in a Ford pick-up truck operated by Volko, which was likewise proceeding in a southerly direction at a speed of from 30 to 38 miles an hour in the outer or slow lane and to the rear of the truck operated by Filippi. The truck being driven by Filippi made a sudden stop, and respondent Volko drove into it. Plaintiff testified that Volko neither applied his brakes prior to the accident, nor did he swerve to the right or left or in any manner change the direction in which he was traveling. Both plaintiff and Volko were injured by the impact. Volko testified that he had his eyes on the truck in front of him at all times and did not see anything that would cause the truck to make the sudden stop it did; that no signal was given; that it was too late for him to make a turn; that he applied his brakes, which were in good condition, but to no avail, and his truck struck the one in front of him with sufficient force to demolish the front and left-hand side of his machine. After the impact Volko remembered nothing, and was taken to a hospital in Redwood City.

[1, 2] The sole question here presented is whether or not the acts of respondent Volko amounted to willful misconduct within the meaning of section 141¾ of the California Vehicle Act (St.1923, p. 517 as added by St.1929, p. 1580, amended by St.1931, p. 1693) so as to entitle plaintiff to recover. We do not think that they did. It may be that respondent was negligent in driving so close to the truck ahead of him, or in failing to slow up in time, but such actions on his part, even if they be conceded to be negligence, under no circumstances can be said to constitute willful misconduct. The question as to what constitutes willful misconduct with reference to facts arising under the provisions of section 141¾ of the California Vehicle Act has been frequently before the Supreme and Appellate Courts of this state since the adoption of the section. Thus it has been held that willful misconduct within the meaning of the statute is intentionally doing something in the operation of a motor vehicle which should not be done, or intentionally failing to do something which should be done, under circumstances disclosing knowledge, express, or to be implied, that an injury to a guest will be a probable result. Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988. It implies at least the intentional doing of something, either with the knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result. Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279. As has been frequently declared, "wilful misconduct" means something more than negligence—more even than gross negligence. Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194; Horning v. Gerlach, 139 Cal.App. 470, 34 P.(2d) 504; Lennon v. Woodbury, 3 Cal. App.(2d) 595, 40 P.(2d) 292. Giving to plaintiff's evidence all the value to which it is entitled, it is not sufficient to support a verdict or judgment if one were given. Plaintiff, too, was looking at the truck ahead of him just before the collision, but he said nothing to respondent, who was driving, of any apparent danger. At most, respondent might have been negligent in driving too close to the truck ahead of him, but the evidence certainly shows that he was not guilty of willful misconduct. This being so, the motion for a nonsuit was properly granted.

The order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

DRISCOLL v. SHIPP.

DRISCOLL et al. v. SAME.

Civ. 10789, 10798.

District Court of Appeal, Second District, Division 2, California.

April 30, 1936.

Rehearing Denied May 22, 1936.

Hearing Denied by Supreme Court June 29, 1936.

1. Appeal and error ⇐931(1)

On appeal from judgment for the defendant, evidence should be viewed in light most favorable to defendant.

2. Automobiles ⇐171(1)

Instruction that area bounded by prolongation of lateral curb or street boundary lines of intersecting street was one "intersection" within California Vehicle Act *held* proper (St.1929, p. 510, § 23).

[Ed. Note.—For other definitions of "Interest; Intersection," see Words & Phrases.]

3. Automobiles ⇐171(13)

Instruction that motorist first entering intersection could assume that he would be given right of way, and that other motorist would not attempt to cross intersection in front of him *held* proper.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Actions by David A. Driscoll, a minor, by John J. Driscoll, his guardian ad litem, and by John J. Driscoll and another against Everett S. Shipp. From judgments for the defendant, the plaintiffs appeal.

Affirmed.

Morfoot & Sutton and Harry A. Sutton, all of Los Angeles, A. Edward Nichols, of Hollywood, and Mervyn A. Aggeler, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

These are appeals consolidated by consent of all parties from judgments for the defendant after trial by a jury in actions to recover damages for the wrongful death of plaintiff's son, John J. Driscoll, Jr., and for personal injuries to plaintiff's son, David A. Driscoll.

[1] Viewing the evidence most favorable to the defendant (Ah Gett v. Carr, 3 Cal. App. 47, 48, 84 P. 458), the facts in the instant cases are:

Where San Vicente boulevard and Cochran avenue cross in the city of Los Angeles, the intersection consists of two roadways along San Vicente boulevard, each roadway being approximately 40 feet wide and being separated by the right of way of the Pacific Electric Railway, which is approximately 50 feet in width. At this point San Vicente boulevard is intersected by Cochran avenue at almost right angles, Cochran avenue running northerly and southerly and being about 40 feet wide. The south roadway of San Vicente boulevard extends through and across Cochran avenue, continuing westerly. The north roadway of San Vicente boulevard does not extend beyond Cochran avenue, but stops at the westerly side of the avenue.

December 10, 1933, defendant drove his automobile in a southerly direction on Cochran avenue where it intersects with San Vicente boulevard at a speed of approximately 15 miles per hour. After defendant entered the intersection, an automobile operated by John J. Driscoll, Jr., traveling on the south roadway of San Vicente, entered the crossing at a speed of approximately 45 miles per hour. A collision ensued, resulting in the death of John J. Driscoll, Jr., and injuries to David A. Driscoll, who was riding in the same car with his brother, the deceased.

Plaintiffs rely for reversal of the judgment on the following propositions:

First. The evidence is insufficient to support the findings of fact upon which the verdicts were necessarily predicated.

Second. The trial court committed prejudicial error in instructing the jury as follows:

(a) "You are instructed that the intersection of public highways is defined by the California Vehicle Act in force at the time and place of this accident, as follows:

" 'The area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the traversable roadways of two or more public streets or highways which join one another at an angle whether or not one such street or highway crosses the other.' [St.1923, p. 520, § 23, as amended by St.1929, p. 510.]

"Therefore, I instruct you, as a matter of law, that from the northerly side of San

Vicente Boulevard to the southerly side of said San Vicente Boulevard, and between the easterly and westerly extensions of Cochran Avenue to the Pacific Electric Company right of way, and all of the territory within said intersection north and south of the Pacific Electric right of way, was one intersection, within the meaning of the California Vehicle Act. That is to say: You have had described to you by the uncontradicted testimony the territory as shown on the northerly side of the Pacific Electric right of way, including San Vicente Boulevard and Cochran Avenue to the easterly side of said Cochran Avenue, and the territory on the southerly side of the Pacific Electric right of way, and this territory, I instruct you as a matter of law, constituted one intersection within the meaning of the California Vehicle Act."

(b) "In order that there be no misunderstanding of the force and effect of that instruction, I am instructing you, for clarity only and not for emphasis upon it, repeat that as a matter of law the intersection at this point consists of all the territory bounded by and within—rather, bounded on the north by the northerly curb line of San Vicente Boulevard prolonged across Cochran Avenue, thence southerly along the westerly side of Cochran Avenue to the southwest corner of San Vicente Boulevard and Cochran Avenue, thence following along the southerly boundary line of San Vicente Boulevard prolonged across Cochran Avenue to the southeast corner of the intersection of San Vicente Boulevard and Cochran Avenue, thence northerly along the easterly boundary of Cochran Avenue, either as it exists or prolonged across the street portion of San Vicente Boulevard, to the point of beginning, constitutes one intersection—with one possible correction of that.—There was some reference to curbs at certain places. You are again reminded that the intersection is the area embraced within the prolongation of the lateral curb lines, or if none, then the lateral boundary lines which join one another at an angle, whether or not one such street or highway crosses the other. So that—'lateral boundary' I think I used in speaking in the latter portion, but curb lines control where there are curb lines, which particular phase of the matter is left to you as a question of fact."

(c) "You are instructed that if the defendant Shipp had entered the intersection, as said intersection is defined in these instructions, before John J. Driscoll, Jr., entered said intersection, then said defendant Shipp, if obeying the law at the time, had the right to assume, unless he had knowledge to the contrary, that the deceased, John J. Driscoll, Jr., would yield to him the right of way, and would not attempt to cross said intersection in front of him, and said defendant was not guilty of negligence, if he was otherwise in the exercise of ordinary care, in thus assuming, and in continuing to move his automobile forward in said intersection."

As to plaintiffs' first proposition, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgments in favor of defendant were necessarily predicated. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Thatch v. Livingston (Cal. App.) 56 P.(2d) 549.

[2, 3] The instructions set forth in paragraphs (a) and (b) of plaintiffs' second proposition are accurate statements of the law. Kienlen v. Holt, 106 Cal.App. 135, 288 P. 866; Lowenbruck v. Stiglmeier, 7 Cal.App.(2d) 204, 206, 46 P.(2d) 251. Likewise the instruction included in paragraph (c) of plaintiffs' second proposition is a correct statement of the principle of law embodied therein. Page v. Mazzei, 213 Cal. 644, 645, 3 P.(2d) 11; Keyes v. Hawley, 100 Cal.App. 53, 59, 279 P. 674.

The judgments are affirmed.

We concur: CRAIL, P. J.; WOOD, J.

13 Cal.App.2d 612

HAULMAN et ux. v. CRUMAL et al.

Civ. 1325.

District Court of Appeal, Fourth District, California.

April 30, 1936.

Attachment ⊂=166

Levy of attachment against negotiable note and mortgage by service of copy of writ of attachment on mortgagor and mortgagee and recording of copy of writ and notice of attachment, without actual seizure of note and mortgage, *held* not to effect levy valid as to subsequent bona fide purchaser for value of note and mortgage without actual knowledge of attachment, in view of statutory requirement that personal property capable of manual delivery be attached by taking it into custody, as against contention that recordation gave bona fide purchaser constructive notice (Code Civ.Proc. § 542, subds. 2, 3, 6; Civ.Code, §§ 3137, 3138).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action in interpleader by Dale Haulman and wife against Lee Crumal and others. From a judgment in favor of defendant Lee Crumal and others, defendant Jemmina Bradley appeals.

Reversed.

Albert Peterson, of Hanford, for appellant.

Sherrill Halbert and Halbert & Stone, all of Porterville, for respondents.

Gaylord N. Hubler, of Porterville, for plaintiffs.

JENNINGS, Justice.

This action in interpleader was instituted in the superior court by plaintiffs whose complaint alleged that they held a specified sum of money which was claimed by each of the defendants named in the action, that plaintiffs were unable to determine which defendant was entitled to receive the money as to which plaintiffs denied that they had any claim and alleged their willingness and ability to pay the same to the party entitled thereto and therefore prayed that the court enter an interlocutory decree requiring the defendants to interplead and set forth their respective claims to said sum of money and to order that upon payment of the same into court plaintiffs thereupon be discharged of all responsibility for the payment of said sum to any one or all of the defendants. Thereafter the court entered its interlocutory decree requiring the defendants named in the complaint to interplead in the action and set forth their claims to the sum of money mentioned in the complaint and providing that upon payment of said sum to the clerk of the court plaintiffs should be discharged from all liability for the payment of said money to the defendants or any of them. In compliance with the decree the defendant Jemmina Bradley filed an answer in which she set forth her claim to the sum of money mentioned in the complaint. The defendants Lee Crumal, Frances Crumal, and L. R. Hill, as sheriff, also filed a joint answer wherein they specified their claim to the money. The defendants Carleton L. Little and Luella A. Little filed an unverified document wherein they jointly disclaimed any interest in the money.

The claims of the conflicting parties, who were Jemmina Bradley on the one hand and the Crumals and Hill on the other, were submitted to the court on an agreed statement of facts. The trial resulted in the rendition of a judgment in favor of the last-named defendants. From this judgment, the defendant Jemmina Bradley appeals.

The statement of facts which forms the basis for the trial court's findings and its consequent judgment presents the following salient facts: On September 5, 1930, the plaintiffs Dale Haulman and Josephine Haulman, his wife, purchased a parcel of land from the defendants Carleton L. Little and Luella A. Little, and as part of the consideration therefor executed and delivered to the Littles a promissory note for $800 dated September 5, 1930, bearing interest at the rate of 7 per cent. per annum and payable on September 5, 1937. Payment of the note was secured by a mortgage on the land purchased by the Haulmans. The mortgage was recorded in the county recorder's office on October 17, 1930. At some time thereafter the Littles entered into an escrow agreement with Jemmina Bradley and the Tulare County Abstract Company whereby the Littles agreed to execute an assignment of the note and mortgage to Jemmina Bradley and to deliver to her the said note and mortgage. The instruments specified in the

escrow agreement, including the assignment of the Haulman mortgage, were recorded by the abstract company on May 29, 1931, on which date the said company issued to Jemmina Bradley a policy of title insurance which showed that the title to the mortgaged property was in the Haulmans subject only to the mortgage. Shortly thereafter and prior to maturity, the note and mortgage were delivered to Jemmina Bradley. In the meantime, on May 23, 1931, Lee Crumal and Frances Crumal commenced an action against the Littles in the superior court of Tulare county and procured the issuance of a writ of attachment. On May 28, 1931, the writ was delivered to R. L. Hill, the sheriff of Tulare county, with instructions to attach the Haulman note and mortgage. On the last-mentioned date the attaching officer caused copies of the writ of attachment to be personally served on the Haulmans and the Littles who were likewise notified that the note and mortgage were attached. On the same date Hill caused a copy of the writ of attachment with a notice of attachment appended thereto to be recorded in the office of the county recorder. No copy of the writ was served either on Jemmina Bradley or the abstract company and neither had any notice of the attachment other than may have been given by recordation of the writ of attachment. On May 28, 1931, the note and mortgage were in the possession of the abstract company. This latter fact was not known by the Crumals.

The briefs of counsel herein evidently assume two additional facts which do not clearly appear from the above-mentioned statement. These are, first, that the note executed by the Haulmans was negotiable, and, second, that Jemmina Bradley furnished adequate consideration for the purchase by her of the note and mortgage. The single question here presented, therefore, is whether or not the mode of attachment pursued by the attaching officer was sufficient to effectuate a valid levy of the writ on the instruments. It is appellant's contention that the note is tangible property capable of manual delivery and that consequently no levy of the writ of attachment valid against the innocent purchaser of the instrument was accomplished by the sheriff since it is undisputed that he did not take possession of the note and mortgage. Respondent, on the other hand, contends that actual seizure of the instruments was not required to accomplish a valid levy of the writ and that service of the writ on the makers of the note and mortgage and on the defendants in the attachment suit and notification to these parties that the instruments were attached, plus the undisputed fact of recordation of a copy of the writ having appended thereto a notice of attachment, were ample to effectuate a levy of the writ effective against a person who was proposing to purchase the note and mortgage, but had not then secured possession of them. In thus contending, respondent relies principally on subdivision 6 of section 542 of the Code of Civil Procedure which, at the time the levy of the writ was attempted to be made, provided that "debts and credits and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, * * * a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ."

Respondent's contention is evidently based on the theory that the property which is sought to be reached by the writ is the debt, that the note is merely evidence of the debt, and that the debt is intangible, incapable of manual delivery, and consequently properly attachable in the manner provided in subdivision 6 of section 542 of the Code of Civil Procedure. While it must be conceded that promissory notes are often referred to as mere evidences of indebtedness, the fact remains that such instruments, particularly those that are negotiable in character, have, through the development of the law merchant, come of themselves to possess well-defined property rights. It is, for example, settled beyond question that the bona fide holder of a negotiable promissory note who takes the same prior to maturity may enforce collection of the note from the maker although, as between the maker and the payee designated in the note, the debt represented by the note may have been extinguished. It is evident, therefore, that a negotiable promissory note is something more than mere evidence of indebtedness. Furthermore, the subdivision on which respondent relies specifically provides that the debts, etc., which must be attached in the

manner there described shall be incapable of manual delivery. A promissory note is certainly capable of manual delivery and the very fact that such an instrument passes readily from hand to hand is intended and expected so to pass, and that this very quality of easy delivery has given rise to unquestioned rights in favor of innocent holders emphasizes the well-recognized characteristic of easy manual delivery which is possessed by such an instrument.

It is our conclusion, therefore, that the facts which are presented by the record herein and which are correctly found by the trial court did not justify the legal conclusion drawn by the court that the money paid into court by the Haulmans, plaintiffs in the action, should be delivered to the sheriff, respondent R. L. Hill, to be held by him under the writ of attachment issued in the case of Crumal v. Little, pending the outcome of said attachment suit.

The above-stated conclusion is based on the opinion that the note and mortgage in question is covered by subdivision 3 of section 542 of the Code of Civil Procedure, which provides that "personal property, capable of manual delivery, must be attached by taking it into custody," and that the levy of the writ of attachment attempted to be made by the sheriff in the manner heretofore described was not valid as against appellant who took the note and mortgage long before maturity, paid valuable consideration therefor, and had no actual notice of the issuance of the writ of attachment in Crumal v. Little or of the attempted levy of the writ in the manner described.

In arriving at this opinion, it must be conceded that no California authority directly in point on the proposition is available. However, in the case of Hoxie v. Bryant, 131 Cal. 85, 63 P. 153, 155, there is to be found language which strongly supports the conclusion that a negotiable promissory note must be attached by taking it into custody. In the cited case the defendant had fraudulently sold a promissory note and mortgage to the plaintiff, who paid defendant the face value of the note. On discovering the fraud, plaintiff brought an action to rescind the sale and recover the amount paid. The judgment was in favor of plaintiff for recovery of the purchase price, and that upon its being paid, the note and mortgage, which had been filed with the court clerk, should be delivered to the defendant. The defendant did not pay the judgment which became final, and prior to the time the note and mortgage would become barred by the statute of limitations plaintiff sought and obtained from the court an order permitting the sheriff to levy execution on the note and mortgage and sell the same. The sheriff thereupon levied on the note and mortgage, took them into his possession, and after notice sold the instruments to plaintiff, who was the highest bidder. On the day preceding the date on which any action on the note and mortgage would become barred by the statute, plaintiff filed a complaint to foreclose the mortgage. Shortly thereafter the defendant moved the court to set aside the order authorizing levy of execution on the note and mortgage, to set aside the levy and sale and recall the writ, and that the judgment in plaintiff's favor be declared satisfied and discharged. It was defendant's contention that an evidence of debt could not be levied upon and sold under execution, and that by taking possession of the note and mortgage and exercising dominion over them plaintiff had converted them to her own use and was prima facie liable for the amount of the debt which would satisfy the judgment. The trial court denied defendant's motions and on appeal its action was sustained. It is pointed out specifically in the opinion that the rights of no creditor other than plaintiff were involved. The decision was based, however, on the proposition that a promissory note is personal property which, under the provisions of subdivision 3 of section 542 of the Code of Civil Procedure, must be attached by taking it into custody. In discussing the distinction that exists between a judgment and a promissory note, the court said:

"The judgment is a matter of record. It is the record evidence of the debt due by the judgment debtor. It is not capable of being taken out of the book where it is recorded and personally delivered. The sheriff cannot seize the judgment, take possession of it, and sell it. But a promissory note, negotiable in form, which passes in the commercial world by indorsement and delivery, and is subject to sale, is quite different. The owner of such promissory note cannot refuse to pay a just judgment against him, and claim the note as exempt from execution. If it, in any way, can be found and seized by the sheriff on execution, it may be sold and delivered to the purchaser."

The above-cited case was cited with approval in Gault v. Wiens, 32 Cal.App. 1, 3, 161 P. 996, as supporting authority for the declaration that the interest of a judgment debtor in promissory notes executed by a third person in favor of the debtor and pledged by him as security for the payment of his debt to the judgment creditor is subject to seizure and sale under levy of execution. In this case the pledged notes which were in the possession of the creditor were surrendered by the creditor to the sheriff under levy of a writ of execution and were sold to the creditor on execution sale.

In 6 Corpus Juris at page 227, the rule is thus stated: "An instrument for the payment of money is property capable of manual delivery within the meaning of the attachment law; and hence an actual taking into the custody of the attaching officer is necessary to constitute a valid levy upon bonds, promissory notes, checks, and other instruments which are unilateral contracts for the payment of money only, acknowledge an absolute obligation to pay, and constitute evidences of debt, the title to which may pass by delivery merely." The text is supported by a number of cited decisions, among which the case of Nordyke v. Charlton, 108 Iowa, 414, 79 N.W. 136, bears the nearest factual similarity to the instant case. In Whitney v. Day, 86 Or. 268, 168 P. 295, a case which is factually similar to the instant action, the Supreme Court of Oregon declared that promissory notes may be attached like any other property, and that if a promissory note is in the possession of the defendant in an attachment suit, it is the duty of the attaching officer to take it into his custody, and that if the note had been transferred to a third person, notice of attachment, together with a copy of the writ, should have been served upon the holder.

It is contended by the respondents, Crumal, that the recordation of a copy of the writ of attachment having thereto attached a notice of attachment operated to give constructive notice of the attachment of the note and mortgage to the appellant Jemmina Bradley. In this connection, it must be borne in mind that the agreed statement of facts which formed the basis for the trial court's findings specified that "on May 28, 1931, R. L. Hill, as sheriff of the county of Tulare, state of California, caused to be recorded in the office of the County Recorder of Tulare County, a copy of the aforementioned writ of attachment together with a notice of attachment appended thereto." It was also specified in the statement of facts that "no notice of the attachment, other than the notice recorded in the recorder's office, was given to Jemmina Bradley, who received the note and mortgage out of the escrow. Likewise, the writ of attachment was not served on the Tulare County Abstract Company who held the note in escrow unbeknown to the Crumals as attaching creditors. So likewise, said Abstract Company had no notice other than that recorded in the office of the County Recorder."

The effect of the above stipulated facts is that on May 28, 1931, the note and mortgage were in the possession of the Abstract Company which held them pursuant to an escrow transaction between Jemmina Bradley and the Littles, that this fact was not known by the Crumals, that neither Jemmina Bradley nor the Abstract Company had actual notice of the attempted attachment of the note and mortgage.

On the date on which the levy of the writ of attachment was attempted to be made, subdivision 2 of section 542 of the Code of Civil Procedure provided that "real property, or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property, and a notice that such real property, and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached. * * * The recorder must index such attachment when filed, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands on the records."

However, it must be borne in mind also that the agreed statement of facts specified that the Haulmans purchased the property from the Littles on September 5, 1930, and as part of the consideration therefor gave the Littles the mortgage and note which were later attempted to be attached in the suit of Crumal v. Little, that the mortgage was recorded on October 17, 1930, and that on May 29, 1931, the Abstract Company issued a policy of title insurance to Jemmina Bradley showing title to the land in the Haulmans subject only to the mortgage executed by them in favor of the

Littles. It is evident therefore that on the date the writ of attachment and notice were recorded the Littles had no interest in the land other than the lien of their mortgage.

It is our conclusion that in view of the above-stated facts the recordation of the writ and notice of attachment by the sheriff in the suit of Crumal v. Little did not operate to give constructive notice of the attachment to Jemmina Bradley at the time she took the instruments paying valuable consideration therefor and taking them long before the maturity of the note. It may further be noted that it is nowhere suggested that appellant, Bradley, at any time acted in bad faith. The appellant, therefore, when she received the instruments became the bona fide holder of the note in due course and was entitled to the rights of such a holder as declared in section 3138 of the Civil Code. Since appellant had no actual notice of the attempted attachment and it is nowhere suggested that she had knowledge of any facts that would cause her action in taking the note to amount to bad faith, the doctrine of constructive notice is not applicable to her. Section 3137, Civ.Code; Ross v. Title Guarantee, etc., Co., 136 Cal.App. 393, 29 P.(2d) 236.

The judgment herein is therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.



13 Cal.App.2d 501

PARKER et al. v. BROWN et al.

Civ. 10334.

District Court of Appeal, Second District, Division 1, California.

April 28, 1936.

1. Fraud ⇐30

Individuals who are parties to consummation of fraud are equally responsible with person with whom contract is made induced by such fraud.

2. Fraud ⇐64(1)

In action for fraud arising out of contract with corporation brought against corporation and certain individuals, court *held* to have properly granted nonsuit as to such individuals where there was no evidence showing their participation in fraud.

3. Appeal and error ⇐933(1), 1015(2)

All presumptions are in favor of order granting new trial as against verdict, and such order granted on ground of insufficiency of evidence must be sustained if there is appreciable conflict in evidence.

4. Appeal and error ⇐1015(3)

In determining whether trial court in passing on motion for new trial was confronted with appreciable conflict in evidence, its probative value, rather than amount of evidence, must be taken into consideration.

5. New trial ⇐71

New trial *held* properly granted where record showed appreciable conflict in evidence, errors of law occurring at trial, and indicated that trial court felt that award of punitive damages was not warranted by evidence.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Henry Parker, also known as H. Padberg, and another, partners, doing business under the fictitious name of the America-India Export Company, against William M. Brown and others. From an order granting a new trial and an order granting a nonsuit as to part of defendants, plaintiffs appeal.

Orders affirmed.

Ogden, Steelman & Crocker, of Los Angeles, for appellants.

Roger S. Page, of Los Angeles, for respondents Snyder and James.

Roger S. Page, and Loeb, Walker & Loeb, all of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for respondent corporation.

PER CURIAM.

The complaint in this action is in two counts, one asking damages for breach of contract; the other seeking damages because of fraudulent representations inducing the execution thereof. The contract was between plaintiffs and the incorporated respondent, hereinafter referred to as "corporation." The individual respondents were connected with the corporation. H. T.

James was president and sole stockholder. The specific capacity of Snyder is not called to our attention.

On the 23d of July and 10th of December, 1927, it is alleged in the first cause of action that two several contracts were entered into between appellants and corporation, wherein and whereby the corporation agreed in the first contract to furnish and deliver twenty motion picture films for exhibition in the Dutch East Indies, and in the second contract, six motion picture films for exhibit in Japan. Of these films, approximately 21 were delivered, and the breach is predicated upon corporation's failure to deliver the balance. The second cause of action is primarily predicated upon the falsity of the representations that the corporation owned the films, which it had failed to deliver in accordance with its contracts so to do, and that those films which were not delivered by corporation were not because the corporation did not at the time of the execution of the contracts, or at any time, own them or have the right to deliver them. In this latter cause of action, plaintiffs requested compensatory and punitive damages. During the course of the trial which was before a jury, a nonsuit was granted as to the individual respondents, and the case was concluded as to corporation alone, the jury bringing in a verdict against corporation for $1,300 actual damages and $5,000 exemplary damages. Thereafter, motion for new trial was made which was granted on all grounds set forth in the notice of motion for new trial (which included all the statutory grounds), the order itself specifying insufficiency of the evidence as one of the grounds. The foregoing proceedings gave rise to two appeals, one from the order granting a new trial, and the other from the order granting a nonsuit on motion therefor by the individual respondents.

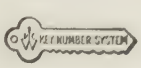
[1, 2] The order of nonsuit will be treated first. We accept appellants' contention that individuals who are parties to the consummation of a fraud are equally responsible with the person with whom a contract is made induced by such fraud. Stirnus v. Adams, 50 Cal.App. 730, 195 P. 955. Conceding, as we do, the soundness of this proposition, it follows that the liability of the individual respondents must be predicated upon evidence showing their participation in the fraud. Scrutinizing all the evidence called to our attention with the well-settled rules governing a trial court's power to grant nonsuit in mind, we find no such evidence. It follows that the order granting nonsuit as to the individual respondents was properly made.

[3, 4] We feel, too, that the order granting motion for new trial cannot be disturbed. All presumptions are in favor of such an order as against the verdict, and when one of the grounds specified by the trial court for the granting of such an order is insufficiency of the evidence, the order must be sustained, if there is an appreciable conflict in the evidence. Further, in order to determine whether the trial court was confronted with an appreciable conflict, it is not the amount of evidence on the one side or the other, but rather the probative value of the evidence that must be taken into consideration, and unless it affirmatively appears from the record that the trial court abused its discretion in accepting evidence of no apparent probative value as against evidence much more abundant, the trial court's discretion cannot be disturbed. Marr v. Whistler, 49 Cal.App. 364, 370, 193 P. 600; Work v. Whittington, 61 Cal.App. 302, 303, 214 P. 474; Rosenberg v. Moore & Co., 194 Cal. 392, 396, 229 P. 34; Clark v. Rauer, 2 Cal.App. 259, 83 P. 291. Further, it has been held that: "Even where the evidence is not conflicting and all the proof seems to be favorable to one or the other * * * the question of the probative force * * * of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial." Dreyer v. Cyriacks, 112 Cal.App. 279, 283, 297 P. 35, 37.

[5] The record before us shows an appreciable conflict in the evidence. This in itself is sufficient to compel us to sustain the order. In addition the record shows errors of law occurring at the trial with reference to at least two instructions requested by appellants, one in which the court erroneously told the jury that the burden of proof with reference to the issue of ownership shifted to the corporation [Original M. & M. Co. v. San Joaquin, etc., Corp., 220 Cal. 152, 163, 30 P.(2d) 47], and another, in which the court instructed the jury on the recovery of prospective profits, there being no evidence of loss of such profits. Jones v. Goldtree Bros. Co., 142 Cal. 383, 386, 77 P. 939. The record also sustains the conclusion that the trial court felt that the implied findings of the jury as to the amount of compensatory damages suffered by plaintiffs and the amount of punitive damages corporation was required to pay were not

warranted by the evidence. Since all presumptions are in favor of the regularity of the order (Philbrook v. Randall, 195 Cal. 95, 104, 231 P. 739), and since we must presume that the court had the matter of damages in mind when it made its order, it follows that the trial court would have a right to grant a new trial on the question raised with respect to damages alone. Dreyer v. Cyriacks, 112 Cal.App. 279, 283, 284, 297 P. 35.

We are satisfied that the order should be, and it is, hereby affirmed.



13 Cal.App.2d 447

MITCHELL, Insurance Com'r, v. BENJAMIN FRANKLIN BOND & INDEMNITY CORPORATION (HAVILAND et al., Interveners).

Civ. 10922.

District Court of Appeal, Second District, Division 2, California.

April 25, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Appeal and error ⇐931(1)

On appeal from judgment for respondent, evidence must be viewed in light most favorable to respondent.

2. Principal and agent ⇐126(4)

Deed in name of attorney in fact does not pass principal's title to property described in deed, even if to the signature is added the words "attorney for (a named principal)" (Civ.Code, § 1095).

3. Principal and agent ⇐126(4)

Deed covering principal's realty which was signed by attorney in fact for named principal *held* void (Civ.Code, § 1095).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by E. Forrest Mitchell, as Insurance Commissioner of the State of California, against Benjamin Franklin Bond & Indemnity Corporation, wherein Edward C. Haviland and Susie J. Haviland intervened. From the judgment, the interveners appeal.

Reversed, with directions.

Leslie L. Heap, Orris R. Hedges, W. W. Davis, and A. E. Stein (by Leslie L. Heap), all of Los Angeles, for appellants.

Eugene P. Fay and Burke Mathes, both of Los Angeles (George W. Rochester, of Los Angeles, of counsel), for respondent E. Forrest Mitchell, as Insurance Com'r, by Frank L. Guerena.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondents after the trial court refused to grant appellants' petition to have declared void a purported deed of certain real property situated in the county of Los Angeles, state of California.

[1] Viewing the evidence most favorable to respondents (Ah Gett v. Carr, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

April 20, 1933, for the purpose of enabling him to obtain revenue for them from a certain parcel of land situated in the county of Los Angeles, state of California, appellants executed a power of attorney in favor of Harry M. Curry, authorizing him to sell, encumber, assign, and transfer the property. On April 21, 1933, Harry M. Curry deeded the property described in the power of attorney to respondent, Benjamin Franklin Bond & Indemnity Corporation, to secure the corporation against any loss that it might incur by reason of its having executed a surety bond guaranteeing the performance by Curry of a contract to sell gasoline which he had made witn George H. Filgo. This contract was a personal one of Curry's and appellants had no interest therein. The purported deed was executed by Curry as follows: "Harry M. Curry, Atty. in fact for Susie J. Haviland, Edward C. Haviland."

Thereafter respondent E. Forrest Mitchell as Insurance Commissioner was appointed to liquidate the business of the respondent bonding company.

This is the sole question necessary for us to determine: Is a deed executed in the name of an agent and to which there is added, "Atty in fact for (naming his principals)," ineffective to convey the principals' title to the property described in the instrument?

[2] The law is well settled that a deed in the name of an attorney in fact, even if to the signature is added the words, "Atty for (a named principal)," does not pass the principal's title to the property described in such deed. Section 1095, Civ. Code; Morrison v. Bowman, 29 Cal. 337, 352; Echols v. Cheney, 28 Cal. 157; 1 Cal.Jur. 836, § 116.

[3] In the instant case the deed covering appellant's property was signed as follows: "Harry M. Curry Atty in fact for Susie J. Haviland, Edward C. Haviland." In Morrison v. Bowman, supra, a deed similarly executed was held to be a nullity.

For the foregoing reason the judgment appealed from is reversed, and the trial court is ordered to enter a judgment in favor of appellants.

It is so ordered.

I concur: WOOD, J.

I concur in the decision: CRAIL, P. J.



13 Cal.App.2d 565

COHN v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

Civ. 1789.

District Court of Appeal, Fourth District, California.

April 29, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Courts ⇐207(4)

Assigning another superior court judge to department in which probate matter was pending instead of allowing judge who had conducted hearing thereon and who was assigned to another department to complete hearing and determination was within discretion of court and presiding judge, and party was not entitled to issuance of writ of mandate commanding original judge to proceed with hearing and determination.

2. Prohibition ⇐3(5)

Whether trial judge was disqualified could be inquired into on application to District Court of Appeal for writ of prohibition, notwithstanding question of judge's disqualification was pending in trial court and could be reviewed on later appeal, where it was sought to set aside, on ground of disqualification, orders of judge relating to two year old phase of probate proceedings pending for nine years, in view of insufficient speed and adequacy of remedy by appeal (Code Civ.Proc. § 170).

3. Judges ⇐42

Judge *held* not disqualified to hear probate proceedings involving question of distribution of estate by fact that judge and another had been owners of undivided one-half interest in lot, which interest, appraised at $150, had been sold for delinquent taxes, although other undivided one-half interest was property of estate, on theory that judge had right to redeem his undivided interest and might prefer to have one person as cotenant rather than another (Code Civ. Proc. § 170).

Application by Bertha M. Cohn for a writ of mandate commanding the Honorable Allan B. Campbell, as one of the judges of the Superior Court of the State of California, in and for the County of Kern, to proceed with the hearing and determination of a certain matter, and for a writ of prohibition restraining all of the judges of the Superior Court of Kern County from passing upon the alleged disqualification of Judge Campbell and from taking any action toward vacating or setting aside certain orders made by Judge Campbell.

Application for writ of mandate denied, and writ of prohibition granted.

Glikbarg & Wolf, of San Francisco, and I. H. Prinzmetal, of Los Angeles, for petitioner.

Joseph A. Brown, of San Francisco, for respondents.

BARNARD, Presiding Justice.

The petitioner seeks a writ of mandate commanding Judge Campbell, as one of the judges of the superior court of Kern county, to proceed with the hearing and determination of a certain matter and also seeks a writ of prohibition restraining all of the judges of that county from passing upon the alleged disqualification of Judge Campbell and from taking any action toward vacating or setting aside certain orders heretofore made by him.

This proceeding relates to certain matters in the estate of Charles Cohn now pending in the respondent court. This estate, in which letters were issued on August 17, 1927, was appraised at $884,000 and consists largely of about 300 parcels of real property situated in four counties. On December 13, 1935, Judge Campbell made and entered a decree of partial distribution, distributing to this petitioner properties of the approximate value of $132,000, but ordering that a portion thereof, to the value of $45,000, should be retained by the executor for the purpose of safeguarding the state of California with respect to a balance of inheritance taxes still due from this estate. This petitioner filed a petition to identify the properties to be so retained as security which petition came on for hearing on December 30, 1935. On that day the matter was partially heard, one witness being partially examined, when the objection was made that Judge Campbell was disqualified for the reason that he was the owner of an undivided interest in certain real property, other undivided interests in which were owned by the estate. Judge Campbell refused to further hear the matter until the question of his disqualification was disposed of and the hearing was continued to January 20, 1936.

It appears that one of the properties in the estate is an undivided one-half interest in a certain lot in the city of Delano, which interest was appraised at $150. It further appears that Judge Campbell and another man were the owners of the other undivided one-half interest in this lot and that on June 29, 1931, their one-half interest in the lot was sold to the state of California for delinquent taxes for the year 1930–1931. Two proceedings were started in the trial court seeking to disqualify Judge Campbell and to set aside all orders theretofore made by him in connection with the partial distribution referred to, on the ground that his ownership of an undivided interest in this lot disqualified him from passing upon any matters which in any way related to the estate's interest in this property. In brief, this is the situation which gave rise to the present proceeding.

[1] We will first take up the question as to whether a writ of mandate should issue directing Judge Campbell to proceed with the hearing and determination of the petition to identify properties, which hearing had been started but not completed when the question of his disqualification was first raised. It appears without dispute that in accordance with the rules and practice of the superior court of Kern county, a change in the allocation of judges in that county took place on January 2, 1936, and that on that day, in the regular course of events, Judge Owen was assigned to the department in which probate matters were pending, including the estate of Cohn, and Judge Campbell was assigned to another department. Such changes in assignment are common and well known and come in the usual course in most, if not all, courts having more than one department. While in some cases the orderly and expeditious handling of the work of the court may suggest the advisability of permitting a judge assigned to another department to complete a matter which he had started to hear before the change in assignments, there is no vested right to have this done in all cases. Any possible saving in time might be trivial in some cases while the resulting inconvenience to both departments of the court might be great. In our opinion, this is entirely a matter of discretion for the courts and the presiding judge. No possible abuse of such discretion here appears and we conclude that, upon the showing made, the petitioner is not entitled to the issuance of a writ of mandate.

[2] Some question is raised as to whether the matter of the disqualification of this judge may be inquired into in such a proceeding as this, in view of the fact that such a question is pending in the trial court and that the same may be reviewed on a later appeal. We think the rules laid down in Central Pacific R. Co. v. Superior Court, 211 Cal. 706, 296 P. 883, 887, are controlling here. It was there held that the fact that a proceeding was pending in the trial court to determine the qualification or disqualification of a judge to act in a certain matter was not sufficient to prevent the consideration of a proceeding similar to that now before us, and writs were issued on the ground that the other remedy was not sufficiently plain, speedy, and adequate to meet the emergencies of the particular case. While the facts of the two cases are not identical, they are similar in many respects, and we think the same rule should be here applied. In the instant case, it is sought to set aside several orders on the ground that the judge who made them was disqualified. These orders all relate to a partial distribution, which matter has already been pending for about

two years. To require a hearing in the trial court on the alleged disqualification, with the possible setting aside of the orders and new proceedings, which may be followed by one or several appeals, all on one phase of a probate proceeding which has already been pending for about nine years, would cause delay and unnecessary procedure, and indicates a set of circumstances which come within the rule laid down in the case referred to.

[3] The petition for a writ of prohibition seeks to prevent further action in certain proceedings instituted in the trial court. One of these is a form of proceeding to disqualify Judge Campbell on the ground that he owned an interest in this parcel of property involved in the partition proceedings which disqualified him from further acting therein. The other is a motion to vacate three orders theretofore made by Judge Campbell in connection with the proceedings for partial distribution. This brings us to the main question here involved, namely, whether Judge Campbell through his right to redeem his undivided interest in this lot, after its sale to the state for delinquent taxes, had such an interest as disqualified him from acting in any matters which affected the estate's undivided interest in that lot.

Counsel for respondents rely on such cases as Heilbron v. Campbell, 3 Cal.Unrep. 204, 23 P. 122; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; Meyer v. City of San Diego, 121 Cal. 102, 53 P. 434, 41 L.R.A. 762, 66 Am.St.Rep. 22; Quatman v. Superior Court, 64 Cal.App. 203, 221 P. 666; Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, and Martin v. Nelson, 217 Cal. 669, 20 P.(2d) 938. Many cases might be cited in which it was held that the circumstances disclosed a sufficient interest on the part of a trial judge to disqualify him from acting therein. Many other cases may be found where the circumstances are held insufficient to show such a disqualifying interest.

Several of these cases are reviewed in the case of Cuyamaca Water Co. v. Superior Court, 193 Cal. 584, 226 P. 604, 605, 33 A.L.R. 1316. In that case the court said: "The petitioners describe the interest which will disqualify a judge as 'a direct pecuniary or direct property interest or one which involves some individual right or privilege in the subject-matter of the litigation whereby a liability or pecuniary gain must occur on the event of the suit.' In Meyer v. City of San Diego, 121 Cal. 102, [53 P. 431, 41 L.R.A. 762, 66 Am.St.Rep. 22], it is defined as 'any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered.' In the same case it is pointed out that if the so-called interest of the judge be 'remote, contingent and speculative' it does not constitute a disqualifying interest."

And further: "We are satisfied, from an examination of the issues involved in the pending quiet title action and the authorities on the subject, that the so-called interest of the respondent judges in the outcome of the action is neither separate, severable, individual, nor defined; that it is not a direct pecuniary or direct property interest or one involving an individual right or privilege whereby a liability or pecuniary gain would occur on the event of the suit, and that the alleged interest is too remote and conjectural to operate as a disqualification."

In that same case, quoting from City of Oakland v. Oakland Water Front Co., 118 Cal. 249, 50 P. 268, the court said: "'The theory of the appellant is that, if the respondent should recover the land sued for, it might be so used as to produce some municipal revenue, and thus affect to some extent the rate of taxation, as a consequence of which the taxes which the said judges would have to pay on their property might to some imaginable extent be lessened, and that thus they are interested and disqualified. * * * In our opinion the word "interested," as used in the section of the Code relied on, embraces only an interest that is direct, proximate, substantial, and certain, and does not embrace such a remote, indirect, contingent, uncertain, and shadowy interest as that asserted as a disqualification in the case at bar.' With reference to the rule that 'no man shall be a judge in his own cause' the court said: 'But surely that means a cause which is really his own cause; not that he must be a formal party to the record, but that it must be such a cause that a judgment rendered therein would necessarily and directly and substantially affect his personal rights. We cannot conceive that the Legislature meant to declare that a mere contingent possibility that some future supposable financial condition of a municipality might in a slight degree af-

fect a judge as a taxpayer would strip him of all his personal judicial qualities.'"

In Lassen Irr. Co. v. Superior Court, 151 Cal. 357, 90 P. 709, 710, the court said: "The interest in an action which disqualifies a judge who possesses it from trying the cause is a property or personal interest, an interest in the event of the suit, in the judgment which may be rendered therein. It must affect him, either in person or property, directly or indirectly."

In Central Pacific R. Co. v. Superior Court, supra, the court said: "The section of the Code as it thus read did not attempt to define the particulars wherein the 'interest' of a trial judge should consist, but it is quite well settled by the uniform current of authority upon the subject that it must be such a direct and immediate interest in the result of the litigation as would in some degree tend to form an improper bias which might influence his conduct in the consideration and disposition of the cause."

In Meyer v. Superior Court, 200 Cal. 776, 254 P. 1108, in construing the interest involved in section 1702 of the Code of Civil Procedure, the court held that a tenant in common has, as such, no interest in the title of his cotenant to property held by them in cotenancy.

The argument in behalf of the respondents seems to be that Judge Campbell, while in no way directly interested in that part of this lot which is owned by the estate, might through his ownership of another undivided interest therein be indirectly interested, since he might prefer to have one person as a cotenant rather than another. Such an interpretation of section 170 of the Code of Civil Procedure would disqualify a judge from hearing matters involving any property which adjoined property he owned or upon which he lived, since in some indirect and vague manner a decision in the matter before him might possibly affect the identity of his future neighbors. We think any such interest is too remote and speculative, and that the Legislature never intended any such meaning by the language used in the section. Any order or judgment entered by Judge Campbell in the matter here in question would not necessarily and directly and substantially affect either his personal rights or property, and we conclude that he is not interested in the property owned by the estate within the meaning of the section, and that he was not disqualified in the proceedings which are under attack. It follows that a writ of prohibition should issue restraining the respondents from hearing any motion or taking any action to vacate or set aside any of the orders in question on the ground referred to.

A motion to strike two of the answers filed was also submitted. This motion is denied.

The application for writ of mandate is denied, and a writ of prohibition will issue as prayed for.

We concur: MARKS, J.; JENNINGS, J.



13 Cal.App.2d 545

McLEOD v. DUTTON et al. (two cases).

Civ. 9970.

District Court of Appeal, First District, Division 2, California.

April 29, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Automobiles ⇐181(7)

Even if motorist on foggy night intentionally raced automobile and ignored "slow" sign while attempting to pass automobile ahead, he was not guilty of "willful misconduct" so as to create liability to guest injured in collision with automobile on its left-hand side of road, although motorist saw automobile when it was three-tenths of a mile away (St.1931, p. 1693, § 141¾).

"Willful misconduct" as used in Statute 1931, p. 1693, § 141¾, relating to liability of automobile driver to guest, means the intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or implied, that an injury to a guest will be a probable result.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇐181(7)

That guest cautioned motorist about fast driving and suggested he slow down *held* insufficient to authorize recovery by guest on

ground of motorist's "willful misconduct" where motorist had no reason to believe that automobile with which he collided would be on its left-hand side of road when motorist attempted to pass automobile ahead (St.1931, p. 1693, § 141¾).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Separate actions by Barbara McLeod, a minor, by M. D. McLeod, her guardian ad litem, and by M. D. McLeod against David C. Dutton and others. Judgments for plaintiffs, and defendants appeal.

Reversed, with directions.

L. R. Weinmann and Weinmann, Quayle & Berry, all of Alameda, and Carlisle C. Crosby, of Oakland, for appellants.

Elliott Johnson and Jesse E. Nichols, both of Oakland, for respondents.

STURTEVANT, Justice.

Barbara McLeod, a minor, while riding as the guest of David C. Dutton, Jr., was injured in an automobile accident. David C. Dutton, Jr., being a minor, the plaintiff joined his father and mother as defendants. M. D. McLeod, Barbara's father, commenced a separate action against the same defendants to recover his damages. The actions were consolidated and tried together. The jury returned verdicts in favor of the plaintiffs and from the judgments entered thereon, the defendants have appealed.

Among other points, the defendants contend that the evidence will not support a finding that the defendant David C. Dutton, Jr., was guilty of willful misconduct, and therefore both judgments lack evidentiary support. Turning to the brief of the plaintiffs, the following facts appear: On the night of the 21st of December, 1933, David C. Dutton, Jr., a student in the San Rafael Military Academy, had assembled in a Cord sedan as his guests, the plaintiff Barbara McLeod, and Richard Leighton, who were seated on the rear seat, and Eleanor Gaddes, who was seated on the driver's right. They were on their way to attend a dance at the academy. Their automobile was on the front end of the Richmond-San Rafael ferry. On the same boat was Eugene R. Billet, another student of the academy, who had assembled in his Packard as his guests, Elmer Sammann and Evelyn Jurs, who were seated on the rear seat, and Miss Barton, who was seated at Billet's right. Billet and his guests were also on their way to attend the same dance. While on the ferryboat the two parties met and held some conversation. Billet stated that he bet he would get to the dance first. To that remark Dutton replied, "Not if I can help it," or "We will see about that," or words to that effect. Dutton's car was the first to leave the ferryboat. Immediately adjacent to the ferry slip the road runs along a bluff. At once Dutton's car set a high speed. The Packard did the same and followed 40 or 50 feet back. After leaving the bluff the highway is laid on level ground. Soon after reaching the level ground the Packard car pulled ahead of the Cord car. Both cars proceeded at a rate of speed variously estimated at from 50 to 60 miles per hour. At a point approximately three miles from the ferry slip the Packard car slowed down somewhat and the Cord proceeded to pass the Packard on its left-hand side and at a speed which was testified as being 73 miles an hour. Having passed the Packard, the Cord pulled to the right and into the right-hand lane. As stated above, these things occurred shortly after 9 p. m. There was evidence that the night was foggy. As to the exact condition in that respect at the place of the accident the evidence is conflicting. The lights on the Cord and on the Packard were burning. On Dutton's right as he was in the act of passing the Packard car there was a large traffic sign "Slow." Dutton testified that he knew of the existence of that sign, but on the occasion of the accident it had escaped his memory.

At this point we will pause to state that the sign just mentioned is on the north side of the highway leading from San Rafael to San Quentin Point and 100 yards more or less east from a point where the highway leading from San Rafael to San Quentin Point forks with the main highway leading from San Rafael to Sausalito. The highway first mentioned is a continuation in a straight line from San Rafael, but the other described an arc to the south. Mr. George A. Carroll, his wife, and Mrs. Custer had driven to Petaluma and were returning to the Richmond-San Rafael ferry to cross to their home in Berkeley. Mr. Carroll was doing the driving. When he reached the fork in the

roads, not being familiar with that neighborhood, he made a mistake and started toward Sausalito. Near by and at his right was a gas station. There he turned around, passed back to the fork and turned to go toward San Quentin Point. In attempting to make that turn he crossed over the white line that divides the San Quentin road into two lanes. He was driving a Dodge. When the front half of his car was on the north side of the white line and the rear half was on the south side of the white line the Cord came forward, attempted to pass on the north side, but failed in the attempt, and the collision occurred.

David C. Dutton, Jr., testified that before turning out from behind the Packard he did not see the Dodge, nor did he see it until he swung his car to the right and the Dodge was then about 125 feet away. He threw on his brakes and attempted to pass the Dodge on his right. There is no evidence that, before seeing the Dodge Dutton had seen or been informed of any obstruction whatever in the highway. There was evidence that Barbara stated to him, "Don't you think you are going too fast and you better slow down." Continuing, she stated that the reply she received was sort of a grin and a laugh, and he seemed to increase the speed of his car.

F. R. Middagh, a traffic officer, went to the scene of the accident almost immediately after the accident happened. He assisted in taking the injured to the hospital. At the hospital he held a conversation with David C. Dutton, Jr. Middagh testified that in that conversation, speaking of the lights on the Dodge, Dutton stated that the lights could be seen; that it appeared the car was moving very slowly or had stopped; that apparently the driver of the Dodge car was uncertain of his path and he was traveling very slowly; and that when he first saw the lights on the Dodge he had rounded the corner of the cut which is a little past the sign that reads, "To Richmond Ferry." Afterwards Middagh went down and measured with the automobile speedometer. The distance is three-tenths of a mile. The officer was not asked and he did not testify as to where Dutton said the Dodge was when it was so seen by him. Dutton testified that before he passed the Packard he looked to the front and he looked to the rear and it was absolutely dark. He did not see any lights at all except the tail-light of the Packard. Neither did he see any object ahead. The road appeared to be clear.

[1] That the foregoing evidence shows the driver of the Cord car committed acts of negligence is not to be debated. Indeed, it may be argued that his acts constituted gross negligence. Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474. However, the evidence carries us no further. Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279. In that case, 132 Cal.App. 124, at page 129, 22 P.(2d) 279, 281, the court said: "The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." In Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194, 197, the court said: "The phrase 'willful misconduct,' as employed in our so-called guest statute, has been variously defined in the many cases that have had occasion to consider the same. We shall not attempt to reconcile the several definitions and applications given to this phrase. It is satisfactorily defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.(2d) 988, 990, wherein it is declared that '"willful misconduct," within the meaning of this statute (St.1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St.1931, p. 1693) may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.'" In the instant case if it be assumed that the driver of the Cord car intentionally raced it, that he intentionally ignored the "Slow" sign, and that he did such acts in the dark on a foggy night, those facts, standing alone, did not constitute willful misconduct. The record must further show that such acts were done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result. The latter factors are wholly absent in the instant case.

The fact, if it be a fact, that David C. Dutton, Jr., saw the Dodge car when it was three-tenths of a mile away, does not change the result. There is nothing in the evidence disclosing that when he attempted to pass the Packard car he knew, or had any reason to know, that the Dodge car was a short distance ahead on its left-hand side of the road and in a position practically broadside to the course of travel.

[2] Whatever might be the force and effect, in an action based on simple negligence or gross negligence, of Barbara's caution about fast driving and to slow down, it is clear from what has been said that such evidence did not prove nor tend to prove knowledge of the presence of the Dodge car nor its position.

The plaintiffs cite and rely on Olson v. Gay, 135 Cal.App. 726, 27 P.(2d) 922; Gieselman v. Uhlman, 7 Cal.App.(2d) 409, 45 P.(2d) 819, and Candini v. Hiatt (Cal. App.) 50 P.(2d) 843. No one of those cases is at variance with anything we have said. In each one the driver either knew or was informed of a certain impending danger ahead—a string of trucks and trailers occupying the highway, a steam train approaching the highway crossing, or an exceptionally sharp and dangerous turn in the highway.

Having reached the foregoing conclusions, it is unnecessary to discuss the other points presented by the defendants.

The contention that the plaintiffs' evidence did not show willful misconduct was presented by a motion for a nonsuit at the conclusion of the plaintiffs' case; likewise by a motion for a directed verdict at the conclusion of the entire case. After the jury had brought in its verdicts and before judgments were entered the defendants made a motion for judgment notwithstanding the verdict. Still later a motion for a new trial was made and the same point was presented. Those motions were denied. It is sufficient to say the trial court erred in denying the motion for judgment notwithstanding the verdict.

It follows that the judgments should be, and they are, reversed, and the trial court is directed to grant the motions for judgment notwithstanding the verdict.

We concur: NOURSE, P. J.; SPENCE, J.

13 Cal.App.2d 495

BECHTEL v. BAGLIETO et al.

Civ. 9574.

District Court of Appeal, First District, Division 1, California.

April 28, 1936.

Rehearing Denied May 28, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Trusts ⇐100

In suit by assignee of bank for deficiency after sale under trust deed, evidence as to whether defendant filing cross-action for damages relied upon promises of bank to loan money on property after foreclosure, and failed to protect herself from foreclosure, *held* for jury.

2. Mortgages ⇐375

Failure of trustor, in reliance on promise of bank to loan money after foreclosure, to protect property from foreclosure, would authorize recovery of damages by trustor by way of cross-complaint and counterclaim, in deficiency suit by bank's assignee.

3. Mortgages ⇐375

In suit for deficiency after sale under trust deed by bank's assignee, trustor's failure to protect property from foreclosure by bank, in reliance upon promise of bank to loan money on property after foreclosure, could be set up by way of cross-complaint, or counterclaim for damages caused thereby.

4. Mortgages ⇐375

Cross-action, seeking damages allegedly caused by failure to protect property from foreclosure because of trustor's reliance on bank's promise to loan money after foreclosure, stated an action in deceit, notwithstanding allegation of an assignment as consideration for promise of bank, and hence was not within operation of statute of frauds.

5. Mortgages ⇐375

Where bank allegedly promised to cancel trustor's indebtedness after foreclosure and accept note and trust deed from third party who had agreed to exchange property with trustor, fact that promise of third party was not in writing was no defense to cross-action for damages by trustor who relied on promise of bank and allowed foreclosure.

6. Mortgages ⇐375

That second trust deed was enforced on property *held* not defense to cross-action, against bank for damages caused by trustor's failure to protect property from foreclosure of bank's first trust deed in reliance on bank's promise.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Appeal and error ⇐1056(1)

In action for damages resulting from trustor's reliance on bank's promise to cancel trustor's indebtedness after foreclosure in exchange for note and trust deed of third party, excluding evidence that defendant had valid contract for acquiring second trust deed note *held* not prejudicial, since foreclosure of first trust deed extinguished interest of holder of second trust deed.

8. Assignments ⇐131

Denial of leave to amend so as to plead defense that assignee could not maintain action because he was not a licensed collector *held* not error, where no proof was offered that assignee did not come within exception of statute (St.1927, p. 822, as amended).

9. Assignments ⇐119

Assignment for collection without consideration is sufficient to enable assignee to recover, notwithstanding retention by assignor of equitable interest in claim (St.1927, p. 822, as amended).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by H. H. Bechtel against Mae M. Baglieto, in which defendant filed a cross-complaint and joined the Bank of America National Trust & Savings Association and H. H. Bechtel as cross-defendants. Verdict was directed in favor of plaintiff and judgment entered thereon, and defendants appeal.

Reversed.

Robinson & Leland, Marcel E. Cerf, Henry Robinson, and Herbert A. Leland, all of San Francisco, for appellants.

PER CURIAM.

The above action was brought by an assignee of Bank of America National Trust & Savings Association, a corporation, formerly Bank of Italy, etc. (which will be hereinafter referred to as the bank), to collect a deficiency following the sale of certain property under a deed of trust.

On November 15, 1927, according to the testimony, Mae M. Baglieto (who will be hereinafter referred to as the defendant) was the owner of an apartment house in San Francisco. On that date she executed a note to the Bank of Italy for $45,000 and secured the same by a first deed of trust on the apartment house. Later a second deed of trust was executed to one Gardner to secure a note in the sum of $22,500. On September 4, 1931, Gardner agreed in writing to transfer this note to defendant in exchange for certain property in Santa Barbara county. He also agreed to pay defendant $500 and lend her $2,200, the latter sum to be secured by a second deed of trust on the apartment house. At this time, due to the nonpayment of interest and taxes, the bank loan was in default, and the bank recorded notice of breach and election to sell. Gardner not having performed his contract with defendant, the latter had various conferences with officers of the bank and, according to her testimony, these officers agreed to a new loan of $45,000, to follow the foreclosure of the old loan, the defendant to pay certain additional amounts covering interest and taxes and an attorney's fee of $200. At about this time defendant entered into an agreement with one Grieb to exchange the apartment house for certain property owned by the latter. Grieb's agreement was made subject to the obtaining of the loan from the bank on the apartment house for $45,000, payable in monthly installments, the payment of which he was to assume. According to the defendant the bank agreed to this; but in the meantime, Gardner having disregarded his agreement, proceeded to sell under his deed of trust. At this juncture the bank advised defendant that due to Gardner's action it would be necessary to proceed with the sale under its deed of trust, that this would have the effect of extinguishing Garder's lien, and that it would thereupon carry out its agreement with the defendant by transferring the property to Grieb, and would accept his note and deed of trust in satisfaction of defendant's debt to the bank.

It was stipulated at the trial that one of the officers with whom defendant negotiated was empowered to act for the bank. Defendant testified that as part of this agreement she assigned to the bank the rents of the apartment house, and that, relying on the bank's promise, she made no further effort to finance the property or protect herself against a deficiency under the sale. Other declarations by the bank official, reasonably calculated to induce the

belief that defendant's interest would be protected without further activity or effort on her part, were related.

The bank bid in the property at the sale under its deed of trust for less than the amount of defendant's debt. As stated, the present action was brought to collect this deficiency, and the above facts—which are not disputed by testimony—were relied upon by defendant as a defense and as ground for a claim for damages against the bank, it being testified that the value of the property was $90,000. 10 Cal.Jur., Evidence, § 278, p. 1023.

[1,2] We are satisfied that the above testimony, if believed by the jury, would have been sufficient to support the conclusion that defendant, relying upon the promises and statements of the bank officer, was lulled into a sense of security, and consequently failed to avail herself of all the possible means of saving her property both from the foreclosure by Gardner in violation of his contract and from that by the bank. The trial court, however, was of the opinion that the facts were not such as to constitute grounds for relief, and directed a verdict in favor of the plaintiff for the amount of its claim. From the judgment entered thereon the defendant has appealed.

It appears to us that the above facts, if true, were sufficient to bring the case within the rule declared by the following decisions: Sandfoss v. Jones, 35 Cal. 481; Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A.L.R. 1200; Bristol v. Hershey, 7 Cal. App. 738, 95 P. 1040; Thomas v. Goodbread, 78 Fla. 278, 82 So. 835; and that relief in the form of a judgment for damages might properly have been given. Price v. Reeves, 38 Cal. 457; Flood v. Templeton, 148 Cal. 374, 83 P. 148; Harris v. Hensley, 83 Cal.App. 283, 256 P. 332; Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.(2d) 501. Consequently the question was one for the jury.

Respondent contends that the bank's promise, if any, was for the benefit of Grieb, who had no interest in the property, and that accordingly the defendant has no cause of action. As to this it will be sufficient to say that the promise was made to the defendant as well, and it was equally for her benefit.

It is also claimed that the above cases apply only to mortgage foreclosures. The principle obtains regardless of the form of the transaction.

[3] It is also urged that the facts relied upon by the defendant, if sufficient to sustain an independent action, were not such as to support an action by way of cross-complaint or counterclaim; but the following decision sustains defendant's claim in this respect: Terry Trading Corporation v. Barsky, 210 Cal. 428, 292 P. 474.

[4] Respondent also claims that there was no consideration for the alleged agreement in that the bank had under its deed of trust the right to collect the rents after default. Although defendant alleged an assignment as a consideration for the bank's promise, the gist of her complaint was deceit but for which she could and would have so acted as to prevent the loss of her property; nor are such cases within the statute of frauds. Webb v. Vercoe, supra.

[5] The further point is made that the title to the property was not in defendant but in one Levine; that no promise in writing was made by Grieb to the bank; and that his ability and willingness to perform were not shown.

In this connection it was testified that although the title stood in the name of Mrs. Levine (who was defendant's sister), the defendant was the owner of the property. As to Grieb, the bank's promises were not, according to the testimony, made upon the condition that a promise in writing to the bank be obtained from Grieb. As stated, he had agreed to do so; and, according to the defendant's testimony, the bank was satisfied with his promise, and there was some evidence of Grieb's ability and willingness to perform. Had the bank offered after the sale to carry out the agreement, a default by Grieb would have been a complete reply to defendant's present claim; but it appearing that it was satisfied with the promises made and had evinced a willingness to proceed without requiring more, we think it is not in a position now to say that more should have been done by the defendant.

[6] As to the further contention that Gardner enforced his trust deed resulting in a loss of defendant's interest in the property, there is evidence that Gardner proceeded in violation of his agreement

with defendant, who testified that the bank official mentioned advised her not to take proceedings to prevent this sale, as a sale by the bank under its prior deed of trust would render ineffectual Gardner's attempt to get the title.

[7] Defendant offered to prove that her contract with Gardner was valid and enforceable, but upon objection by respondent that this was not pleaded permission was refused. We think the fact immaterial as it appears that the bank by its sale acquired title to the property, and thus extinguished any interest acquired by Gardner, a result which was contemplated by the parties.

[8] Defendant questioned the right of respondent as assignee to maintain the action upon the ground that he was not a licensed collection agent under the act defining such agencies (Stats.1927, p. 822 as amended, Deering's Gen.Laws 1931, and Gen.Laws Supp.1933, Act 1460); and in this connection asked leave at the trial to plead this defense by amendment to her answer. Leave to amend was denied, and she complains of this ruling.

The offer of proof was that plaintiff was a person engaged in the business of collecting claims and seeking to make collection of claims on behalf of others. The statute excepted from its operation, however, persons employed on regular wage or salary, as a credit man or other similar capacity, by any corporation not engaged in the business of a collection agency, and no offer was made to show that respondent was not acting in such capacity in this instance. Lawful conduct is presumed. 10 Cal.Jur., § 74, p. 764.

[9] An assignment for collection without consideration is sufficient to enable the assignee to recover notwithstanding the retention by the assignor of an equitable interest in the claim [Hammell v. Superior Court, 217 Cal. 5, 17 P.(2d) 101], and the record discloses no abuse of discretion in the court's ruling.

Defendant on the whole case having adduced competent evidence sufficient, if true, to justify a verdict in her favor the court's direction to the jury constituted error.

The judgment is reversed.

13 Cal.App.2d 482

GALLAGHER v. CALIFORNIA PACIFIC TITLE & TRUST CO.

Civ. 9693.

District Court of Appeal, First District, Division 1, California.

April 28, 1936.

1. Damages ⇐153

Complaint stating facts showing damage in manner sufficient to sustain judgment, and concluding with prayer for damages in named sum, is sufficient to state cause of action for damages, though it fails to contain formal allegation that plaintiff has been damaged in stated amount (Code Civ. Proc. §§ 307, 475, Civ.Code § 3281).

2. Pleading ⇐34(6)

In case of general demurrer, or in support of judgment, whatever is necessarily implied, or reasonably to be inferred from allegation, is to be taken as directly averred (Code Civ.Proc. §§ 307, 475, Civ.Code § 3281).

3. Pleading ⇐34(3)

Pleading will be construed liberally and every reasonable intendment indulged in its favor, where objection to sufficiency thereof is first raised at trial (Code Civ.Proc. §§ 307, 475, Civ.Code § 3281).

4. Judgment ⇐199(2)

Defendant's motion for judgment notwithstanding verdict, on ground that plaintiff's cause of action as disclosed by complaint was for money had and received and not founded on instrument in writing so as to be barred by two-year statute of limitations, *held* properly denied where only formal allegation lacking in complaint to qualify it as one for damages was averment that plaintiff was damaged in designated amount by refusal of defendant to repay money deposited with it by plaintiff (Code Civ.Proc. § 307; § 339, subd. 1; §§ 452, 475, Civ.Code § 3281).

5. Escrows ⇐15

In action for damages for defendant's failure to return money deposited in escrow transaction, allegations of complaint *held* sufficient to state cause of action (Code Civ. Proc. §§ 452, 475, Civ.Code § 3281).

Complaint alleged employment of defendant for consideration to render service in transaction in nature of escrow, by which defendant undertook in writing to examine and report upon title to certain real property and to pay out money

deposited by the plaintiff in accordance with terms of writing; that defendant disbursed money contrary to and in disregard of terms of writing; that plaintiff demanded return of money; that defendant failed and refused to comply with demand; and that holder of title to property conveyed no right, title, or interest therein to plaintiff.

6. Limitation of actions ⇐127(4)

Allowance of amendment of complaint for money had and received to conform to proof of breach of contract would be proper where same transaction and same alleged violation of right were involved, notwithstanding that cause of action for money had and received was barred by limitation, while cause of action for breach of contract was not so barred (Code Civ.Proc. § 339, subd. 1).

7. Escrows ⇐15

In action for damages for defendant's failure to return money deposited in escrow transaction, evidence of defendant's payment away of money in violation of conditions of its deposit *held* sufficient to justify allowance of amendment of complaint so as to allege damage on ground that person upon whose order money was disbursed by defendant was not agent of depositor or was without authority to authorize divergence from escrow agreement, and that depositor had not ratified acts of such person (Code Civ.Proc. § 1832).

8. Principal and agent ⇐148(2)

Company with which money had been deposited in escrow transaction *held* to have accepted at its peril directions materially changing terms of agreement of exchange to advantage of person giving directions who claimed to be depositor's agent, but whose adverse interest was known to company.

9. Principal and agent ⇐148(2)

Generally, person undertaking to deal with alleged agent is put upon inquiry and must discover scope of agency at his peril, particularly where it is first transaction with agent, and circumstances are such as to put him on inquiry, as where interest of agent and principal are adverse, or authority is unusual, improbable, or extraordinary in nature.

10. Principal and agent ⇐101(1)

Fact that agent is employed to make contract does not imply power to vary or cancel contract or waive rights of principal thereunder.

11. Principal and agent ⇐166(1)

Generally, in order that ratification of unauthorized act of agent may be valid and binding, it is essential that principal had full knowledge at time of ratification of all material facts and circumstances relative to unauthorized act or transaction, unless principal is willfully ignorant or purposely refrains from seeking information.

12. Principal and agent ⇐166(1)

Principal's failure to use diligence to discover that agent is doing unauthorized act in his name is not such negligence as would charge principal with constructive knowledge of what he might have discovered by such inquiry.

13. Trial ⇐232(3)

In action for damages for failure of defendant to return amount deposited in escrow transaction, submission to jury of form of verdict in which amount, if any, to be awarded plaintiff was that which plaintiff's evidence tended to prove *held* not error, where defendant failed to offer evidence as to damages or to request permission to reopen case to present such evidence after amendment of complaint to allege damages had been permitted at close of all evidence.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Thomas M. Gallagher against the California Pacific Title & Trust Company. Verdict and judgment for plaintiff, and, from an order denying its motion for judgment notwithstanding the verdict and from a judgment for the plaintiff, the defendant separately appeals.

Order and judgment affirmed.

Henry E. Monroe and Robert A. Woodyard, both of San Francisco, for appellant.

Elmer P. Delany, of San Francisco, for respondent.

PER CURIAM.

In this cause there are two appeals taken by the defendant—one from an order denying its motion for judgment notwithstanding the verdict, and the other from the judgment. They were taken separately, but by stipulation and order they have

been submitted upon one transcript and a single set of briefs.

On its appeal from the order it is urged by appellant that its motion ought to have been granted because plaintiff's cause of action was barred by the two-year provision of the statute of limitations (Code Civ. Proc. § 339, subd. 1) as being one not founded upon an instrument of writing but of the nature of an action for money had and received.

The complaint alleges the employment of defendant by plaintiff for a consideration to render service in a transaction in the nature of an escrow, by which it undertook in writing to examine and report upon the title to certain real property situated on Sixth street in San Francisco and to pay out money deposited with it by plaintiff in accordance with the terms of a writing, designated as an "agreement of exchange"; that it disbursed said money contrary to and in disregard of those terms; that plaintiff demanded the return of the money ($5,000); and that defendant failed and refused to comply with said demand. Then follows a prayer for judgment in the named sum.

The appellant urges that the cause of action stated is one for money had and received after rescission of the contract; the respondent contends, on the other hand, that it is at least an attempt to state a cause of action for damages for violation of a written contract and, as such, is governed by the four-year statutory limitation.

[1] "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." Code Civ. Proc. § 307. "The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code." Code Civ.Proc. § 421. "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Code Civ.Proc. § 452. No error or defect in a pleading is to be regarded unless it affect substantial rights. Code Civ.Proc. § 475. "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." Civ.Code, § 3281. "The rule is sustained in many decisions that a complaint which states the facts showing the plaintiff's damage in a manner sufficient to sustain a judgment, and concludes with a prayer for damages in a named sum, is sufficient though it fails to contain a formal allegation that plaintiff has been damaged in a stated amount." 8 Cal.Jur., Damages, § 123, p. 883, citing Tucker v. Cooper, 172 Cal. 663, 158 P. 181, and other cases.

[2, 3] No demurrer to the complaint, either special or general, was interposed, and the objection to the sufficiency of the complaint comes after verdict. "It is a general rule that in case of a general demurrer" (i. e., in the absence of special demurrer) "or in support of a judgment whatever is necessarily implied or reasonably to be inferred from an allegation is to be taken as directly averred." 1 Bancroft's Code Pleading, § 25, p. 59, citing Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39, Alexander v. McDow, 108 Cal. 25, 41 P. 24, and other cases. "The practice of pleading to the merits, encouraging the opposite party to prepare for trial and then at the trial interposing the objection that the pleading is not sufficient to let in evidence is not favored by the courts; and so where objection to the sufficiency of a pleading is first raised at the trial such pleading will be construed liberally and every reasonable intendment indulged in its favor." Id., § 76, p. 159.

[4] The only formal allegation lacking in the complaint here involved to qualify it as one for damages is an averment to the effect that the plaintiff, by the refusal of the defendant to return or repay the $5,000, was damaged in that amount; but the allegations that the defendant in violation of its duty paid out plaintiff's money and refused upon demand to return the amount are allegations from which a plain inference of monetary damage or injury arises, and this, when followed by a prayer for the amount, it has been held, is sufficient. Riser v. Walton, 78 Cal. 490, 21 P. 362; Barr v. Southern California Edison Co., 24 Cal.App. 22, 25, 140 P. 47.

On this same question it appears that at the close of the testimony and when both sides had rested the plaintiff was permitted to amend his complaint to conform to the proof, and that he so amended it by including the formal allegation of the damage suffered. This amendment overcomes the objection we are now considering; but since the amendment itself is attacked on various grounds on the appeal from the judgment we have not thought it necessary to resort to it in considering the question of the sufficiency of the pleading.

[5] On the appeal from the order denying defendant's motion for judgment notwithstanding the verdict, the further point is made that the court erred in overruling defendant's objection made at the commencement of the trial to the introduction of any evidence whatever upon the ground that the complaint failed to state a cause of action, this point being directed to an allegation in paragraph VIII thereof that by certain mentioned deeds the plaintiff did not receive any right, title, or interest in and to the real property described, and that there is no allegation in the complaint that the plaintiff never received title to the property.

There is no merit, we think, in this contention, since in the very next paragraph of the complaint there is a general allegation that the holder of the title to said property conveyed no right, title, or interest therein to plaintiff.

On the appeal from the judgment several points are presented, namely, that the trial was had upon the theory that the cause of action was one for money had and received; that prejudicial error was committed by the trial court in permitting amendment of the complaint after both plaintiff and defendant had rested, because said amendment changed the cause of action from one of money had and received, which was barred by limitation, to an action for damages for breach of contract, and also that there was no evidence of damage to support the amendment of the complaint; further, that there could be no such evidence of damage for the reason that the plaintiff in the transaction involved acted through an agent, one W. G. Harkins, and ratified all his acts; and finally that there was prejudicial error committed by the court in the forms of verdict submitted to the jury.

[6] We have already seen that the trial court correctly construed the complaint as one founded upon breach of a written contract; and we may add that even if the complaint had been in form one for money had and received the cause of action was not changed by the amendment by which it became in terms one for breach of contract, since the same transaction and the same alleged violation of right were involved. In such a case the facts upon which defendant's obligation to plaintiff is founded may be pleaded in a different way, and even the relief sought may be changed, without there being involved any change in the cause of action; and the fact that the cause of action in the manner first pleaded may have been barred by limitation, and may be within the statutory period as set forth in the amended pleading, is no objection; quite the contrary. Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53; Union Lumber Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 142 P. 910; Merchants' Collection Agency v. Gopcevic, 23 Cal.App. 216, 137 P. 609; Born v. Castle, 22 Cal.App. 282, 286, 134 P. 347.

While the defendant very strenuously contended at the trial that the action was one for money had and received, it is quite apparent from the opening statement of plaintiff's counsel that he was not proceeding on any such theory. A quotation from such opening statement will clearly demonstrate this:

"Now we state that that is a breach of contract by the California Pacific Title and Trust Company; that as a result of their failure to perform their contract they have caused damage to Gallagher in the sum of his deposit with them, $5,000. * * * Now, it is our contention that the Title company breached its contract with Gallagher, and as a result of that caused a loss to Gallagher of $5,000. * * *

"The Court: I will ask a question now to clarify the situation in my mind: Gallagher paid $5,000 into the Title Insurance company and he is suing for the return of that $5,000?

"Mr. Delaney: (plaintiff's counsel:) For the breach of that contract for damages."

[7] As to appellant's contention that there was no evidence of damage upon which to base the amendment to the complaint to conform to the proof, the fact of defendant's payment away of plaintiff's money in violation of the conditions of its deposit was directly testified to; and while the plaintiff after so testifying did not add in so many words, "By such wrongful payment I was damaged to the extent of $5,000," the inference arising from such unauthorized payment was clearly to that effect. Such inference constitutes evidence. Code Civ.Proc. § 1832. This question was directly decided in Jones v. Title Guaranty, etc., Co., 178 Cal. 375, at page 380, 173 P. 586, 588, where it is said: "If plaintiff's property, deposited with the defendant upon certain conditions, was disposed of without compliance with those conditions, the plaintiff was, of course, entitled to recover such damages as he may have suffered through

defendant's unwarranted act. The defendant contends that the plaintiff showed no damage. But this claim is obviously without merit. There is evidence that plaintiff's check for $2,000 was cashed, and the money paid out by the defendant under the amended instructions. Apart from any question of the notes, it needs no argument to show that the plaintiff suffered damage by being deprived, without his authority or consent, of the money represented by his check."

Coming to appellant's contention that there was no evidence of damage, and could not be any, for the reason that plaintiff ratified all the acts of his agent, this question involves a further contention, namely, that one W. G. Harkins was the agent of the plaintiff in the transaction involved, with whom the defendant was authorized to deal, and its determination necessitates some reference to the evidence.

The plaintiff Thomas M. Gallagher was a carpenter and builder, and without much experience in the buying and selling of real estate. The property here involved is a lot on Sixth street in San Francisco improved with a building used as a hotel. One Collins, associated with M. J. Hanlon, both real estate brokers, acting for the undisclosed owner, had arranged with the plaintiff for an exchange of properties, by which Gallagher was to give certain lots and in addition the sum of $3,250 for the Sixth street property, record title to which was to be subject to an existing $14,000 first mortgage and a second mortgage of $4,000. Gallagher was to be furnished with a "preliminary report for a policy of title insurance," to be made by defendant, showing good and marketable title free and clear of incumbrances with the exceptions mentioned. On March 10, 1928, Gallagher, accompanied by Harkins and Collins, entered the defendant's office and proceeded to open a transaction in the nature of an escrow with Phil H. Garvey, one of the officers of the company, looking to the consummation of the exchange mentioned, the details of which, so far as Gallagher's part in the transaction was concerned, had been filled in on a printed blank entitled "agreement of exchange." Shortly prior to this time Collins, on behalf of the seller of the property, had placed the matter with the defendant. Gallagher deposited with Garvey the sum of $500, together with a receipt for $500 which had been given him by Collins upon his making a down payment in that amount, and the so-called agreement of exchange, executed by him only and being in effect an offer to the undisclosed owner to acquire the Sixth street property on the terms written therein. At this time the defendant was already in business relations with the Realty Funding Corporation, which was expecting within a few days to acquire title to the property through a trustee's sale under a deed of trust in which the defendant was trustee and the Realty Funding Corporation beneficiary, and the latter had given to Harkins an option on the property together with other lots (contingent upon the corporation being able to acquire it at a given price at such sale) at a lower price than that which Gallagher was offering to pay, and this option or a copy of it was in the possession of the defendant. While there is no direct testimony to that effect, it is apparent that Gallagher's offer to buy the property on the terms already stated had been obtained on behalf of Harkins, who subsequently consented to a change in those terms by eliminating the $4,000 mortgage and increasing the cash payment required to a total of $6,750. Mr. Garvey read over the "agreement of exchange," and observing that it called for a report on the Sixth street property to be made by defendant, stated that his company had shortly before prepared such a report and, according to testimony given by him as a witness at the trial—although in this behalf he was contradicted by the plaintiff—the parties present, including the plaintiff, went over it. The report showed, as indicated in the "agreement of exchange," a mortgage of $14,000 upon the property, and also showed that an action had been commenced to foreclose such mortgage. Garvey at this time issued the company's receipt covering the $500 then paid to it, the "agreement of exchange," and the receipt given by Collins to Gallagher; and then, according to his testimony (which, too, was denied by Gallagher), asked the latter what instructions he wished to give for the disbursement of the $500, who replied that Harkins would represent him in the transaction. This also the plaintiff as a witness denied, his version of the incident being that he himself asked Garvey to whom he should pay the balance of the money called for by the agreement of exchange, and that Garvey replied: "You can pay it either here or to Mr. Harkins." A few weeks thereafter, to wit, on April 6th, Harkins deposited with defendant on behalf of plaintiff $4,500, being part of a sum of $5,750 received by him from the plaintiff. In the meantime the Realty Funding Corporation, having since the inception of the transaction become the

record owner of the title, and in fulfillment of its option given to Harkins, deposited with defendant a deed to the property naming Mabel F. Roberts (the nominee of Harkins, whose name was used for convenience only) as the grantee, to be recorded upon payment to the defendant for its account of the sum of $5,000. On April 13th the defendant "issued" its report on title, showing title to be in Realty Funding Corporation subject to certain exceptions, including two, numbered 8 and 9, respectively. No. 8 was the pending suit to foreclose the mortgage of $14,000, and No. 9 referred to a defect consisting of the conveyance of title by a former corporate owner under a name other than that in which it received it and without identifying its new name with the old. On April 23d Harkins called at the office of the defendant and inquired if the transaction had been closed. He was informed that it could not be closed without instructions regarding exceptions 8 and 9 of its report. Harkins then, by his written and signed notation on the instructions previously given by plaintiff and without consulting him, waived these exceptions, and on April 26, 1928, the plaintiff's money was paid over to or for account of the Realty Funding Corporation. The original instructions of plaintiff required title to be recorded in his name, but by instructions given by Harkins a deed was furnished by the seller in the name of Mabel F. Roberts, but before its recordation the defendant, having pointed out that there was a judgment standing against this person, the named grantee was changed to Eneas Kane, another nominee of Harkins, who also brought to the defendant for recordation, and purporting to complete the transaction, a deed from this nominee to Thomas M. Gallagher; the description in this last deed, however, being of a piece of property on Hayes street and making no mention of the Sixth street lot. During this time the defendant had sent to plaintiff no report on title or other communication. Shortly after the closing of the transaction in the manner stated, Gallagher learned from the holder of the $14,000 mortgage that it would not be removed and that foreclosure proceedings had in fact been commenced. He thereupon visited the office of the defendant, where he talked with Garvey and demanded the return of his money, but was referred by him to Harkins, nor was he informed that his money had been paid over. Thereafter, on March 8, 1929, there was filed for record by the defendant a deed from Eneas Kane to the plaintiff of the Sixth street property, this being done at the instance of the Realty Funding Corporation which was being threatened with suit by the plaintiff for the recovery of the purchase money.

[8-10] We think this partial review of the evidence is sufficient to show that it supports an implied finding of the jury in aid of its verdict either that Harkins was not appointed by plaintiff to represent him in his dealings with the defendant, or that if so appointed any authority given to him was so limited in scope as not to authorize any change in the quality of title required by the so-called agreement of exchange, but merely extended to conveying to defendant such instructions as might be from time to time indicated by defendant as necessary for the purpose of consummating the transaction as therein outlined. In any event, the defendant had full notice of Harkins' adverse interest, and accepted at its peril from him any directions which would materially change the terms of said agreement of exchange to his own advantage and to the detriment of plaintiff. "As a general rule every person who undertakes to deal with an alleged agent is by the mere fact of agency put upon inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act * * * particularly where it is his first transaction with the agent, or the circumstances connected with the agency are such as to put him upon inquiry, as where it appears from the circumstances of the particular transaction that the interests of the agent and principal are necessarily adverse, or that the authority is of an unusual, improbable or extraordinary nature." 2 Cor.Jur., Agency, § 20, p. 562.

The fact that an agent is employed to make a contract does not imply the power to vary or cancel it or to waive the rights of his principal under it. Id., Agency, p. 645; Jones v. Title Guaranty, etc., Co., 178 Cal. 375, 173 P. 586; Harbor Construction Co. v. Walters, 101 Cal.App. 470, 281 P. 1062.

In this connection we have referred to appellant's contention that the plaintiff in any event ratified the acts of Harkins in his dealings with it. This contention rests upon evidence of various acts of Gallagher, such as that after the close of the transaction Harkins notified him to take possession of the Sixth street property, that an agent of the Realty Funding Corporation accompan-

ied him there and delivered possession to him, that he remained in possession for about two months, and that as late as September 5, 1928, he executed a deed of trust and a chattel mortgage on the hotel property and its contents. On the other hand, there is evidence on behalf of the plaintiff that while the transaction was still pending Harkins commenced with him a negotiation by which he was to acquire other property owned or controlled by the same seller, and to which the money placed by him with the defendant would be applied; that he went into possession of the Sixth street property in anticipation that his deal therefor would be closed and without being informed that his money had in fact been paid over, but that when he learned that the $14,000 mortgage would not be renewed and that a suit was pending to foreclose it he quit the property; and that as to the deed of trust and chattel mortgage, he recognized his signature to those papers but that when he signed them they were incomplete and were part of the new transaction referred to and which was ultimately abandoned. Apparently the jury gave entire credence to the plaintiff's testimony, and this being so we are unable to say that it is insufficient to support its verdict.

[11, 12] "As a general rule, in order that a ratification of an unauthorized act of an agent may be valid and binding it is essential that the principal have full knowledge at the time of the ratification of all material facts and circumstances relative to the unauthorized act or transaction * * * unless the principal is wilfully ignorant or purposely refrains from seeking information." 2 Cor.Jur., Agency, § 93, p. 576. "The doctrine of constructive knowledge of material facts or imputation of knowledge of such facts does not generally obtain in the case of ratification, as ordinarily it is what the principal knows, and not what he has mere legal notice of, that is to be considered in determining whether there has been ratification. * * * A principal's failure to use diligence to make such discovery" (i. e., that one is doing unauthorized acts in his name) "is not such negligence as will charge him with constructive knowledge of what he might have discovered by such inquiry." Id., § 97, p. 480.

[13] It is finally urged by appellant that the trial court erred in submitting to the jury a form of verdict in which the amount to be awarded plaintiff, if it found in his favor, was inserted, namely, the sum of $5,000.

As to this contention we think it sufficient to say that the action was tried on plaintiff's part as one for damages; that the complaint, as we have seen, was amended by inserting therein a formal allegation of such damages; that plaintiff's evidence tended to prove damage in the amount named, which was the only evidence of damage in the case. The defendant was not precluded from offering evidence to show that this sum did not truly represent the damage; and if it was surprised by the court's ruling permitting the amendment to the complaint, thus placing the nature of the action beyond question, it could have asked and received permission to reopen the case in order to give it a further opportunity to present evidence upon this point. This it did not do, and is therefore not in a position to complain. The result was that if the jury found damages for the plaintiff it could only do so in the amount named.

It follows from what we have said that both the order and judgment appealed from should be affirmed.

The order denying defendant's motion for judgment notwithstanding the verdict is affirmed.

The judgment is affirmed.

13 Cal.App.2d 293

HANSEN et al. v. d'ARTENAY et al.

Civ. 1388.

District Court of Appeal, Fourth District, California.

April 18, 1936.

Hearing Denied by Supreme Court June 15, 1936.

1. Appeal and error ⇐1208(2)

General rule that party deprived of property under judgment reversed on appeal, is entitled to its restitution, and if restitution is not made by appellate court, he may obtain possession by motion duly made in trial court, is not mandatory, and trial court may in its discretion refuse to restore possession of property.

2. Attachment ⇐57
Execution ⇐42

Interest of vendee under conditional sales contract is subject to levy of attachment and execution.

3. Execution ⇐319

A deed executed after sale by sheriff under execution issued upon final judgment, conveys to purchaser all interest of judgment debtor in property sold, and as to judgment debtor, judgment, execution, and sheriff's deed is prima facie evidence of purchaser's title.

4. Execution ⇐290

Where vendor under executory contract for sale of realty brought suit against vendee to quiet title, and pending vendee's appeal, which resulted in reversal, vendor purchased by quitclaim deed vendee's interest in the realty which interest was sold under execution to third party, vendor acquired all interest of purchaser at execution sale, including interest of vendee.

5. Execution ⇐276(2)

Where, pending appeal from judgment against vendee quieting title in vendor, vendor acquired title to vendee's interest from purchaser at execution sale, reversal of judgment in quiet title action did not create new interest in vendee, who had lost all interest by failure to exercise right to redeem from execution sale, nor entitle vendee to writ of restitution.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Nis Hansen and another against J. A. d'Artenay and others. From an order of the Superior Court denying their motion for restitution of property involved in the action, defendant J. A. d'Artenay and Octavia d'Artenay appeal.

Order affirmed.

N. Lindsay South, of Fresno, and Sam Taylor, of Bakersfield, for appellants.

John F. Pryor, of Hanford, and Farnsworth, Burke & Maddox, of Visalia (James K. Abercrombie, of Visalia, of counsel), for respondents.

MARKS, Justice.

This is an appeal by J. A. d'Artenay and his wife, Octavia, from an order of the superior court of Kings county denying their motion for restitution of the property involved in this action. Various phases of the controversy have been before this court before. Hansen v. D'Artenay, 121 Cal.App. 746, 9 P.(2d) 889; d'Artenay v. Hansen, 138 Cal.App. 39, 31 P.(2d) 460, 462.

Plaintiffs were the owners of 800 acres of land in the Tulare Lake Bottoms, and 320 shares of stock in the Gates-Jones Ditch. Under date of September 1, 1922, they entered into an executory contract for the sale of this property to J. A. d'Artenay. On June 20, 1929, they instituted an action against d'Artenay, and others, to quiet title to the property. On October 28, 1929, judgment was rendered in favor of Mr. and Mrs. Hansen quieting their title against all defendants. Mr. and Mrs. d'Artenay alone appealed, and the judgment against them was reversed by this court. Hansen v. D'Artenay, supra. The remittitur was issued May 20, 1932. On November 19, 1929, Mr. and Mrs. Hansen had been put in possession of the real property by the sheriff of Kings county. d'Artenay and his wife made a motion for restitution of the property which was denied on November 27, 1934, and this appeal followed. No final judgment has been entered by the superior court of Kings county in the case of Hansen v. D'Artenay.

On December 15, 1928, the F. G. Cross Hardware Company, a corporation, commenced an action in the superior court of Kings county against J. A. d'Artenay to recover money alleged to be due it on an express contract. An attachment was issued and levied on the interest of d'Artenay in the property in question. Judgment was rendered in favor of the F. G. Cross Hardware Company in that action and an execution was issued on March 2, 1929, and levied upon the interest of d'Artenay in the

real property in controversy here. On March 29, 1929, the interest of d'Artenay was sold to the F. G. Cross Hardware Company and the sheriff's certificate of sale delivered to it and recorded on April 1, 1929. A sheriff's deed was executed and delivered to the F. G. Cross Hardware Company and recorded on May 9, 1930, conveying to it all of d'Artenay's interest in the property. The proceedings in that case are not attacked, and we must assume their regularity.

On June 12, 1930, the F. G. Cross Hardware Company conveyed all its right, title, and interest in the property to Nis Hansen. This deed would seem to furnish the reason for the order denying the motion for restitution of the premises to d'Artenay and his wife.

The F. G. Cross Hardware Company was joined as one of the defendants in the case of Hansen v. D'Artenay, supra, and judgment went against it, as well as the other defendants. The F. G. Cross Hardware Company, did not appeal, and the judgment against it has long since become final.

Mr. and Mrs. d'Artenay, in their opening brief, thus state the questions involved in this appeal: "Where the vendor under executory contract of sale of real property with the vendee brings suit against vendee to quiet title against vendee also making a party to the action a corporation that had theretofore attached the equity of vendee and the trial court found against vendee and the attaching creditor. Vendee on appeal reversed the trial court, the Appellate Court holding that vendee had performed the terms of the contract, the other party failed to appeal. The vendor pending the appeal claims to have purchased the creditor's title. Can vendor pending appeal purchase the alleged outstanding title and use it against vendee, after reversal, and keep vendee from regaining possession of said ranch and performing the contract?"

[1] It is a general rule that a party, deprived of property under a judgment, reversed on appeal, is entitled to its restitution, and if restitution is not made by the appellate court, he may obtain possession by motion duly made in the trial court. 2 Cal.Jur. 1062, et seq., and cases cited. This rule is not absolute and unyielding and is subject to a well-recognized exception. In Spring Valley Works v. Drinkhouse, 95 Cal. 220, 30 P. 218, 219, the Supreme Court, in discussing this question, said: "It is insisted that the reversal of the judgment gives appellant the absolute right to a restitution of the premises, but the wording of the statute will bear no such construction. The section is not mandatory upon the court, but the power conferred thereby is to be exercised when the circumstances of the case call for the use of a judicial discretion." See, also, Yndart v. Den, 125 Cal. 85, 57 P. 761.

Under this rule it must be determined here whether the trial court abused its discretion in refusing to restore the possession of the property to d'Artenay. In so doing, we must consider the following: (1) The effect of the execution sale in the case of F. G. Cross Hardware Company v. d'Artenay and the sheriff's deed of the property to that plaintiff; (2) the effect of the deed from the F. G. Cross Hardware Company to Nis Hansen; (3) the effect of our reversal of the judgment of plaintiffs here against Mr. and Mrs. d'Artenay, and the final judgment of Mr. and Mrs. Hansen against the F. G. Cross Hardware Company.

[2, 3] That the interest of a vendee of real property, under a conditional sales contract, is subject to levy of attachment and execution, is too well settled to need support by citation of authorities. A deed executed after a sale by the sheriff, under an execution issued upon final judgment, conveys to the purchaser all of the interest of the judgment debtor in the property sold, and as to him the judgment, execution, and sheriff's deed is prima facie evidence of the plaintiff's title. Robinson v. Thornton, 102 Cal. 675, 34 P. 120. As the regularity of the proceedings leading up to the sheriff's deed are not questioned, we must conclude that the sheriff's deed to the property in question here transferred all of d'Artenay's right, title, and interest to the F. G. Cross Hardware Company in so far as the question can be raised between those parties.

[4] It is also elementary that a person, not under disability, having an interest in real property, can sell that interest to another and that a quitclaim deed will convey to the grantee all of the grantor's right, title, and interest in the property. Therefore, it follows that by the quitclaim deed of June 12, 1930, Nis Hansen acquired all of the right, title, and interest the F. G. Cross Hardware Company had in the real property on that date which was whatever interest it acquired under the sheriff's deed of May 2, 1930, which conveyed to it all the right, title, and interest of d'Artenay. Were there no other circumstances bearing

on the question, the conclusion would necessarily follow that on May 9, 1930, the F. G. Cross Hardware Company became the owner of d'Artenay's right to purchase the property and all his interest in it, and that Nis Hansen succeeded to this right on June 12, 1930, and that the title and all equities were then vested in Hansen, and d'Artenay passed completely out of the transaction.

While it is somewhat difficult for us to determine just what was in the minds of counsel for the d'Artenays from what they have written in their briefs concerning the effect of the final judgment of October 28, 1929, which quieted Mr. and Mrs. Hansen's title to the property against the F. G. Cross Hardware Company, and our reversal of the judgment against d'Artenay and his wife, we believe we can summarize the legal effect of their argument as follows: That the F. G. Cross Hardware Company became the owner of d'Artenay's interest in the property on March 29, 1929, subject to his equity of redemption; that on October 28, 1929, by the judgment in this action, Mr. and Mrs. Hansen's title to the property was quieted as against the F. G. Cross Hardware Company so that it had nothing to convey to them on June 12, 1930; that by our reversal of the judgment against d'Artenay and his wife we establish the law of the case to be that d'Artenay had not breached his contract with Mr. and Mrs. Hansen and that between them it was in full force and effect.

[5] This is the first time that the judgment in favor of Mr. and Mrs. Hansen, quieting their title against the F. G. Cross Hardware Company after it purchased the property at execution sale, has been called to our attention. It was not even mentioned by counsel on the former appeals. In the opening brief filed on behalf of Mr. and Mrs. d'Artenay on the first appeal (Hansen v. D'Artenay, supra) the question is thus stated: "Inasmuch as under paragraph 8 of the findings, the only amount by reason of the unmatured crops to which plaintiffs would be entitled, if any amount, is $500.00, the principal question involved on this appeal is whether J. A. d'Artenay has forfeited his equity under the contract by reason of a failure to irrigate said premises, at a time when there was no water in the canals thereon available for irrigation. In other words, was d'Artenay required to deepen the pit in the well subsisting on the premises, and install a pump thereon, when the water table in said well had been lowered from natural causes, so as to supply water sufficient for the irrigation of the entire 800 acre ranch?" In their brief, counsel for Mr. and Mrs. Hansen on that appeal thus stated those issues: "By way of answer the defendants set forth the conditional sale contract and alleged full performance of its terms and conditions on their part. The issues involved at the trial hinged entirely upon the ultimate question of performance or nonperformance by the defendants. There were other parties defendant to the action, but they, and their interests in the subject matter of the litigation, are not necessary to be considered on this appeal. The real parties in interest, so far as this court is concerned, are the plaintiff and respondent, Nis Hansen, and the defendant and appellant, J. A. d'Artenay. The other parties, plaintiff and defendant, are named merely because they are the wives respectively of the contending parties. For convenience, therefore, we will hereafter, in this brief merely refer to the parties as appellant and respondent. While the ultimate question presented to the trial court for decision involved a finding of performance or nonperformance of the contract by appellant, this finding depended mainly upon the legal interpretation and construction to be placed upon certain provisions of the contract of sale."

Thus, if this court was remiss on the first appeal in not giving effect to the transfer of d'Artenay's interest in the property to the F. G. Cross Hardware Company, there would seem to be some justification for its lapse because its members had no idea that such a question might be involved. Our former decision did not go beyond holding that the evidence failed to show that the d'Artenays had breached their contract. We established no rights in them except the right to a new trial. This is clear from what we said in the case of d'Artenay v. Hansen, supra: "The judgment was reversed by this court on appeal upon the ground that the evidence failed to show default on the part of J. A. and Octavia d'Artenay. This decision left the case in the same condition as though it had never been tried except for our conclusion on the sufficiency of the evidence introduced at the trial. We established no new rights in any of the parties, but merely declared their rights as they existed when the pleadings were filed in that action. When the remittitur was filed, it left the case at issue to be tried again on the complaint of the plaintiffs to quiet title to the property and the answer of the defendants in which they set

up an interest in the property through their contracts of purchase which must have been considered by them in full force and effect under such allegations."

We did not attempt to pass on the rights of d'Artenay and the F. G. Cross Hardware Company under the contract of purchase. We could not do so, as they were not adversary parties in that action, and that question was beyond any issues raised by the pleadings of the parties then before us. A question of the effect of a judgment in another case where the parties were defendants and not adversaries was considered in Hardy v. Rosenthal, 2 Cal.App.(2d) 442, 38 P.(2d) 412, 413, where it was said: "A further reason for concluding that the judgment in the Stoffel case could not estop the plaintiff from recovering in the instant case is found in the following quotation from Victor Oil Co. v. Drum, 184 Cal. 226, at page 239, 193 P. 243, 248, where it was said: 'The defendants also contend that the court erred in refusing them leave to file a supplemental answer pleading a judgment against the plaintiff and Drum in an action by the Hamilton Company, wherein a number of the questions of fact involved here were, according to defendants' contention, determined adversely to the plaintiff. The only object of the supplemental answer was to set up the judgment by way of estoppel. The refusal of the court to permit this was correct, since the judgment would not have so operated. It would not so operate because it was not between the parties to this litigation. It is true that both Drum and the plaintiff were parties defendant in the action in which the judgment was rendered, but the judgment was not between them, but between them on the one side and the plaintiff in that action on the other. A judgment may operate as an estoppel between parties to it only when they are adverse parties, so that the judgment is a determination of issues between them. Section 1910, Code Civ.Proc.; 23 Cyc. 1237.'"

As between the F. G. Cross Hardware Company and d'Artenay, the latter's interest in the property passed to the former at the time of the sheriff's sale under execution, subject to the equity of redemption which expired without redemption of the property, the sheriff's deed following. The judgment quieting title of Mr. and Mrs. Hansen against the F. G. Cross Hardware Company could by no stretch of the imagination revive or recreate any lost interest of d'Artenay in the property. While it cut off any right of the corporation to complete the contract of purchase, it could create no right in d'Artenay so to do. After the sheriff's sale, he only had his equity of redemption, which he lost by failing to exercise it within the time allowed by law.

An examination of the case of d'Artenay v. Hansen, supra, discloses that after the reversal of the judgment in the case of Hansen v. D'Artenay, supra, Mr. and Mrs. d'Artenay served a notice upon Mr. and Mrs. Hansen demanding repayment of the portion of the purchase price paid and rescinding the contract of purchase because of the wrongful invasion by Mr. and Mrs. Hansen of their rights under the contract of purchase, which amounted to an abandonment of the contract by them and entitled Mr. and Mrs. d'Artenay to rescind and recover the purchase money paid. Mr. and Mrs. d'Artenay brought that action to recover the portions of the purchase price paid by them.

From what we have already said, it must be evident that we regard the contention that Mr. and Mrs. Hansen were trustees for d'Artenay at the time they acquired the interest of the F. G. Cross Hardware Company without merit even though we should adopt the theory that the rules governing trusts are applicable here. d'Artenay was not the beneficiary under any trust at that time. His interest in the property, and his right to purchase it, had passed out of him as completely as though he had made a voluntary assignment or conveyance. This being true, he cannot complain of Mr. and Mrs. Hansen acquiring an outstanding interest in the property. The question is moot as to him. He has no rights under the contract, and to order restitution of the property would be an idle act which the courts are not called upon to perform.

Order affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

13 Cal.App.2d 551

WINCHESTER et ux. v. GENERAL CAB CO. et al. (two cases).

Civ. 10384, 10348.

District Court of Appeal, Second District, Division 1, California.

April 29, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. **Appeal and error** ⇐82(3)

Order permitting defendant to file amendment to motion to vacate default judgment *held* not appealable as "special order made after final judgment," since such order did not finally dispose of the motion (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

2. **Appeal and error** ⇐790(3)

Appeal from order permitting defendant to file amendment to motion to vacate default judgment was dismissed as moot, where final order disposing of motion was in plaintiff's favor.

3. **Insurance** ⇐670

Findings that liability policy was issued to receiver of cab company to enable receiver to operate cabs, that license to operate cab company was predicated upon such policy, and that judgment for damages was had against cab company, which was in fact the insured, *held* to sustain judgment against insurer, as against contention that findings did not show that insurer insured the cab company itself.

Appeal from Superior Court, Los Angeles County; Henry O. Wackerbarth, Judge.

Two actions by Ruffus T. Winchester and Dona Winchester, husband and wife, against the General Cab Company, doing business under the fictitious firm name and style of Red Top Cab Company, and others. From an ancillary order made in proceedings initiated by defendant Mercer Casualty Company to vacate a judgment and enter a new and different judgment, the plaintiffs appeal and defendant moves to dismiss appeal; and from an order in the second case denying the motion of defendant Mercer Casualty Company to vacate the judgment and enter a different judgment, defendant Mercer Casualty Company appeals.

Motion to dismiss the appeal in the first case granted, and order denying motion to vacate judgment and enter different judgment in second case affirmed.

Lasher B. Gallagher, of Los Angeles, for plaintiffs.

Elbert E. Hensley, of Los Angeles, for defendant.

ROTH, Justice pro tem.

There are two appeals in this case which will be considered together, the first, 10384, and the second, 10348. In 10384, Mercer Casualty Company, one of the defendants in the trial court (referred to herein as Casualty Company), is the respondent, and the Winchesters are appellants. This is an appeal from an ancillary order made in proceedings initiated by Casualty Company to vacate a judgment and enter a new and different judgment. In 10348, Casualty Company is appellant and the Winchesters are respondents. This is an appeal from the order denying Casualty Company's motion to vacate judgment and enter a new and different judgment. Heretofore, Casualty Company had appealed from the judgment rendered against it in this case, which appeal was dismissed as it was not perfected in time. Winchester v. General Cab Co. (Cal.App.) 47 P.(2d) 1116.

The appeal in 10384 will be considered first for the reason that it is before us at this time on a motion to dismiss.

On October 4, 1934, respondent Casualty Company, having theretofore suffered a default judgment against itself which was entered in the above-entitled action, served a notice of motion to vacate the judgment and enter different and distinct judgment under authority of sections 663 and 663a of the Code of Civil Procedure. The notice, however, did not, as required by said sections, specify "the particulars in which the conclusions of law are not consistent with the finding of fact * * *." Thereafter, a motion was made, pursuant to the notice thereof, and submitted. During the submission and on December 20, 1934, respondent served and filed another "notice of motion for leave to vacate submission of motion to vacate judgment and enter different and distinct judgment, and for leave to further argue said motion," the purpose of which was to correct and amend the defects in the first notice of motion and the motion pursuant thereto.

[1, 2] The second motion was heard over appellants' objection on December 26, 1934, and granted. On the same day and at the same time, the first motion as amended by the second was denied. This appeal is from the order permitting respondent to file amendments to its first motion. Respondent moves to dismiss the appeal, because the original motion was lost by respondent and the appeal from the order is therefore moot, and also for the reason that the order thus appealed from is not an appealable order. Section 963, Code of Civil Procedure, sets forth the orders and judgment from which an appeal may be taken. The order herein appealed from is not one of those specifically mentioned, and may be considered as an appealable order only if it is included in the language "special order made after final judgment" set forth in said section. What is a "special order made after final judgment" has been defined by the decisions. A definition enunciated upon analogous facts is set forth in the case of Kaltschmidt v. Weber, 136 Cal. 675, 677, 69 P. 497, wherein the court says: "In the present case the order appealed from is only a ruling of the court upon an ancillary motion made by the plaintiff in the proceeding for a new trial, and does not finally dispose of the motion, any more than would an order extending the time for preparing the bill of exceptions, or continuing the hearing upon its settlement beyond that allowed by the statute. If the motion for a new trial is denied, the appellant will not be 'aggrieved,' or even desirous of an appeal. If it is granted, he can appeal from the order, and the action of the court now objected to can be reviewed upon the record upon which the motion for a new trial was heard, wherein the several rulings and orders of the judge may be incorporated as hereinabove shown. A question kindred to the present was presented in Griess v. State Investment, etc., Co. [93 Cal. 411, 28 P. 1041], upon which the court said: 'The refusal to dismiss a motion for a new trial does not finally dispose of the motion itself, and, until some order is made by the trial court which has the effect to either grant or deny the motion for a new trial, neither party can be said to be aggrieved, and there is nothing to appeal from.'" McWilliams v. Hudson, 98 Cal.App. 185, 276 P. 598, 277 P. 529; Lake v. Harris, 198 Cal. 85, 243 P. 417. So in this case, the order appealed from was an ancillary order which did not finally dispose of the motion, and the ruling thereon is one which could be considered upon an appeal from the order finally disposing of the motion. Since, however, in this case the final order disposing of the motion was in appellants' favor, the appeal from the intermediate order does not affect the rights of the parties, and such appeal is therefore moot. Estate of Blythe, 108 Cal. 124, 41 P. 33; Turner v. Markham, 156 Cal. 68, 103 P. 319; Sorensen v. Coddington, 79 Cal.App. 199, 249 P. 37.

We now proceed to the second appeal, 10348, in which Casualty Company is appellant and the Winchesters are respondents. This is an appeal from the order denying the motion of Casualty Company to vacate the judgment and enter a different judgment.

[3] The sole point on the appeal from this order is that the findings do not support the judgment. Casualty Company is an insurance company and had, prior to the accident which gave rise to the judgment against it, issued a policy of indemnity to John P. Coyle, receiver in equity for General Cab Company, doing business as Red Top Cab Company. The above companies were joined as defendants, as was the driver of the cab involved in the accident, but Coyle, the receiver, was not a party to the action.

Appellant concedes that Coyle as receiver of the General Cab Company is and was liable in his official capacity for all torts committed by him as such receiver and that Casualty Company issued the policy in question to protect him from such liability, but contends that Casualty Company never insured the General Cab Company, doing business as Red Top Cab Company. The pertinent clause in the policy of insurance on which appellant relies is: "It is further understood and agreed that in the event of final judgment covering any loss or claim under this policy is rendered against the assured, the Insurance Carrier guarantees the payment of such part of said judgment as is within the limits expressed in the policy direct to the plaintiff. * * *"

Since respondents never obtained final judgment against assured John P. Coyle appellant says Casualty Company has no liability. The findings, however, do not support the contention of appellant.

The findings of the trial court pertinent on this question are as follows:

"* * * that on or about the 18th day of September, 1931, policy No. 80070 of the

Mercer Casualty Company was written, naming John P. Coyle, Receiver in Equity for General Cab Company, dba Red Top Cab Company, as the insured under said policy. * * * That the said B. K. Elgin was the duly authorized agent in California for the Mercer Casualty Company. * * * That on September 29, 1931, a telegram was sent and received * * * as follows: 'Board of Public Utilities, City Hall Building. Please cancel Mercer Policy Eight Naught Naught Seven Naught issued September Eighteenth favor Redtop Cab Company Los Angeles Cancellation effective as of noon October Thirtieth Cancelled Account of Hazardous Risk and on Prohibitive List of this company Confirmation by air mail. Mercer Casualty Co.'"

That on September 29, 1931, Mercer Casualty Company wrote to the Board of Public Utilities, City Hall Building, Los Angeles, Cal. (in part), as follows:

"Thank you for your wire of the 28th re Mercer Casualty policy 80070 issued in favor of Red Top Cab Company, Los Angeles. I feel that my Agent in California took undue advantage of me in placing the policy on the Red Top Cab Company. * * *

"* * * that from and after the 31st day of October, 1931, Mercer Policy No. 80070 was held on file in the office of the Board of Public Utilities of the City of Los Angeles.

"* * * that unless there was some form of policy on file with the Board of Public Utilities, City Hall Building, of Los Angeles, the operation of said taxicabs was in violation of the City Ordinance.

"* * * that the act of B. K. Elgin, agent of Mercer Casualty Company in purporting to extend the running of the policy * * * was for the * * * purpose of enabling the said John P. Coyle, Receiver in Equity for General Cab Company, Inc., dba Red Top Cab Company, to obtain a license to continue to operate its taxicabs in the City of Los Angeles, California."

Finding 14 of the trial court, which is somewhat long, shows that a letter dated October 20, 1931, found to have been written by Mercer Casualty Company, recognized that the fictitious name under which General Cab Company was doing business in Los Angeles was a reference to an assured under the policy issued to the receiver, and upon which the claim in this case is predicated.

Respondents' contention is that John P. Coyle was not the person really insured. It is apparent, of course, that Coyle personally could suffer no loss by reason of any liabilities incurred by taxicabs operated by the corporation as a result of personal injuries or death caused by the negligence of the operators of such taxicabs. The loss or liability, if any, would have to be paid out of the assets of the corporation for which he was receiver, and such corporation, therefore, was the actual insured, together with any of its regularly employed drivers operating such taxicabs. We believe the findings show that the court found as a fact that the contract of insurance was made for the benefit of the General Cab Company, Inc., doing business as Red Top Cab Company. Finding 23 specifically shows that the insurance was written to enable the receiver to operate the cabs of the General Cab Company, Inc., doing business as Red Top Cab Company, and that a license to operate said cab company was predicated upon the very policy of insurance here in question. The facts as found by the court show that the judgment for damages was against one of the parties which was, in fact, the insured. This in our opinion is sufficient. Goss v. Security Insurance Company, 113 Cal.App. 577, 298 P. 860.

The motion to dismiss the appeal in 10384 is granted.

The order denying the motion to vacate the judgment and enter a different judgment in 10348 is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

13 Cal.App.2d 522

McKINNIE v. GUARDIAN HOLDING CORPORATION et al.

Civ. 10149.

District Court of Appeal, Second District, Division 1, California.

April 28, 1936.

Corporations ⇐320(11)

Evidence *held* insufficient to support judgment against director of holding corporation for value of stock in holding corporation exchanged for stock in new corporation organized by stockholder of holding corporation on ground of fraudulent representations in procuring exchange of stock.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Anna McKinnie against the Guardian Holding Corporation and Charles H. Hamburg and others. Judgment for plaintiff, and defendant Charles H. Hamburg appeals.

Reversed, with directions.

E. Neal Ames, of Los Angeles, for appellant.

Scott McReynolds, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Appeal in his own behalf by defendant Hamburg from a judgment rendered against Guardian Holding Corporation, Master Holding Corporation, and three individuals, Johnston, Pratt, and Hamburg, this appellant. He contends that the judgment is not supported by the evidence. The Guardian Holding Corporation organized under the laws of California and dealing largely with building and loan securities, had been doing business very successfully for some years prior to 1929, the value of its shares increasing steadily. Johnston and Hamburg served upon its board of directors, the former as president; Pratt acted as fiscal agent. Early in 1929, as appears from minutes of a special meeting of the board of directors held on March 4th, this California corporation took under consideration a plan to organize under the laws of Delaware a new company to do business on a large scale and to be known as "Master Guardian Holding Corporation," also occasionally called the "Master Holding Corporation." It was intended, with the consent of the "Guardian" stockholders, "to convey to the new corporation all the assets and liabilities of the Guardian Holding Corporation and receive therefor shares in the Master Holding Corporation so that each shareholder in the Master Holding Corporation shall receive one share at $25.00 par for each share of $10.00 par now held by him or her." During the year 1929 various letters touching upon the proposed merger were mailed to "Guardian" shareholders by that corporation. The letter of December 29, 1929, recited reasons why some of the shareholders refused to send in their stock, thereby blocking the merger, and closed with the following words:

"In regard to the future your Board of Directors now recommends that on account of general conditions we adopt a policy that is ultraconservative. They cannot foretell the results of conditions caused by stock market deflation and they believe we should now await developments. *They feel we should make no change in our policy and also undertake no expansion until conditions have returned to normal.*

"Also they feel we should make no change in our corporate structure until such normal conditions have returned. They believe you will fully agree with them that this is the wise thing to do and they will bring this recommendation before you at our stockholders' annual meeting in January." (Italics ours.)

So far as the evidence discloses, this was the last letter sent the stockholders of Guardian Holding Corporation by the corporation or any of its officers, with the exception of the letter of February 14, 1930, reporting upon the annual shareholders' meeting held on January 29, 1930. In that letter we find the following recommendation by the board of directors:

"That on account of the present general financial conditions and the changes which have been made in the laws of California (effective August 14th, 1929) that we defer further action for sixty days, or until said general financial conditions again become normal. This recommendation was accepted by the stockholders and was adopted by unanimous vote.

"You may, therefore, expect to receive, in due time, a further recommendation from your Board of Directors and in such

manner that we may obtain your opinion and approval at that time."

It will be noted that these two letters were written after the financial depression broke upon this country in the fall of 1929, and we know definitely that Guardian Holding Corporation never did effect a merger of that company into the Master Holding Corporation or Master Guardian Holding Corporation; the normality of general financial conditions, mentioned in the final company letter of February 14, 1920, as a condition of further action, never returning. About this time, however, the defendant Pratt, a shareholder in Guardian Holding Corporation, got busy on another plan not calling for a merger, and, on March 10, 1930, filed in Delaware a certificate organizing Master Holding Corporation, the cost of incorporating being met by Pratt personally, and none of it being contributed either by Guardian Holding Corporation, by Johnston, its president, or, so far as appears, by any other person. Following this Pratt undertook to dispose of "Master" stock under a permit issued by the corporation commissioner of this state, and, having served as fiscal agent of the Guardian Holding Corporation for several years prior to 1930, and having formed acquaintance with many of its stockholders, he made a special canvass among them as likely prospective buyers of the new stock. He established offices of the "Master" company in the same suite with the "Guardian" company, and there installed a broker named Kemp for the purpose of handling stock transactions. Kemp's commission, as well as those of salesmen that he employed, were paid by Master Holding Corporation, and all salesmen were furnished with a special cost list to be used in closing a deal with a "Guardian" stockholder.

Mrs. McKinnie, respondent in this case, several years previously had purchased stock in the "Guardian" company through Pratt, and in June of 1930 was the owner of 4228 of its shares. On a five-to-three basis of acquisition, adopted by the organizers of Master Holding Corporation, this stock of the par value of $42,280 would produce, with the addition of $33.34 cash, the even amount of $70,500 worth of "Master" stock at par. Accordingly, on June 30, 1930, respondent furnished Kemp with "buying" and "selling" orders and $33.34 in cash, by means of which, together with an exchange of checks between himself and Master Holding Corporation, Kemp secured issuance on August 12, 1930, to Mrs. McKinnie of "Master" stock of the par value of $70,500. A year and a half later Mrs. McKinnie, having received meanwhile certain dividends from Master Holding Corporation, filed this action for damages, claiming that she had been imposed upon by fraudulent representations chargeable to the defendants, and secured judgment in the sum of $42,280, equaling the alleged par value of her "Guardian" stock as of August 14, 1930, and interest from that date to the date of the judgment, February 10, 1933, amounting to $7,275.66. The court also decreed, upon the prayer of Mrs. McKinnie's complaint, that the shares of stock of Master Holding Corporation that had been issued to her were null and void, finding that they had been issued in violation of the terms of the permit, in that no sale of "Master" stock had taken place, but merely a transfer for stock of Guardian Holding Corporation.

It did not appear at the trial whether the corporation commissioner took any steps to invalidate the issuance of "Master" stock, or whether the permit for selling stock was canceled. The invalidation in the instant case was decreed at the request of plaintiff, as has been said, and forms the basis of this action, grounded upon her receiving valueless stock through the fraud and manipulations of the defendants.

Up to the present moment Hamburg, the appealing defendant, has scarcely been mentioned in this recital, but, since there is a judgment now amounting to more than $50,000 entered against him in favor of Mrs. McKinnie, the interests of both these parties demand that we give their respective contentions most careful consideration. Hamburg never became a director of Master Holding Corporation, and seems to have had nothing to do with the business of that corporation. He was not present at the directors' meeting of March 4, 1929, when Guardian Holding Corporation decided to notify its shareholders of the possibility of forming a new corporation, nor did he appear as a witness in the trial of this case. It is the theory of respondent's counsel that Guardian Holding Corporation itself actually sponsored and carried through "the plan of organizing a Master Holding Corporation and inducting the stockholders of Guardian Holding Corporation, of which Mrs. McKinnie was one," and, because Hamburg was a director

of that company, he must bear full responsibility for Mrs. McKinnie's loss. But we think that the Guardian Holding Corporation's minutes of March 4, 1929, and the company's letters that were introduced in evidence, show conclusively that the corporation which it proposed to sponsor, and later decided not to, was not the same as the one organized by Pratt, individually. We have already noticed the official company announcements of December, 1929, and February, 1930, abandoning the plan of merger, at least temporarily; and there is no evidence that we can find in the record to indicate that that plan was ever resumed, carried through by Guardian Holding Corporation, or that the company adopted Pratt's plan or carried it through. The letter of February 14, 1930, had said: "You may * * * expect to receive in due time a further recommendation from your Board of Directors and in such manner that we may obtain your opinion and approval at that time." No such letter was ever sent. Respondent calls attention to the fact that Pratt wrote letters on Guardian Holding Corporation stationery to "Dear Friends" and "Dear Shareholders," signing them "Guardian Holding Corporation, by E. E. Pratt", and occasionally inclosing with them "literature," so called, these letters and literature containing most of the statements characterized in the complaint as false. On examination of them we find that many of these questioned statements had a basis in fact, and most, if not all, of the others reveal the author's roseate hopes for the future when returning prosperity was "just around the corner." For example, the plan to "secure for you the benefit which is rightfully yours, to increase your security and earnings," may very well have been grounded on the genuine hope and belief that such would be the result, especially in view of the record of striking success that building and loan companies and corporations holding their securities had achieved in the preceding years. It does not appear from our reading of the record that there was any scheme undertaken by Pratt or any one else, to defraud any one, for Pratt invested $10,000 of his own money in the purchase of the first stock issued by Master Holding Corporation on the same basis as every other purchaser, and the class B voting stock that was issued to him later "for organizing and promoting the organization" he assigned to the management without any profit to himself, giving substance to his statement, claimed as a misrepresentation that "all of the officers and directors had paid one hundred cents on the dollar for their shares."

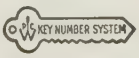
The system by which Mrs. McKinnie's "Guardian" stock became "Master" stock, involving the use of checks instead of coin and currency, was a transaction initiated and put through by Pratt individually and for the Master Holding Corporation, not by or for the Guardian Holding Corporation, or with the knowledge of any of its directors, so far as we are advised by the record before us. Respondent believes that Guardian Holding Corporation is chargeable with fraud because of the stationery and signature employed by Pratt; but he was at that time merely a stockholder of Guardian Holding Corporation (though, according to Johnston, he had been general manager in the year 1930), and was not authorized by the Guardian Holding Corporation or by its directorate to use the stationery, and did not sign his letters as a director or officer of Guardian Holding Corporation. He had access to the stationery, and apparently Johnston had some knowledge that the letters were being sent out; however, at that time, Pratt was not connected with Guardian Holding Corporation, but was manager of Master Holding Corporation and selling stock for that organization.

Respondent relies upon the case of McClory v. Dodge, 117 Cal.App. 148, 4 P.(2d) 223, where defendants, directors of Federal Securities Corporation, were held liable for loss suffered by plaintiff whose Union Mortgage Company stock was turned over to the accredited representative of Federal Securities Corporation, upon his promise to deliver in return for it 13,000 shares of Federal Securities stock. Instead, the Federal Securities Corporation sold the Union Mortgage stock, never delivered anything to plaintiff, and finally became bankrupt. As an argument to justify the judgment entered in this case against Master Holding Corporation, or any of its directors, the McClory Case may be in point, but we are not satisfied with it as an authority to bind Hamburg, who was never a director of Master Holding Corporation. It may be noted that at the time of the transaction mentioned in the McClory Case, as in the case of Vujacich v. Southern Commercial Co., 21 Cal.App. 439, 132 P. 80, the original provision of the Constitution (section 3, art. 12), fixing liabil-

ity of directors "for all moneys embezzled or misappropriated by the officers," was in effect, and in both those cases there had been embezzzlement, while here there was none. If it can be said that any of the letters and pamphlets which Pratt sent out were false in any material respect, still we can find no evidence in the record that appellant knew of the falsity or knowingly participated in any fraudulent conduct in connection with the distribution of such "literature." Lacking such proof, he could not justly be held liable, even if he were a director of Master Holding Corporation; a fortiori, he is not liable as a director of Guardian Holding Corporation.

It is our opinion that the finding of the trial court that appellant, as one of several defendants, made false representations to respondent with the intent and purpose of defrauding her, is not supported by the evidence; therefore the judgment against appellant Hamburg is reversed, and the trial court is directed to enter judgment in accordance with this decision.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 449

In re HENDERSON'S ESTATE.

Civ. 10083.

District Court of Appeal, First District, Division 1, California.

April 27, 1936.

Hearing Denied by Supreme Court June 25, 1936.

Dead bodies ⇐5

Trust fund created by testatrix for construction of mausoleum for burial of testatrix and removal of the remains of her predeceased husband, son, mother, and father, and burial therein, *held* enforceable, notwithstanding contrary wishes of testatrix' sole surviving sister, who was next of kin (St. 1931, p. 2445, § 21).

Appeal from Superior Court, Santa Cruz County; Maurice T. Dooling, Jr., Judge.

Proceeding in the matter of the estate of Katherine C. Henderson, deceased, wherein Walter H. Linforth and Wells Fargo Bank & Union Trust Company, as trustees, under the trust created by the last will and testament of Katherine C. Henderson, deceased, filed a petition asking the Superior Court for instructions as to further action in reference to carrying out provisions of trust, and wherein Agnes Hihn Younger appeared and testified in opposition to granting any relief under the petition. From an adverse decree, the trustees appeal.

Reversed, with directions.

Jesse H. Miller, of San Francisco, for appellants.

Donald Younger, of Santa Cruz, and Frederic C. Benner, of San Francisco, for respondent.

PER CURIAM.

This appeal involves the question of judicial power to enforce testamentary directions as to the place and manner of burial of a decedent's remains as against the contrary wishes of a sole surviving sister, who is the next of kin.

The facts out of which the controversy arises are as follows: The testatrix, Mrs. Katherine C. Henderson, a widow, died testate on March 12, 1921, leaving an estate in excess of the value of $390,000. She was one of several surviving children of Mr. and Mrs. F. A. Hihn, pioneer settlers of Santa Cruz. Her husband, H. O. Henderson, and her only child, as well as all of her brothers and sisters, except Mrs. Agnes Hihn Younger, predeceased her, so that at the time of her death her next of kin was Mrs. Younger, the sole surviving sister. Her other heirs at law were certain nieces and nephews. Three of them were Mrs. Younger's children, and among the others were Ruth Ready, the sole child of a predeceased sister, and Teresa Hihn, the child of a predeceased brother. These five nieces and nephews were named as residuary legatees under the will. The remains of all members of the Hihn family (except one, the mother of Ruth Ready), and the bodies of Mrs. Henderson's infant child and her husband, were interred in the F. A. Hihn burial plot in the Odd Fellows' Cemetery in Santa Cruz. The remains of Ruth Ready's mother were buried in the Catholic Cemetery in that city. Mrs. Hen-

derson's remains were also interred in the Hihn burial plot in the Odd Fellows' Cemetery, but by the twelfth clause of her will she provided as follows: "I give and bequeath to Walter H. Linforth of San Mateo County, California, the sum of twenty thousand ($20,000) dollars in trust for the following purposes, to-wit: Said sum or so much thereof as may be necessary to be used for the purchase of a plot at the Cypress Lawn Cemetery and the building of a suitable vault thereon wherein the remains of my late husband, H. O. Henderson, my son, Fred Hihn Cope, and myself shall be placed. The remains of my said husband and my said son are now in the cemetery at Santa Cruz, and I request my said trustee, upon the completion of said vault to cause the remains of the persons above mentioned to be removed from said cemetery at Santa Cruz and placed in the aforesaid vault. It is also my wish that the remains of my father and mother now at said cemetery at Santa Cruz be also removed and placed in said vault, and I request my said trustee to use his best endeavors in bringing about such result. Whatever may be left of said fund of twenty thousand ($20,000) dollars shall form part of the residue of my estate and be distributed in accordance with the provisions herein contained." In this latter respect the will provided that said residue should be divided as follows: 35 per cent. thereof to Mrs. Younger's three children, 15 per cent. to Teresa Hihn, and 50 per cent. to Ruth Ready.

There was no contest to the probate of the will, and on August 11, 1923, final distribution of the estate was granted. In accordance with the clause above quoted, the sum of $20,000 was distributed in trust for the purposes set forth in said clause to the trustee therein named and to the Union Trust Company of San Francisco, which, at the request of the nominated trustee, was appointed to act jointly with him in carrying out the purposes of the trust. No appeal was taken from said decree, but after it became final Mrs. Younger refused to give her consent to the removal of the remains of her father and mother to the proposed mausoleum in San Mateo county, and finally at the end of ten years during which the trustees continued their efforts to effect an amicable arrangement with Mrs. Younger whereby the wishes of the testatrix might be carried out, Mrs. Younger objected also to the removal of the remains of the testatrix; whereupon the trustee petitioned the superior court for instructions as to further action in reference to carrying out the provisions of the twelfth clause of the will. Mrs. Younger appeared and testified in opposition to the granting of any relief under the petition. In this regard she stated that the Hihn fortune had been acquired in Santa Cruz county, that with the exception of herself all of the Hihn children had resided there from birth until death, and that for those and sentimental reasons she objected to the removal of the remains of the testatrix as well as those of her father and mother. She further stated that the testatrix had told her in contradiction of the terms of the will that she wished to be buried in Santa Cruz, but that the clause in the will providing for the erection of the mausoleum in San Mateo county had been suggested by her attorney. The latter, however, denied ever having made any such suggestion.

The trial court's decision in the matter, from which this appeal has been taken by the trustees, embodies a written opinion theretofore filed by the court setting forth its findings and conclusions. The opinion reads as follows: "In view of the refusal of Mrs. Younger, as surviving next of kin of the deceased, to permit the removal of deceased's body from Santa Cruz I have been reluctantly forced to the conclusion that under Enos v. Snyder, 131 Cal. 68, 63 P. 170, 53 L.R.A. 221, 82 Am.St.Rep. 330, the testamentary trust for burial cannot be carried out. I must therefore direct the trustees to pay the trust funds to the persons and in the proportions provided, in the clause of the decree of distribution creating the trust, for the payment of any residue remaining. I have no sympathy with the rule announced in Enos v. Snyder. I feel strongly that a testator's wishes for the disposition of his body expressed in his will should be carried out. But the reasoning adopted by the Supreme Court in deciding the Enos Case is so sweeping that I cannot undertake to distinguish it. But while I may feel bound by that decision the Supreme Court need not, and I strongly recommend to the trustees that they take an appeal in an attempt to carry out the wishes of the testatrix. In re Estate of Duffill, 188 Cal. 536, 206 P. 42; In re Estate of Gartenlaub, 185 Cal. 648, 198 P. 209, 16 A.L.R. 520. This is one case in which I would wel-

come a reversal." And in accordance with said written opinion, the trust fund was ordered distributed as part of the residue of the estate, to wit, 50 per cent. to Ruth Ready, 15 per cent. to Teresa Hihn, and the remaining 35 per cent. to Mrs. Younger's children.

We are unable to agree with the trial court's conclusion that the decision in Enos v. Snyder, supra, is controlling in the present situation first, because said decision is based upon facts essentially different from those of the case here presented. There the testator was survived by a widow with whom he had not lived for several years immediately preceding his death. During that time he resided at the house of a Mrs. Snyder, who was in no way related to him; and he died in her home. By his last will the testator directed that the time, place, and manner of burial of his body should be "according to the wishes and directions" of Mrs. Snyder. It will be seen, therefore, that unlike the present case the testator there did not in the slightest way intimate in his will what his wishes were as to the place and manner of burial of his remains, but he attempted to delegate these matters to a nonrelative; and it was held that as between the wishes of his widow and those of Mrs. Snyder, the wishes of the widow were paramount.

Secondly, the "sweeping reasoning" adopted in that case, which is referred to by the trial court and upon which it based its decision, is clearly dictum, the effect of which is that in no case may the testamentary wishes of a decedent as to the manner and place of his burial be judicially enforced as against the contrary wishes of the next of kin, however remote the relationship may be; and such dictum, as shown by said decision, is based upon the strict, ancient English doctrine that there can be no property in a dead body (Williams v. Williams, L.R. 20 Ch.Div. 659); whereas, as will hereinafter be shown, the great weight of authority in this country is to the effect that so far as burial purposes are concerned, a person does possess certain elements of proprietary interest in his body, sufficient to enable him to make a valid direction as to the place and manner of interment, which directions, if they be reasonable and appropriate, may be judicially enforced. It was expressly so declared in this state in the case of O'Donnell v. Slack, 123 Cal. 285, 55 P. 906, 907, 43 L.R.A. 388, wherein the Supreme Court said that although the body of one whose estate is in probate unquestionably forms no part of the property of the estate, it "is recognized that the individual has a sufficient proprietary interest in his own body after his death to be able to make valid and binding testamentary disposition of it," and that the "court in probate and the personal representative acquire jurisdiction from the last testament to see that its provisions in this regard, as in all others, are duly executed." In other words, as stated by the author of the opinion in the leading case of Pettigrew v. Pettigrew, 207 Pa. 313, 56 A. 878, 879, 64 L.R.A. 179, 99 Am.St.Rep. 795: "It is commonly said, being repeated from the early cases in England, where the whole matter of burials was under the jurisdiction of the ecclesiastical courts, that there can be no property in a corpse. But, inasmuch as there is a legally recognized right of custody, control, and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. Whether, however, the rights be called 'property' or not is manifestly a question of words, rather than of substance." And in that case and in several others of equal prominence, among them being Wood v. E. R. Butterworth & Sons, 65 Wash. 344, 118 P. 212, wherein many of the outstanding authorities upon the subject are reviewed and discussed, it is forcefully pointed out that the clear trend of American authority is contrary to the strict, ancient English rule, and that it is now held universally in this country that whenever a dispute arises as to the manner or place of burial of a body as between relatives of the deceased or some of them, and the wishes of the deceased as expressed by him in his will or otherwise, there is presented a proper subject for judicial determination, which will be decided by the courts on the merits in accordance with the principles of equity and such considerations of propriety and justice as arise out of the particular circumstances of each case; and that although such a dispute is of a nature that no hard and fast rule may be applied alike to all cases, and that consequently the court's decision should be controlled by the inherent equities of the particular case, having due regard to the interests of the

public, the wishes of the deceased and the feelings of those entitled to be heard by reason of relationship or association, nevertheless, under the generally accepted rule that a person can make a testamentary disposition of his remains, if considerations of propriety and decency do not intervene, the chancellor should give heed to the wishes of the deceased if they can be ascertained; that it always has been and will ever continue to be the duty of the courts to see to it that the expressed wishes of one as to his final resting place, shall, so far as possible, be carried out. And the following cases are cited as setting forth the principle that where there is a controversy about the matter, the wishes of the deceased person, if ascertained, should be given controlling force: 13 Cyc. 271; In re Richardson, 29 Misc. 367, 60 N.Y.S. 539; Matter of Bratt, 10 Misc. 491, 32 N.Y.S. 168, 169; In re Donn (Sup.) 14 N. Y.S. 189; Wilson v. Read, 74 N.H. 322, 68 A. 37, 16 L.R.A.(N.S.) 332, 124 Am.St. Rep. 973; Pierce v. Proprietors of Cemetery, 10 R.I. 227, 14 Am.Rep. 667. To the same effect, see Thompson v. Deeds, 93 Iowa, 228, 61 N.W. 842, 35 L.R.A. 56; Yome v. Gorman, 242 N.Y. 395, 152 N.E. 126, 47 A.L.R. 1165; Sacred Heart Church v. Soklowski, 159 Minn. 331, 199 N.W. 81, 33 A.L.R. 1427; 14 L.R.A. 85, note; 3 Ann.Cas. 135, note; 8 R.C.L. § 7, p. 687; § 11, p. 690; 17 Cor.Jur. 1138.

Thirdly, the remaining ground upon which the decision in Enos v. Snyder was placed is that by penal statute existing at that time (section 292, Pen.Code) the duty of burying the body of a deceased person devolved upon certain relatives specified therein, which, in the Enos Case was the surviving widow; and that it was further provided in section 294 of said Code that the persons charged with such duty were "entitled to the custody of such body for the purpose of burying it." These Code sections have since been repealed, however (Stats.1931, p. 2451), and under the present law (Stats.1931, p. 2434) no such duty of burial is imposed nor right of possession of the body given where "other directions shall have been made therefor by the deceased." Section 21 (page 2445).

Appellant also raises the point that the objection now made by Mrs. Younger to the enforcement of the terms of the twelfth clause of said will constitute an attack upon the validity of that clause, and that since she filed no contest to the will nor to any part thereof, and took no appeal from the final decree of distribution, she is precluded now from making such an attack. In view, however, of the conclusion we have reached on the other branch of the case, we do not find it necessary to inquire into this latter point.

Therefore, since in our opinion the decision in Enos v. Snyder, supra, does not have the effect of denying to the trial court herein the judicial power to enforce the wishes of the testatrix as expressed by her in the twelfth clause of her will, in so far as they relate to the building of the mausoleum and the removal thereto of her remains and those of her predeceased husband and predeceased child, and inasmuch as the trial court has already determined that, if legally possible, the wishes of the testatrix in the respect above mentioned should be carried out, the decree from which the appeal herein was taken is reversed, and it is ordered that a new decree be entered whereunder the terms of said twelfth clause, in the respects above mentioned, may be appropriately executed.



13 Cal.App.2d 625

LOTTS et al. v. BOARD OF PARK COM'RS OF CITY OF LOS ANGELES et al.

Civ. No. 10371.

District Court of Appeal, Second District, Division 1, California.

May 1, 1936.

As Modified on Denial of Rehearing May 28, 1936.

Hearing Denied by Supreme Court June 29, 1936.

1. Municipal corporations ⇐210

Transfer of certain civil service employees of city park department from full-time to half-time employment without cause *held* "removal" or "suspension" within prohibition of city charter, entitling such employees to reinstatement as full-time employees, especially where transfer was not made to curtail expenses and others were employed in place of transferred employees.

"Removal" is the act of a person or body having lawful authority thereto in depriving one of an office to which he was ap-

pointed or elected, and word is commonly applied to a change from one position to another. "Suspension" is a temporary delay, interruption, or cessation as of labor or temporary forced withdrawal of the exercise of official powers or prerogatives.

[Ed. Note.—For other definitions of "Remove; Removal" and "Suspend; Suspension," see Words & Phrases.]

2. Mandamus ⇐77(1)

Where board acts arbitrarily against vested rights of individuals, mandamus will lie to compel a recognition by such board of such rights, and conformity by board with laws governing procedure prescribed for terminating vested right of employee to a position held under civil service regulations (Code Civ. Proc. § 1085).

3. Mandamus ⇐77(4)

Where certain civil service employees of city park department were arbitrarily transferred without cause and without charter authority from full-time to half-time employment, mandamus would lie to compel reinstatement of such employees to their former positions (Code Civ.Proc. § 1085).

4. Municipal corporations ⇐864(1)

Back salary due city employees who had been wrongfully transferred from full-time to part-time employment *held* not "indebtedness" within Constitution prohibiting city from incurring any indebtedness exceeding in any year income and revenue provided for such year (Const. art. 11, § 18).

[Ed. Note.—For other definitions of "Indebted; Indebtedness," see Words & Phrases.]

5. Mandamus ⇐187(4)

Defense of laches in proceeding for writ of mandate by city employees who had been wrongfully transferred from full-time to part-time employment to compel the city to reinstate them in their former positions could not be raised for first time on appeal.

6. Mandamus ⇐187(4)

Contention that question of reinstatement of city employees who had been wrongfully transferred from full-time to part-time employment had become moot because of the removal of such employees for cause by serving employees with appropriate notices could not be raised for first time on appeal.

7. Appeal and error ⇐761

Questions raised for first time in oral argument before appellate court or for first time in appellants' reply brief will not be considered by appellate court.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Proceeding for writ of mandate by William Lotts and others against the Board of Park Commissioners of the City of Los Angeles and Mrs. Mabel V. Socha, Roy S. Stockton, Ernest E. Duque, Henry W. Bruce, Frank Merrill, as members thereof, and others. From a judgment granting the writ, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., and Frederick Von Schrader, and Leon T. David, Asst. City Attys., all of Los Angeles, for appellants.

Delvy T. Walton, of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an appeal from a judgment of the superior court declaring that petitioners are entitled to a peremptory writ of mandate ordering their reinstatement to full-time positions in the department of parks of the city of Los Angeles, upon full pay; and further directing the said city to draw warrants in favor of petitioners for the difference in wages between those paid and those appurtenant to full-time employment.

The record discloses that on June 26, 1931, the council of the city of Los Angeles passed Ordinance No. 69872, providing for the creation of half-time positions in what is known as the classified service, and further providing that the general manager, officer, or board having the power of appointment in any department of the city should have the authority to order the employment of persons on a half-time basis, and to reduce the compensation of such persons according to the provisions of the ordinance. The ordinance further declared by its terms that such half-time positions were to be filled by persons who had been in the service of the city of Los Angeles for at least five years previous, where they were still able to render service satisfactory in quality, but where, because of advanced years or injury, such work was less than standard quantity. By its terms the ordinance further provided that before any reduction in compensation could

be made, the board of commissioners in any department should approve the same, and the general manager or personnel employee of such department should file with said board a report, showing that a careful investigation had been made relative to the work of such persons, and recommending such reduction. The council, in enacting the ordinance, did so as an emergency measure, stating therein that a great number of persons employed by the city were still able to render service satisfactory in quality, but, because of advanced age or injury, of less than standard quantity, and that the retention of such employees on a full-time basis would be detrimental to the public welfare. It is conceded that nowhere in the charter of the city of Los Angeles is any provision made for retirement on pension of employees such as petitioners herein, and therefore this ordinance was not adopted pursuant to any pension or retirement system, but must depend for its validity upon the general powers granted to the city and to its council, as well as the limitations provided in the charter.

It appears from the record that the department of parks of the city of Los Angeles is one of the semiautonomous divisions of the city mentioned in such ordinance; that is to say, the funds for its operation are automatically allotted to it by virtue of the requirement that not less than a 7-cent levy be allocated for its support every year. The balance of the funds for its operation comes from budgetary appropriations in aid of its work made by the city council, but, except as expressly granted by charter, the council has no control over its operations. The respondent board of park commissioners has full control over the appropriation of funds and over all park operations, and its powers are exercised by order or resolution, while its administrative operations are in charge of a general manager. Provisions of the charter authorize the department of parks to prepare its own budget and expend the funds of the department in accordance with the budgetary appropriation. The respondent board of park commissioners is also authorized by the said charter to "create the necessary positions in said department, authorize the necessary deputies, assistants and employees, and fix their salaries and duties. * * *"

In the spring of 1932 it appears that the park department employed several hundred employees. Proceeding under the terms of the above-mentioned ordinance, the board of park commissioners, in providing a budget for the fiscal year 1932–1933, created half-time positions, and notified petitioners herein that they would be placed upon a half-time basis. The respondent board of park commissioners adopted various resolutions, predicated on the aforementioned ordinance, and reciting that the employees named therein were able to render service satisfactory in quality, but, because of advanced years or injury, of less than standard quantity, and directing that such employees be placed on half-time work at a reduced salary. Thereafter the petitioners (respondents herein) demanded that they be reinstated to full-time positions at full-time salaries, and upon denial of their applications for reinstatement petitioners commenced this proceeding.

By their petition for a writ of mandate petitioners contend that any reduction of hours or compensation constitutes a discharge from the position held by them prior to the initial action taken in 1932, and contend that placing petitioners on half-time work was in defiance of the terms of sections 112(a) and 125 of the Charter of the city of Los Angeles. The trial court found that the action of respondent board of park commissioners and the department of parks, in placing petitioners upon half-time work, constituted a removal, suspension, and lay-off, and deprived petitioners of their regular full-time employment, while some 300 or more employees of the same civil service grade or class were continued on a regular full-time basis; that this action constituted a discrimination against petitioners under the classified civil service positions held by each of them, and that such action, not having been taken in accordance with civil service regulations, was illegal and void, and entitled petitioners to a writ of mandate directing their reinstatement to full-time positions and payment to them of the difference in salaries actually received by them for their half-time work and the amount that would have been received by them as salaries had they been continued on a full-time basis. Judgment was entered accordingly.

Petitioners were regularly appointed civil service employees of the city of Los Angeles, assigned to permanent duty in the department of parks of said city, where

they had been employed for periods ranging from something over four to twenty-two years, and classified in such service as foreman, gardeners, and assistant gardeners.

Section 112(a) of the Los Angeles City Charter provides that any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge, or suspend any officer, member, or employee of such department, subject, however, to the restraint that no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged, or suspended except for cause, which cause shall be stated in writing by the board or officer having the power to make such removal, discharge, or suspension, and filed with the board of civil service commissioners with certification that a copy of such statement has been served upon the person or employee so removed, discharged, or suspended, personally, or by leaving a copy thereof at his last known place of residence, if such employee cannot be found. This section of the city charter then goes on to say that upon such filing, the removal, discharge, or suspension of the employee shall take effect. The same section then goes on to provide that within fifteen days after such statement shall have been filed the board of civil service commissioners may, upon its own motion, or upon written application of the employee removed, discharged, or suspended, proceed to investigate the grounds for such removal, discharge, or suspension. This section further empowers the board of civil service commissioners, if they find that the grounds stated for such removal, discharge, or suspension were insufficient or were not sustained, and that the discharged employee is a fit and suitable person to fill the position from which he was removed, to cause his reinstatement or restoration to duty. Said section further provides that if the board of civil service commissioners, after hearing, shall order the reinstatement of a removed, discharged, or suspended employee, such employee shall be entitled to receive compensation from the city, the same as if he had not been removed, discharged, or suspended by the appointing board or officer.

Section 125 of the Los Angeles City Charter provides that whenever an employee shall be suspended because of lack of work, lack of funds, or abolishment of his position, or otherwise, excepting suspension for personal delinquency, the reinstatement of employees so suspended for reasons other than personal delinquency shall be based upon seniority. This section further provides that in case of suspension for other than personal delinquency, the person having the shortest length of service in such civil service classification shall be suspended first, and that any person so suspended shall be entitled to displace the person holding the position in a class-group in which a regular position was formerly held by the person so suspended who has a shorter length of service in such class-group and in classes of higher rank.

Pursuant to the aforesaid charter provisions, the board of civil service commissioners adopted rules and regulations defining the procedure available to employees to obtain an investigation by the board of civil service commissioners of the grounds for such removal, discharge or suspension.

Appellants assail the judgment mainly on the ground that the action of the board of park commissioners in placing the petitioners on a half-day basis did not constitute a removal, discharge, or suspension under section 112 (a), supra, of the City Charter, and that the council of the city of Los Angeles acted within its rights in adopting the aforementioned ordinance and that the respondent board of park commissioners, in proceeding thereunder to change the status of petitioners from full-time employees to half-time workers acted legally and within its rights; arguing in support thereof that the appellant board of park commissioners, by virtue of its own power of employment, its own power to manage its department, its autonomous control of its own funds, and in the absence of any charter provisions providing for retirement of its superannuated employees, has ample authority to provide half-time positions within each grade of classified service, to which those who are physically unable to perform a full day's service may be assigned, allowing them, as appellants urge, to earn some salary in lieu of the pension which the citizens of Los Angeles have not seen fit to provide. We are of the opinion that however laudable

may be the motives, or however humane and kindly may be the objectives, of the city counsel and the board of park commissioners, nevertheless, the charter limitations and legal restraints upon such official action may not be brushed aside upon the plea that good, perchance, may follow. Such philosophy finds no countenance in the American system of government.

[1] We must now determine whether the transfer of petitioners from full-time employment to half-time work constituted a removal, suspension, or dismissal from the classified positions held by them, and whether they were entitled to retain their full-time positions unless removed for cause in accordance with civil service regulations. Webster's New International Dictionary (1931) defines removal as "the act of a person or body having lawful authority thereto, in depriving one of an office to which he was appointed or elected." Words and Phrases, Third Series, vol. 6, p. 688, is authority for the statement that "removal is commonly applied to a change from one position to another." In Webster's Dictionary, supra, suspension is defined as "a temporary delay, interruption, or cessation, as of labor; temporary forced withdrawal of the exercise of official powers, prerogatives," etc. Therefore, when, as in the instant case, the board of park commissioners transferred petitioners from full-time positions to half-time work and proceeded to fill the vacated full-time positions with other employees taken from the civil service list, it seems to us that petitioners were removed from their positions, and that such removal could only be accomplished for cause and in conformity with the charter provisions governing the removal of classified civil service employees. To hold otherwise would be to say that any classified civil service employee in the park department, after years of service, in good health, perfectly capable of discharging the duties of his position, whose behavior has been excellent, and against whom no charges are made, may nevertheless by resolution of the board of park commissioners be placed in a half-time position and his salary reduced one-half, and then assigned, as petitioners herein were, to precisely the same duties he discharged before he was placed on half-time work, and his full-time position filled by the park board with someone else. We think this cannot be justly said to be the exercise either of the power to regulate and define the duties of employees in the park department or of the simple power to fix their salaries. That such a power would be, in the present case, in good hands, and that no arbitrary or improper action on the part of the board would result from its exercise, may be fully conceded. It is a question simply whether under the city charter and laws the power has in fact been granted, and upon a careful examination we are compelled to say we think it has not. If the power generally to fix salaries were held to include this right of discrimination, then under that power the board could, notwithstanding civil service classification, reduce the salaries of employees in some cases to a very nominal amount, and require of such employees the preformance of precisely the same duties as other employees, the latter of whom would be receiving a higher salary. In this way the provision of the law that entitles classified civil service employees to a notice of their removal and a statement of the cause therefor, and giving them the right to make written application to the board of civil service commissioners for an investigation of the grounds of their removal, discharge or suspension, could be easily nullified. We do not dispute the right of the board to reduce the salaries or the hours of labor of all park department employees within a given classification, but we think it clearly illegal and a violation of the vested rights of employees for the board of park commissioners to transfer certain employees to half-time work at a reduced salary and permit other employees in the same grade or civil service classification to continue at full-time work, and then proceed to fill the vacated positions with other civil service eligibles. To so arbitrarily reduce the status of petitioners from that of full-time employees to that of half-time employees, with a consequent reduction in compensation, served to violate and nullify the provisions of section 112 (a) of the charter, which provides that no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended, except for cause, which cause shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the board of civil service commissioners, with certification that a copy of such statement has been served upon the person or employee so removed, discharged or suspended, personally, or by leaving a copy thereof at his last

known place of residence, if such employee cannot be found; and further providing that within 15 days after such statement shall have been filed the board of civil service commissioners may, upon its own motion or upon written application of the employee removed, discharged or suspended, proceed to investigate the grounds for such removal, discharge or suspension. Klein v. Board of Education of City and County of San Francisco, 1 Cal.(2d) 706, 37 P.(2d) 74; People ex rel. Gillespie v. Bundesen et al., 277 Ill.App. 169; Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042; Mitchell v. Board of Trustees of Visalia Union High School District, 5 Cal.App.(2d) 64, 42 P.(2d) 397; Bois v. Mayor of City of Fall River, 257 Mass. 471, 154 N.E. 270; Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682. If, as contended by appellants, these petitioners, by reason of the infirmities of age, or otherwise, have become inefficient or incapable of performing their usual duties as gardeners or assistant gardeners in the park department, their removal may be accomplished pursuant to the provisions of the city charter and the civil service regulations; but they are entitled, under the charter provisions, to be informed in writing of the charges made against them and to make application to the board of civil service commissioners to investigate the grounds for such removal, discharge or suspension. To hold otherwise would be to vitiate and destroy every semblance of protection intended to be afforded by the spirit of civil service.

We are cited by both appellants and respondents to the case of Kabisius v. Board of Playground and Recreation of City of Los Angeles (Cal.App.) 39 P.(2d) 264, reversing a judgment of the superior court denying a writ of mandate to compel the reinstatement of Kabisius to duty as a beach guard. In this case however, a hearing was granted by the Supreme Court, and subsequent to the filing of the final brief in the instant case the Supreme Court, in deciding the Kabisius Case, affirmed the judgment of the superior court denying the issuance of the writ. 50 P.(2d) 1040. We have read the Supreme Court decision in the Kabisius Case, but find no analogy between the facts therein and the facts of the case before us. In the Kabisius Case the services of the employee were terminated by reason of reduction of force for lack of work and lack of funds, and as the Supreme Court observes in its opinion, section 112 (a) of the Charter of the city of Los Angeles provides that the order of any appointing board or officer terminating the services of an employee because of lack of funds in such department shall be final and not be subject to review by the board of civil service commissioners. In the case before us there is no question of lack of funds or reduction in force, because the evidence in the instant case shows that after the respondents herein were demoted to half-time positions the board of park commissioners proceeded to fill the vacated full-time positions with other eligible civil service employees.

[2, 3] Appellants contend that the writ of mandamus may not be resorted to as a means of coercing a board, officer of inferior tribunal's discretion; that mandamus may compel a board to exercise its discretion, but cannot direct the manner in which such discretion shall be exercised; and appellants argue that what the board of park commissioners did was merely a discretionary exercise of power, and that therefore the courts have no authority to review the board's action in that regard. Conceding the correctness of this principle, still it has been uniformly held that if a board or commission acts arbitrarily against the vested rights of individuals under the law, and therefore against the law itself, the board has not strictly, as is frequently said, "abused its discretion"—a term which is responsible for some confusion of ideas on this subject—but in contemplation of law, under those circumstances, the board has not exercised its discretion at all, but has sought to substitute its arbitrary determination in opposition to rights guaranteed individuals by law. In such cases the courts will by mandamus compel a recognition by the board or commission of the individual's rights and conformity by the board with the laws governing the procedure prescribed for terminating the vested right of an employee to a position held under civil service regulations. Where, as in the instant case, petitioners were arbitrarily displaced from a position to which they had been regularly appointed, and such displacement was accomplished without conformity with the charter provisions governing removal, the writ of mandamus will lie to compel the reinstatement to their positions of employees thus arbitrarily and illegally removed. Section 1085 of the Code of Civil Procedure is authority for resort to the writ of mandamus to compel the admission of a party to the use and enjoy-

ment of a right or office to which he is entitled, and from which he is unlawfully precluded by a board, tribunal, or officer. Spring Valley Water Works v. City of San Francisco, 82 Cal. 286, 22 P. 910, 1046, 6 L.R.A. 756, 16 Am.St.Rep. 116; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; Raisch v. Board of Education, 81 Cal. 542, 22 P. 890; Wood v. Strother, 76 Cal. 545, 548, 18 P. 766, 9 Am.St.Rep. 249.

[4] Appellants' next contention is that the portion of the judgment directing the city of Los Angeles to draw its warrants in favor of petitioners for the difference in salary actually received by them as half-time employees and that due them as full-time employees cannot be enforced and is invalid in the absence of proof of the availability of funds. It is appellants' contention that payment of the claims of petitioners out of revenues for 1934 to 1936 is forbidden by article 11, section 18, of our State Constitution, prohibiting the city or any of its independent boards from incurring any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the consent of the electors. Appellants argue that there is no evidence or allegation of the availability of such funds in the instant case, and that in the absence of such funds appellants' controller, treasurer, and board are forbidden by law to issue warrants or to pay them, as commanded by the judgment herein. While it is our opinion that appellants are foreclosed from raising this contention for the first time on appeal, and that failure of petitioners to allege in their petition the condition of the funds of the city did not render it demurrable, as this was a matter of defense if it existed (Kennedy v. City of Gustine, 199 Cal. 251, 256, 248 P. 910); still, even though the city had set this up as a defense we do not feel that such a defense is tenable under the facts of this case. It has been repeatedly held by the courts of this state that section 18 of article 11 of the Constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred—that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Lewis v. Widber, 99 Cal. 412, 33 P. 1128. The clear intent expressed in the constitutional clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur, and in our opinion the salary due an employee is an obligation of the city not responsive to section 18 of article 11 of the Constitution. In City of Long Beach v. Lisenby, 180 Cal. 52, 55, 56, 57, 179 P. 198, the Supreme Court deals exhaustively with the history of this constitutional provision, commencing with the debates in the constitutional convention, and concludes that the application of this provision is limited to those forms of indebtedness and liability which may have been created by the voluntary action of the officials in charge of the affairs of such city, and that it has no application to cases of indebtedness or liability imposed by law or arising out of tort. Clearly the facts in the instant case place it without the pale of the inhibition of the constitutional provision.

[5] The next point made by appellants is that petitioners herein are barred by laches. This claim on the part of appellants was not raised by their answer or amendment to their answer to the petition for the writ of mandamus in the lower court. Such defense cannot be raised for the first time on appeal, but should have been presented in some manner to the trial court, so that petitioners might have an opportunity to meet it by proofs. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 P. 21; La Shells v. Hench, 98 Cal.App. 6, 15, 276 P. 377; Elliott v. Pardee, 149 Cal. 516, 86 P. 1087; 10 Cal.Jur. 556.

[6, 7] Appellants in the oral argument of this cause and in their reply brief for the first time contended that the question of reinstatement of petitioners herein is moot. So far as we can gather from the discussion in the briefs, it would appear that after the trial court rendered judgment in favor of petitioners, which included a mandate for their reinstatement, appellants proceeded, in accordance with the provisions of the charter of the city of Los Angeles, to remove petitioners from their positions for cause, by serving upon them appropriate notices. Questions raised for the first time in the oral argument before the appellate court or for the first time in appellants' reply brief will not be considered by us.

For the foregoing reasons, the judgment should be, and the same is, hereby affirmed. The attempted appeal "from all other appealable orders made in the said proceeding" is dismissed.

We concur: HOUSER, P. J.; YORK, J.

13 Cal.App.2d 573

TURNER v. REDWOOD MUT. LIFE ASS'N OF FRESNO.

Civ. 1769.

District Court of Appeal, Fourth District, California.

April 29, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Witnesses ⇐208(1)

Statute relating to privileged communications between physician and patient should be liberally construed in favor of patient (Code Civ.Proc. § 1881, subd. 4).

2. Witnesses ⇐219(6)

Provisions in application for life policy waiving privilege of physician and patient by insured would be strictly construed against insurer where insurer sought to avoid liability under policy by means of evidence of physicians of insured, since application and policy were prepared by insurer and such provisions were sought to forfeit policy (Code Civ.Proc. § 1881, subd. 4).

3. Insurance ⇐389(9)

Where insured in application for life policy containing waiver of privilege between physician and patient revealed an illness and treatment by named physicians that occurred at same time as operation which she did not mention, and insurer made no investigation but accepted payments for six years, insurer *held* estopped from asserting purported fraud in such misstatement and introducing evidence by physicians who attended insured (Code Civ. Proc. § 1881, subd. 4).

4. Insurance ⇐388(4)

Where death assessments were accepted late on four occasions and application for reinstatement was made on only one occasion, and then without insured's knowledge, insurer waived right to forfeit policy because of late payments.

5. Insurance ⇐365(2)

Where application for reinstatement of life policy was not necessary to keep policy in force because of acceptance by insurer of late payments, misstatement in application, which application was made without insured's knowledge, was not ground for avoiding liability on policy.

6. Insurance ⇐291(3)

Liability on life policy could not be avoided on ground of alleged fraud by insured in misrepresenting condition of health in application, where it was not shown that insured knew of ailment from which she was supposed to be suffering at time of and prior to issuance of policy.

7. Appeal and error ⇐692(1)

Where record on appeal contained neither death certificate nor a summary of its contents, alleged prejudicial error in striking out certificate during trial of action on life policy could not be considered.

8. Appeal and error ⇐901

Appellant must supply a sufficient record upon which appellate court may determine prejudicial nature of any alleged erroneous ruling of trial court.

9. Pleading ⇐122

Denial upon information and belief, or for lack of information and belief, of an allegation in a verified complaint where facts alleged and attempted to be denied are within actual knowledge of defendant, raises no issue and is in effect an admission of truth of allegation.

10. Pleading ⇐122

In suit on life policy, denial upon information and belief that members of mutual life association in good standing at time of death of insured were sufficient in number to pay maximum amount collectible on policy did not raise an issue and admitted truth of allegation, so that judgment for maximum amount of policy was not error.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by John Turner against the Redwood Mutual Life Association of Fresno, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clyde E. Cate, of Fresno, for appellant.

Sutherland, Dearing & Jertberg, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff recovered on a policy of life insurance issued October 19, 1928, by defendant upon the life of Maude Turner, who died on October 23, 1934. The statement of the question for decision on

this appeal, required by section two of rule VIII, Rules of the Supreme Court and District Courts of Appeal, is thus stated by defendant on the first page of his opening brief: "Is the privilege of confidential communications created by Section 1881, subdivision 4 of the Code of Civil Procedure of the State of California (Physician and client) waived for all purposes when it appears that a written waiver is given by the insured to an insurance association?"

Under date of October 18, 1928, Mrs. Turner signed an application for membership in the defendant corporation for a policy of insurance. The application was granted and the policy issued the following day without medical examination. The policy incorporated the application by reference. The application contained the following provision: "I hereby authorize any doctor at any time to give to said association any information he or she may have regarding me." The following questions were asked and answered: "What doctors have you consulted during last three years? Dr. Newton & Vanderburg. From what illnesses have you suffered during the last three years? Droppage of bladder (fully recovered). * * * Have you ever had an operation? Operation for small rupture, 1921 * * * I am * * * in good health and so far as I know have no disease or other condition that would prevent me from obtaining life insurance."

The answer sought to relieve defendant from liability under its policy because of alleged fraud on the part of the insured in making untrue answers in her application for the policy and in an application for its reinstatement made July 10, 1934. Defendant asserts that Mrs. Turner had suffered from twenty-three ailments during the period between October 18, 1925, three years prior to the date of the application, and the date of her death, and that these were concealed from defendant, constituting fraud on her part voiding the insurance. It sought to support this defense by the evidence of the physicians who had attended Mrs. Turner. The trial court excluded the evidence of these witnesses under the provisions of subdivision 4 of section 1881 of the Code of Civil Procedure. Defendant maintains that the provisions of this section were waived by Mrs. Turner by the quoted paragraph in her application for insurance and that the testimony of the physicians who had treated her was therefore admissible. The precise question seems to be a new one in California. It must be admitted there is considerable authority from other jurisdictions supporting the position of defendant.

[1, 2] In approaching the question we must bear in mind two well-settled rules of construction in California: (1) That the provisions of subdivision 4 of section 1881 of the Code of Civil Procedure should be liberally construed in favor of the patient, Kramer v. Policy Holders' Life Ins. Ass'n, 5 Cal.App.(2d) 380, 42 P.(2d) 665; McRae v. Erickson, 1 Cal.App. 326, 82 P. 209, and (2) that as the application and insurance policy were both prepared by the insurance carrier and the provisions here in question are invoked to forfeit the policy, their terms should be strictly construed aganst it, Witherow v. United American Ins. Co., 101 Cal.App. 334, 281 P. 668.

A very similar situation under a statute quite like subdivision 4 of section 1881 of the Code of Civil Procedure, where the policy of insurance contained a waiver of the privilege of physicians, was before the Supreme Court of Iowa in the case of Pride v. Inter-State Business Men's Acc. Ass'n of Des Moines, 207 Iowa, 167, 216 N.W. 62, 66, 62 A.L.R. 31. That court said:

"It is contended by appellant that by such application the insured waived the privilege of the statute on confidential communication. It is undoubtedly true that a patient may waive his privilege, and that he may do so by contract in advance. But it is contended by appellee that the proviso above quoted has no application to the particular question before us. It will be noted from a reading of the quoted proviso that the waiver speaks in the present and in the past tense, and that it does not in terms refer to future communications. The appellant construes this proviso as though it read as follows:

" 'In so far as you are permitted to do so under the laws of the state in which you now reside, for yourself and for your beneficiary do you consent that any physician or surgeon who has been consulted by you (or may hereafter be consulted by you) may be examined,' etc. (The parenthesis is ours.)

"We think appellee's position is well taken, and that the insured did not purport to waive the confidence of communications which he might thereafter make. The parenthetical words are not in the proviso, and the appellant is not entitled to enlarge, by interpretation, the policy which was formulated by itself."

The Supreme Court of Michigan also considered the same question in the case of Gilchrist v. Mystic Workers of the World, 196 Mich. 247, 163 N.W. 10, and went so far as to hold that the waiver was against public policy and void. See, also, Robinson v. Supreme Commandery, 38 Misc. 97, 77 N.Y.S. 111; Meyer v. Supreme Lodge, Knights of Pythias, 82 App. Div. 359, 81 N.Y.S. 813; Meyer v. Supreme Lodge, K. of P., 178 N.Y. 63, 70 N.E. 111, 64 L.R.A. 839; Supreme Lodge, K. of P., v. Meyer, 198 U.S. 508, 25 S.Ct. 754, 49 L.Ed. 1146.

In the case of Geare v. United States Life Ins. Co., 66 Minn. 91, 68 N.W. 731, the Supreme Court of Minnesota had a similar question before it. It was there held that the waiver did not extend to any communications made after the date of the policy and that an application for reinstatement reverted back to the date of the policy and did not constitute a new waiver.

[3] Under the foregoing rules, the only illness of deceased which the proffer of proof shows to be material here, and which was not disclosed in the application for insurance, was an operation performed on deceased in 1926. It should be remembered that plaintiff disclosed an operation in 1921 and stated that she had suffered from "droppage of bladder" within three years prior to October 18, 1928. While the proffer of proof shows that the operation in 1926 was not on Mrs. Turner's bladder, but an organ in close proximity to it, there is nothing to show that she did not believe it was on her bladder and not on another organ. She gave the names of her attending physicians, and defendant could have ascertained the exact nature of her illness and treatment had it sought that information before it issued its policy. There is nothing to show that the operation was not a complete success and that she had not "fully recovered" from that illness as stated in the application.

As we have observed, defendant did not require an examination by a physician of any of its policyholders. It issued its policies upon the statements contained in the applications and in the instant case one day after the date of the application which informed defendant that the applicant had suffered an illness and had been treated by physicians within the specified period of three years. Defendant had placed at its disposal the exact source from which it could obtain the information which it now maintains was withheld from it. It did not choose to make any inquiry, but issued its policy with extreme promptness, to say the least, and accepted deceased's money for six years, during all of which time defendant led her to believe she had a valid and enforceable policy of insurance on her life. Under such circumstances, defendant should not be permitted to come into court after death had sealed the insured's lips and prevented her from explaining, if she could, why she did not mention an operation in 1926, when she did mention an illness and treatment by physicians which, we conclude from the evidence and proffer of proof, occurred at the same time as the operation. The illness and some treatment, though not the correct organ involved, were disclosed, and only the fact of an operation to effect a cure was withheld. As defendant made no investigation when it should and could have, and as it issued its policy of insurance, accepted Mrs. Turner's money for six years, and lulled her into the secure belief that she had a valid policy of life insurance, it must be held that it waived the misstatement in the application and is now estopped from asserting the purported fraud.

[4, 5] Defendant bases its defense upon the further fact that in July, 1934, an application for reinstatement was filed in which it was stated that Mrs. Turner was in good health and had not consulted any physicians, when it could prove by attending physicians, if permitted, that those statements were false. The evidence shows this application was not signed by Mrs. Turner. There is nothing to show that she knew anything about it. The record discloses that her adopted son went to the office of defendant in Fresno and was requested by an employee in charge of reinstatement to make out and sign the application, which he did in the presence of the employee and paid the premium on the policy. Mrs. Turner was not in Fresno at that time. The statements in this ap-

plication show that they relate more to the son than to Mrs. Turner.

The record shows that on the 15th of each month defendant mailed Mrs. Turner a death assessment notice requiring payment of a death assessment on the 1st of each succeeding month. On each notice was printed, "If not paid within fifteen days from date mailed, insurance will lapse." The records introduced by defendant show that the death assessment was paid by Mrs. Turner on the 1st of the month on but four occasions. On all others it was paid and accepted on later dates, and only on the one occasion was an application for reinstatement made, and, in so far as we know, Mrs. Turner knew nothing about that instance. Under these facts, the defendant waived the right to forfeit the policy because the death payments were made after the dates upon which they were due and the application for reinstatement signed by the son was not necessary to continue the policy in force. Vinther v. Sunset Mutual Life Ins. Co. (Cal.App.) 53 P.(2d) 182; Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 56 P. 773; Bryson v. National Travelers Cas. Co., 206 Cal. 475, 274 P. 957.

[6] A further ground exists for rejecting many of defendant's contentions of fraud practiced by Mrs. Turner, as it fails to appear that she knew of the ailment from which she was supposed to be suffering at the time of and prior to the issuance of the policy, except "droppage of bladder," which she disclosed, as well as others prior to filing the application for reinstatement. In the case of Wills v. Policy Holders Life Ins. Ass'n (Cal.App.) 55 P.(2d) 920, 921, provisions similar to those in the instant case were contained in the application for insurance. The court there said: "There is no substantial evidence to support the judgment which was rendered against the plaintiff in the present case. The burden was on the defendant to prove as a matter of defense that the statements of the insured which are contained in her application were not only untrue but that she knew they were false, or at least that she had reasonable cause to believe they were false. * * * The mere fact that the insured first said that she was 'in good health,' in the absence of evidence that she knew or believed that she was not in good health, is not such misstatement of fact or fraud as will render an insurance policy void. Burr v. Policy Holders' Life Insurance Association, 128 Cal.App. 563, 17 P.(2d) 1014, 1015; 4 Cooley's Briefs on Insurance (2d Ed.) p. 3296, c. 17, subd. (i). In the Burr Case above cited it is said in that regard: 'The term "Good Health" in the life insurance policy or application is comparative, and an assured is in good health unless affected with a substantial attack of illness threatening his life or with a malady which has some bearing on the general health. It does not mean perfect health; nor would it depend upon ailments slight and not serious in their natural consequences.' And in 2 Cooley's Briefs on Insurance, at page 3296, it is said with respect to the use of the term 'good health': 'If the applicant is free from apparent sensible disease, and unconscious of any derangement of important organic functions, he may truthfully say that he is in good health, although he may have some slight or temporary indisposition.' The preceding definitions of the term 'good health' are peculiarily applicable to the facts in this case, for the very next statement of the applicant is that 'so far as I know have no disease.' That statement regarding the general state of the applicant's health upon which the respondent relies does not constitute fraud nor furnish grounds upon which the obligation of the insurance company may be repudiated. In the absence of evidence to the contrary, we must assume the insured believed she was in good health at the time she signed her application for a policy."

What we have said disposes of the question involved in this appeal as stated on the opening page of defendant's brief. Defendant argues two other questions which are not there stated. While we are probably not required to consider questions not so stated, yet we will give them our attention.

[7, 8] Defendant introduced in evidence, the death certificate prepared and filed after the death of Mrs. Turner. This was later stricken out on motion of plaintiff. Defendant urges this ruling as reversible error. Neither the certificate nor a summary of its contents appear in the record. Assuming that it was admissible in evidence and that it was error to strike it out, still we cannot hold the alleged error prejudicial because we know nothing of the contents of the document. It is incumbent

on defendant to bring up a sufficient record upon which we may determine the prejudicial nature of any alleged erroneous ruling of the trial judge. As it has failed to do this, the error, if any, cannot be considered as prejudicial.

[9, 10] The trial court gave judgment against defendant for $1,500. The insurance policy had a maximum face value of that amount, but contained a provision to the effect that the beneficiary should only receive the amount raised by a death assessment of $1 on each member in good standing, but not exceeding the sum of $1,500. There was no evidence introduced showing the number of members of defendant subject to the assessment, and its counsel urges that, in the absence of evidence that there were 1500 members in good standing, it was error to render judgment for the full amount of $1,500.

It is alleged in the complaint, on information and belief, that on the date of the death of Mrs. Turner defendant had sufficient members in good standing so that at least the full sum of $1,500 would have been produced if a death assessment had been levied at the rate and in the manner provided in the insurance policy. This allegation was denied in the answer for lack of information and belief, and not otherwise.

It is evident that defendant had possession of its own records, an examination of which would have disclosed the exact number of its members in good standing at the time of the death of Mrs. Turner. This information would have enabled defendant to answer the allegation of the complaint definitely. The possession of such information rendered abortive its attempt to deny the allegation for lack of information and belief. A denial upon information and belief or for lack of information and belief of an allegation in a verified complaint, where the facts alleged and attempted to be denied are within the actual knowledge of a defendant, raises no issue and is in effect an admission of the truth of the allegation. McLellan v. Cocola, 133 Cal.App. 9, 24 P.(2d) 200; Boscus v. Bohlig, 173 Cal. 687, 162 P. 100; Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871. The allegation of the complaint not having been denied, the trial court did not err in entering judgment for the full amount of $1,500. Taketa v. Policy Holders' Life Ins. Ass'n, 131 Cal.App. 551, 21 P.(2d) 646.

Judgment affirmed.

We concur: BARNARD P. J.; JENNINGS, J.



13 Cal.App.2d 376

JACKSON v. CITY OF SANTA MONICA.

Civ. 10037.

District Court of Appeal, Second District, Division 1, California.

April 22, 1936.

Hearing Denied by Supreme Court June 19, 1936.

1. Statutes ⇐225

Court, in construing acts relating to liability of officers of city and city for injuries arising out of dangerous condition of streets, had duty to give effect to both acts if possible (Gen.Laws 1931, Act 5149, §§ 1–3; Act 5150, § 1, and § 2 as amended by St.1933, p. 2147).

2. Municipal corporations ⇐812(9)

Statutory requirement that claims against officers of city for injuries or damages resulting from dangerous condition of streets must also be filed with city means merely that city shall be notified of claim against officer, since city attorneys have duty to defend suits of claims against officers for their negligence (Gen.Laws 1931, Act 5149, §§ 1–3; Act 5150, § 1, and § 2 as amended by St.1933, p. 2147).

3. Municipal corporations ⇐812(9)

Statute requiring filing of claim with employee and city within 90 days for injuries or damages resulting from dangerous condition of streets was enacted to prescribe procedure for enforcement of claims against employees and not against city, and hence, where city alone is charged with liability, claim need not be filed with employee (Gen.Laws 1931, Act 5149, §§ 1–3; Act 5150, § 1, and § 2 as amended by St.1933, p. 2147).

4. Constitutional law ⇐48

Statute requiring filing of claim with employee and city within 90 days for injuries resulting from dangerous condition of streets

could not be construed as requiring filing of claim with officer, where city alone was charged with liability, since such construction would violate constitutional requirement that subject of act must be expressed in its title (Gen.Laws 1931, Act 5149, §§ 1–3; Act 5150, § 1, and § 2 as amended by St.1933, p. 2147; Const. art. 4, § 24).

5. Statutes ⇐117(2)

Title of statute requiring filing of claim with officer and city within 90 days for injuries or damages resulting from dangerous condition of streets, which related to officer's liability and procedure for enforcement thereof, *held* insufficient to include procedure for enforcing city's liability for such injuries, as regards duty to file claim with officer where city only was charged with liability (Gen. Laws 1931, Act 5149, §§ 1–3; Act 5150, § 1, and § 2 as amended by St.1933, p. 2147).

6. Statutes ⇐117(2)

Title of statute requiring filing of claim with officer and city within 90 days for injuries or damages resulting from dangerous condition of streets which related solely to officer's liability and procedure for enforcement thereof, and did not include general claims of negligence, *held* insufficient to include provisions of original act relating to claims of negligence of other classes (Gen.Laws 1931, Act 5149, §§ 1–3; Act 5150, § 1, and § 2 as amended by St.1933, p. 2147).

7. Statutes ⇐109

To comply with constitutional requirement that subject of an act shall be expressed in its title, there must be a statement of general purpose of the act in language which would convey to legislators' minds or to members of public, whose rights are governed by provisions thereof, a fair conception of the scope of the legislation (Const. art. 4, § 24).

8. Automobiles ⇐230

Failure of plaintiff to file claim with city within 90 days for damages for injuries sustained when plaintiff was struck by city's motorbus driven by city employee *held* not to bar action against city (Gen.Laws 1931, Act 5149, §§ 1–3; Act 5150, § 1, and § 2 as amended by St.1933, p. 2147).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Charles J. Jackson against the City of Santa Monica. From an adverse judgment, plaintiff appeals.

Reversed.

For prior opinion, see 54 P.(2d) 743.

Paul Blackwood and Bingham Gray, both of Los Angeles, for appellant.

Shattuck, Davis & Story and George H. Moore, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

In this case the opinion heretofore filed was recalled and a rehearing was ordered by the court of its own motion for the consideration of questions of law which were not presented in the briefs or decided by the court, but which were nevertheless presented by the record. They are questions which must necessarily arise frequently and which, for reasons which will appear, we believe should be considered by the court at this time.

Plaintiff was injured while a passenger in a motorbus belonging to the city of Santa Monica and being operated by its employee Dawes. This action, which was against the city alone, went to trial upon the complaint and the answer of the city, which alleged as a special defense that plaintiff had not filed with the city or with the employee Dawes any claim or demand on account of his injuries within 90 days after the date of the accident, October 5, 1933, and in support of this defense the city relied upon St.1931, p. 2476 (Deering's General Laws, Act 5150—to be so referred to hereafter), as amended by St.1933, p. 2147, which we shall refer to as the 1933 statute. The sufficiency of this defense was tested at the time of trial, upon plaintiff's demurrer to the same, and the demurrer having been overruled and plaintiff having admitted the facts alleged in the special defense to be true, judgment was entered in defendant's favor without further trial.

The questions now to be considered and which have been argued and briefed by counsel are the following: Does said Act 5150 relate to the liability of municipalities and claims thereunder, and if it purports so to do, is the title of the act sufficient to embrace the provisions which relate to such liability and claims at all, and is it sufficient to embrace the subject of claims of liability not arising out of injuries to person or property resulting from the dangerous or defective condition of streets, public property, or buildings?

In the acts to which we shall refer, public thoroughfares, buildings, and property are mentioned, as well as public corporations and political subdivisions to which the various acts relate. When we speak of streets hereafter, it may be understood that we mean also highways, buildings, parks, grounds, public works, and public property, and when we refer to cities, it may be understood that we mean municipalities, counties, cities and counties, school and other districts, but not the state of California. We shall refer to attorneys for such public corporations as city attorneys.

The title of the act reads as follows: "Act 5150.—An act relating to the liability in damages of officers of municipalities, counties, cities and counties, school districts, and the state of California, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property, and alleged to be due to the negligence or carelessness of such officers; prescribing the duties of claimants in such cases, and authorizing the state and such public or quasi-public corporations to take out and pay for insurance to protect their officers against such liability."

Section 1 of Act 5150 reads as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, and/or the negligence or carelessness of any public officer, a verified claim for damages shall be presented in writing and filed with such officer and the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received. *In the case of a state officer said notice and claim shall be filed with the governor as well as the officer himself.*" Section 2 makes it the duty of attorneys for cities (including the attorney for the state of California) to defend, at public expense, suits brought against *officers* for damages claimed as the result of the dangerous or defective condition of streets "and/or the negligence or carelessness of such officer." Section 3 authorizes cities (and the state of California) to insure their *officers* at public expense *against loss by reason of damage claims arising out of the dangerous condition of streets and due to the negligence of officers.*

Section 2 of the act was amended, as stated, in 1933 so as to require city attorneys (including the attorney for the state of California) to defend suits brought against any *officer* on account of injuries to persons or property "alleged to have been received as a result of the negligence or carelessness of such officer occurring during the course of his service or employment," as well as suits *against officers* arising out of the dangerous or defective condition of streets alleged to be due to the negligence of such officer; the words "public property" were defined to include "any vehicle, implement or machinery owned by a municipality, county, city and county, school district, or the State of California, or operated by or under the direction or authority or at the request of any public officer * * * of a municipality, county, city and county, school district or the State of California, acting within the scope of his office, agency or employment."

The title of the amending act of 1933 (St. 1933, p. 2147) reads as follows: "An act to amend sections 2 and 4 of an act entitled [title of Act 5150], approved June 19, 1931, extending the provisions of the act to *include suits* against employees as well as officers of municipalities, counties, cities and counties, school districts, and the State *and to suits* against such officers and employees for alleged negligence or carelessness thereof while engaged in the public service, and defining terms used in the act."

The respondent city of Santa Monica contends that although the city alone was sued, plaintiff was required to file a claim with the city and the employee within 90 days after the date of the accident, because the injury to plaintiff was alleged to have resulted from the negligence of an employee in operating a city motor vehicle. The argument of the city rests upon the assumption that Act 5150 relates to the liability of cities and to claims based thereon. In considering this question it becomes necessary to refer to other legislation relating to claims against cities based upon their statutory liability for negligence.

On the same day that Act 5150 was approved, there was also approved a "companion" act, St.1931, p. 2475 (Deering's General Laws, Act 5149—hereinafter called Act 5149), the title of which reads as follows: "An act relating to the liability in damages of municipalities, counties, cities

and counties, and school districts, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property; prescribing the duties of the officers thereof in such cases, and authorizing such public or quasi-public corporations to take out and pay for insurance to protect *them* against such liability." Section 1 of that act requires the filing of claims with the city within 90 days after injuries to person or property caused by the dangerous or defective condition of streets. Section 2 makes it the duty of the attorneys for *cities* to defend suits brought against *cities* upon such claims, and section 3 authorizes *cities* to insure themselves against loss on account of such claims.

The substance of the city's contention may be briefly stated as follows: Act 5149 relates only to claims against *cities* arising out of the dangerous or defective condition of streets; Act 5150, as amended, relates to claims against *cities* and against *officers, deputies, assistants, agents,* and *employees,* as well, arising out of the dangerous or defective condition of streets and also to claims against cities and such officers, deputies, assistants, agents and employees based upon their alleged negligence generally, including the negligent operation of motor vehicles. It is claimed that Act 5150 must be construed as applying to the liability of cities and as requiring claims arising out of the alleged negligence of officers and employees to be filed with the city as a prerequisite to suit against the city, because in each case where an officer or employee is liable there is a corresponding liability upon the part of the city, and that therefore it is to be assumed that every claim based upon alleged negligence of an officer or employee asserted against the individual is also asserted against the city. From this premise it is argued that if the liability of the city did not enter into the matter, and if the liability of the officer alone was the basis of the claim, there would have been no purpose served in requiring the claim to be presented to the officer and filed with the city because the city would have no interest in the matter.

There are reasons why we cannot accept either the premise or the conclusion. It is true, of course, that an officer or employee of a city or the state is liable for personal acts of negligence, equally with other individuals, although the liability of officers with relation to alleged negligence in the maintenance of public property is limited by statute. But an officer or employee may be personally liable for his own negligence without a corresponding liability on the part of the city in whose employ he may be. The city is liable only when the facts of the case meet the conditions of the city's statutory liability. Act 5150 (sections 1 and 2), in its reference to claims of negligence on the part of officers, was not limited to such acts as were committed within the scope of their service or employment, nor was such limitation accomplished, although it was perhaps attempted by the amending act of 1933 in defining the word "officer" as including agents and employees acting within the scope of their employment. Claims against state officers or employees were required to be filed with the governor of the state, as well as with the officer or employee. While there is liability on the part of the state for the negligence of its officers or employees in the operation of motor vehicles (Vehicle Code, § 400, St.1935, chap. 27, p. 152), there is no general liability as there is in the case of cities, counties, and other political subdivisions for negligence in the maintenance of public property (23 Cal. Jur. 580), nor as in the case of school districts for negligence of officers, agents and employees generally. School Code, § 2.801, as amended by St.1931, p. 2487. Yet the act makes no exceptions and requires service of the demand regardless of any liability or claimed liability of the state.

A comparison of Acts 5149 and 5150 will disclose that each act covers the subject of a certain class of claims in the same manner, Act 5149 as to claims against cities, and Act 5150 as to claims against officers. The former relates and is limited to the matter of claims arising under St.1923, p. 675 (Deering's Gen. Laws, Act 5619), by which liability of public corporations, including cities, was created, for injuries to person or property resulting from the dangerous or defective condition of public streets. The latter was clearly intended to relate to claims against officers of cities, with relation to the dangerous or defective condition of public streets, which while it existed independently of statute (Doeg v. Cook, 126 Cal. 213, 58 P. 707, 77 Am.St.Rep. 171), was limited by St.1911, p. 1115, replaced by St.1919, p. 756 (Deering's Gen.Laws, Act 5618).

The title of Act 5150 refers exclusively to the liability of officers arising out of the defective or dangerous condition of streets, etc., *and alleged to be due to the negligence or carelessness of such officers.* It has re-

lation to the liability of *officers* which had been the subject of previous legislation, namely, liability in connection with the maintenance of public property as limited and defined by said Act 5618, and this was a distinct and separate liability from that of *cities* created by said Act 5619. Section 1 of Act 5150 relates specifically to the liability of officers arising out of the dangerous or defective condition of streets. Had section 1 stopped there, it could not have been doubted that Act 5150 applied solely to the liability of *officers* corresponding to the liability of *cities*, upon which claims were required to be filed under Act 5149. Turning to section 3 of Act 5150, we find that it authorizes cities (and the state) to insure their officers only against liability arising out of the dangerous condition of streets and due to the negligence of the officers, thus conforming to the title of the act, and providing for the insurance of officers at public expense against the liabilities which cities could insure themselves against under the provisions of section 3 of Act 5149. So far the acts are parallel (except for the inclusion of state officers in Act 5150) and the subjects to which they relate are clear and distinct, one relating to the liability of cities and the other to the liability of officers. But the Legislature has created great confusion and uncertainty by the unfortunate and ill-advised use of the term "and/or" in the text of sections 1 and 2 of Act 5150, that term having been substituted for the phrase "and alleged to be due to," found in the title preceding the words "the negligence or carelessness of such officers." It thus appears probable that the legislature has attempted by the use of this perplexing term to broaden the scope of section 1 of Act 5150, which requires the filing of claims, and of section 2, where "and/or" is again used, with respect to the duty of city attorneys to defend suits against officers, so as to make those two sections apply generally to claims arising out of negligence of officers and to suits thereon against officers, having no relation at all to the limited class of claims, namely, those arising out of the dangerous or defective condition of streets, which had been the subject of previous legislation, and to which the language of the title of the act, as well as the provisions of section 3 of the act, were limited. We cannot believe that the legislature by the use of this careless expression has undertaken to do away with or to revise Act 5149, which alone by its title and its text relates to the matter of filing claims with cities based upon the liability of cities. By the haphazard interpolation of "and/or," it was perhaps intended to require that every demand seeking to hold an officer liable for negligent acts, committed within or without the line of his duties, should be presented to the officer and to the city as well, but it does not follow that the Legislature was prescribing procedure for the enforcement of the liability of cities or the state.

[1] Except for the use of "and/or," Act 5150 would have related exclusively to claims arising out of the dangerous or defective condition of streets. It may be assumed that in such cases, where an officer would be liable the city also would be liable. To meet situations where the joint liability was sought to be enforced, two acts were passed. Act 5150 would have had no existence if cities alone were to be charged with liability, and Act 5149 would have been unnecessary if Act 5150 had been understood as applying to the liability of cities. We must give effect to both acts if that can be done, which is not possible if we construe Act 5150 as applying to all cases covered by Act 5149. The legislature clearly did not so intend.

[2] If the negligent act arose out of the dangerous condition of a street and the city was sought to be held liable, a claim would have to be filed under Act 5149. Could it be contended in such a case that if the negligent officer were not to be sued, the claim, arising out of his negligence, would have to be presented to him, also, under Act 5150? And if an officer is guilty of some *other* act of negligence for which the city alone is sought to be held liable, must a claim for damages be presented to the officer before the city can be sued? If Act 5150 applies to the case, service on both the officer and the city would be required, there being no provision therein for filing the claim with the city alone, where the officer is not to be sued. Was it not rather the intention that the claims to be filed under that section were only such as sought to enforce the liability of the officer? If this had not been the intention, then Act 5149 should have been amended so as to apply to all claims of negligence for which cities are liable. The fact that claims against officers must also be filed with the city in cases arising out of the dangerous condition of streets means no more than that the city shall be notified of the claim against the officer, Act 5149 governing if

the city is to be held liable. And if it was intended to bring in all claims against officers by the use of the expression "and/or," it still was the intention, as we construe the various acts, that the city (or the state) should have notice of the claim against the officer, even though no demand was being made against the city (or the state). There are reasons why it should be so. It is the duty of city attorneys (and the attorney for the state) to defend suits on all claims against officers based upon their negligence, and cities have authority to insure their officers against liability therefor. It is unquestionably to the interest of cities that they be advised of damage claims against their officers. These reasons are sufficient for the requirement that cities receive the claim as well as the officer.

The Legislature evidently had grave doubt as to what interpretation might be put upon the expression "and/or," for in 1933 when section 2 was amended it was clearly provided that city attorneys (or the attorney for the state) should defend suits against officers in all cases of alleged negligence during the course of their service or employment. But section 1 of Act 5150 was not amended and still remains in its former confused state and subject to the uncertainties we have pointed out. It is only by means of the definition of the term "officer" as including deputies, assistants, agents, and employees that it can be contended, at all, that before a city (or the state) can be held liable for the negligence of an employee a claim must be filed with the employee and with the city (or the governor of the state) under section 1 of Act 5150. Was it the purpose in so amending the law to make it necessary, before the state or a city or school district, alone, could be held liable, that the deputy, assistant, agent, or employee alleged to have been guilty of negligence should be sought out and served with a claim for damages? We do not believe so.

When the title of the 1933 amendment is read and the scope of the amendments of Act 5150 is considered, it becomes increasingly apparent that the Legislature did not at the time of the amendment have in mind the liability of cities (or the state), for the provisions of the act are extended to include *suits* against employees, as well as *suits* against officers, in the cases authorized by Act 5150 and to *suits* against officers and employees for alleged negligence or carelessness while engaged in the public service, and the liability of cities (or the state) is neither directly nor indirectly mentioned or suggested.

[3] The foregoing reasons persuade us that the purposes of Act 5150 were to prescribe rules of procedure for the enforcement of claims against officers, to provide for the defense of suits for damages against officers, and to authorize the insurance of officers at public expense; the purpose was not to lay out procedure for the enforcement of negligence claims against cities or the state. The filing of claims against officers with cities or the state was required only for the information of city or state authorities. Therefore, under the acts in question, where a city, but not an officer thereof, is charged with liability, a claim need be filed with the city only in the cases specified in Act 5149.

[4] There is another reason for our conclusions, which we deem controlling. To give the act the construction contended for by the city would bring it into conflict with article 4, section 24, of the Constitution, which provides that the subject of an act shall be expressed in its title. The subject of the liability of municipalities (or the state) is not expressed in the title of the act nor in the title of the amending act. The liability of cities has always been treated as distinct and separate from that of officers and has been dealt with separately by the legislature. The provisions of the act, in so far as they might be read as applying to the liability of cities or to claims based upon that liability, are foreign to the subject of the title of the act and for that reason could not be given effect.

In Brunson v. City of Santa Monica, 27 Cal.App. 89, 148 P. 950, the statute of 1911, to which we have already referred, was under consideration. The title of the act read: "An act relating to the liability of public officers for damages resulting from defects and dangers in streets, highways, public buildings, public work or property." In the body of the act it was sought to fasten a liability on counties, cities, and cities and counties in cases of injuries arising out of the dangerous or defective condition of streets, highways, public buildings, public work or property. In holding the title of the act to be insufficient to cover the liability of public corporations, the court, speaking through Mr. Justice Conrey, said: "Here we have an act which, in its title, purports to deal with the liability of public officers for damages re-

sulting from certain specified causes. This cannot, by any process of reasoning, be made to include the subject of liability of the public corporations in whose service such officers may be. The act is void as to any purported legislation therein contained attempting to create a new rule of liability as against such corporations." Of this case the Supreme Court said, in Heron v. Riley, 209 Cal. 507, 289 P. 160, 162: "The title of the act there involved was unquestionably misleading and insufficient, for it very definitely intimated that the act related solely to the *liability of public officers*, thus effectively precluding any thought or idea that the body of the act dealt with the liability of the public corporations represented by such officers." Thus the Supreme Court, by approving the holding in the Brunson Case, which distinguished between the liability of officers and the liability of public corporations, has made the latter case a controlling authority.

In Heron v. Riley, where the present question was fully discussed, the title of an act which added section 1714½ to the Civil Code was under consideration. The title related "to negligence upon the part of officers, agents and employees of the state, counties, cities and counties, municipal corporations, school districts, irrigation districts, districts established by law and political subdivisions of the state and authorizing the issuance of insurance covering such liability." (St.1929, p. 565.) The body of the act provided a liability of the political subdivisions named for negligence in the operation of their motor vehicles and it was held that it was not necessary that the title should refer to the liability resulting from the negligence, the court saying: "We do not think it fatal to the act that the title failed to further refer to the subject of liability, for that is a subject germane to and logically falling within the bounds of the title." The court further said, in distinguishing the act then under consideration from the one considered in Brunson v. City of Santa Monica, supra: "The title of the act in the case at bar does not, in our opinion, as did the title in the Brunson Case, restrict the provisions of the act to the 'liability' of any person or persons." By distinguishing between the broad subject of negligence and the particular subjects of the liability of officers or municipalities, Heron v. Riley supports rather than opposes the conclusion that the title of Act 5150 is insufficient.

[5] The defendant city contends that Brunson v. City of Santa Monica, supra, is not in point because in that case matters of substantive law were under consideration, whereas Act 5150 relates merely to matters of procedure with reference to claims arising out of the liability of public officers. The argument again is that if an officer, deputy, agent, assistant, or employee is liable, his superior, the city, or other political subdivision in whose service he is, must also be liable, and that therefore the title of the act, relating to matters of procedure affecting claims arising out of the liability of public officers is broad enough to permit of legislation in the body of the act with reference to procedure as to claims arising out of the liability of the corporations in whose service the officers may be. We do not agree that there is less distinction between the matter of procedure to enforce the liability of cities and the matter of procedure to enforce the liability of city officers, than there is between the liabilities themselves. Nor is it less important that a statute relating to procedure should bear a title sufficient to put the reader on notice as to the subject-matter covered by the text. The title of the act, relating solely to the matter of liability of officers and procedure to enforce the same, given the most liberal construction, excludes the subject of procedure for enforcing the liability of cities and other political subdivisions and precludes legislation thereon in the body of the act.

[6] The title of Act 5150 is deficient in another respect. It relates only to the liability of officers for negligence in connection with the dangerous or defective condition of streets. General claims of negligence are not within its scope. The provisions of the original act relating to claims of negligence of classes other than the single one referred to in the title are therefore ineffectual, for the same reasons given on the point last discussed. The amending act of 1933 did not cure the defect in the original title. It does relate to the defense of suits against officers and employees arising out of alleged negligence while in public service, but the matter of presenting or filing claims is not touched upon in the title nor is it covered in the text. If the definition of the word "property" be carried into the title of Act 5150 and be read as including motor vehicles, it still relates only to the dangerous or defective condition of property and not to its

operation. In reading the titles of the original and of the amending acts, we find nothing therein to indicate that the texts of the acts relate to the filing of claims at all, except in cases arising out of negligence in connection with the defective or dangerous condition of streets.

If the title of Act 5150 should be held sufficient to embrace the texts of the act and of the amending act, with as great propriety it might be urged that it would be necessary for one seeking to hold the state liable for the negligent operation of a motor vehicle by a state officer or employee, to present a claim to the officer or employee and also to the Governor of the state, within 90 days after the injury, or be barred from all recourse against the state, The matter of the liability of the state in such a case is a subject which is not expressed in the title of the act.

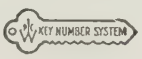
As further illustrating the inadequacy of the titles of the two acts, it may be pointed out that Act 5150 authorizes the insurance of officers against claims arising out of their alleged negligence in connection with streets. The text of the act follows the title in this matter. Then by the 1933 act an officer is defined to be any deputy, assistant, agent or employee "acting within the scope of his office, agency or employment." Is an employee to be insured at public expense under this amendment in view of the restricted title of Act 5150? And "public property" has been defined as including motor vehicles. Is a public employee to be insured against claims arising out of the negligent operation of an automobile under an act, the title of which relates to insurance of *officers* against claims arising out of the dangerous or defective condition of streets? These questions of course do not arise in the present case. We call attention to them only to point out the need for revision of the acts in question due to the failure of the legislature to observe the requirement of the Constitution that the subject of an act must be expressed in its title.

[7] Such expression as the Constitution requires in the title of an act, we apprehend, is a statement of the general purpose of the act in language which would convey to the minds of legislators or to members of the public, whose rights are governed by the provisions of the act, a fair conception of the scope of the legislation. If the wording of the title is such as would deceive or mislead the mind of the average reader as to the subject-matter of the legislation, then we think the title does not comply with the constitutional requirement, even though the subject-matter might by intricate processes of reasoning be divined by legal experts or rhetoricians.

[8] We hold, therefore, that plaintiff was not required by Act 5150 to file a claim with the city or to present it to the city employee before he could maintain this action, and that the special defense of the city of Santa Monica, alleging the failure of plaintiff to present such a claim was not a sufficient defense to the action. The court therefore erred in overruling plaintiff's demurrer to such special defense.

The judgment is reversed.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 621

MIAMI VALLEY COATED PAPER CO. v. PACIFIC NAT. BANK et al.

Civ. 9823.

District Court of Appeal, First District, Division 1, California.

May 1, 1936.

1. Courts ⇐91(1)

Judgment of Supreme Court holding constitutional a statute requiring an action to be brought to trial within five years after its filing *held* binding on District Court of Appeal, where precise point made in immediate case and same argument advanced in support of claim of unconstitutionality were advanced before Supreme Court (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

2. Constitutional law ⇐191

Retroactive amendment to statute changing requirement that action must be brought to trial within five years after filing of answer, to requirement that it be brought to trial within five years after filing of action *held* not to violate constitutional right of plaintiff to reasonable opportunity to exercise his remedy after enactment of statute where plaintiff had seven months in which to bring action to trial after amendment was enacted (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Miami Valley Coated Paper Company against the Pacific National Bank and others. From orders dismissing the action, plaintiff appeals.

Affirmed.

Esmond Schapiro, of San Francisco, for appellant.

Oliver Dibble, of San Francisco, for respondent San Francisco Warehouse Co.

Hugh K. McKevitt, of San Francisco, for respondent Pacific Nat. Bank.

TYLER, Presiding Justice.

Dismissal for failure to bring case to trial within the statutory period. The action was one brought to recover certain personal property consisting of 104 cases of paper and was filed March 28, 1929. The answer of defendant San Francisco Warehouse Company was filed November 29, 1933, and that of defendant Pacific National Bank was filed November 25, 1933. The record does not disclose the reason for the delay in the filing of the different answers. Memorandum of motion to set the cause for trial was duly served on said defendants by plaintiff on October 24, 1934, and was filed with the clerk on October 26, 1934. Thereafter defendants duly served their notices of motion for an order to dismiss the action on the ground that it was not brought to trial within five years after the filing of the complaint. The motions to dismiss were duly heard by the lower court on January 9, 1935, and granted. This is an appeal from said order.

[1, 2] At the time this action was commenced, section 583 of the Code of Civil Procedure provided: "Any action heretofore or hereafter commenced shall be dismissed * * * unless such action is brought to trial within five years after the defendant has filed his answer." Effective August 21, 1933 (St.1933, p. 853) the Legislature changed this provision to read as follows: "Any action heretofore or hereafter commenced shall be dismissed * * * unless such action is brought to trial within five years after the plaintiff has filed his action." It will be noticed that, by the amendment, the time for the right of dismissal is shortened, as it dates from the time the action is filed rather than to the date of the filing of the answer.

It is appellant's contention (1) that the 1933 amendment is unconstitutional, because by its very wording it was made applicable to actions previously commenced, and cut them off by not affording a reasonable time to bring such cases to trial, and the court has no right to legislate by determining that, in spite of the amendment, cases previously commenced have a reasonable time to be brought to trial; (2) assuming the amendment is constitutional generally and that there is allowed a reasonable time within which to bring to trial cases previously commenced, plaintiff did not have a reasonable time to bring the action to trial after the amendment went into effect, and therefore the retroactive application of the amendment is unconstitutional as to this plaintiff and the action should not have been dismissed. It is conceded by appellant, as indeed it must be, that the Legislature may shorten the period within which an action is required to be brought to trial and may make the new period applicable to existing causes to action. It insists, however, that where the shortening of time is made retroactive there must be a reasonable time provided in the act itself for the party affected to avail himself of his remedy after the new statute goes into effect. It is argued that this omission in the act renders it unconstitutional as to actions previously commenced, and it is not for the court to supply this omission and to say that, notwithstanding the clear wording of the amendment, a reasonable time is allowed to bring pending cases to trial, it being a cardinal rule of statutory construction that courts have no authority in any wise to add or supply words to a statute or to insert in a statute what has been omitted therefrom. We need not be at pains to discuss this question as it is not one of first impression in this state. In the case of Rosefield Packing Co. v. Superior Court (Cal.Sup.) 47 P. (2d) 716, it was expressly held that the 1933 amendment to section 583 of the Code of Civil Procedure is constitutional if a reasonable time is allowed plaintiff to bring his action to trial. Appellant insists, however, that nowhere in the decision is the question of the power of the court to grant a reasonable time after the effective date of the amendment considered or passed upon. This precise point made

here was raised in the petition for rehearing, and the same argument advanced in support of the claim that the amendment in question is unconstitutional, and a rehearing was denied. We are bound by the decision as it was the identical point involved. The amendment did not cut off the right of appellant to proceed with the trial of its case. And this brings us to appellant's second contention. As hereinabove set forth, the complaint was filed on March 28, 1929. The effective date of the amendment was August 21, 1933. The five year period from the date of the filing of the complaint expired March 28, 1934. Appellant filed its motion to set cause for trial on October 26, 1934. Appellant had, therefore, seven months after the date of the amendment and before the lapse of the five-year period to bring its case to trial, and more than sixteen months had passed without a trial at the time the dismissal was granted. The duty and burden rested on appellant to bring the case to trial within the period prescribed by the amendment or within a reasonable time after the effective date thereof. In the Rosefield Case, supra, the party affected had one year by reason of the amendment within which to set its case for trial, and this was held to be a reasonable time. By the same token, seven months was a reasonable time for appellant to proceed with its remedy, and this being so the amended statute may be applied to the action without violating any constitutional right of appellant.

The orders of dismissal are affirmed.

We concur: KNIGHT, J.; CASHIN, J.



13 Cal.App.2d 585

FREDERICK v. FEDERAL LIFE INS. CO.

Civ. 10198.

District Court of Appeal, Second District, Division 2, California.

April 30, 1936.

Rehearing Denied May 29, 1936.

1. Insurance ⇐377(2)

Report of medical examiner containing matters which insured failed to set forth in application for health and accident policy did not give insurer knowledge that insured made false representations concerning such matters, as respects whether insurer waived falsity of such representations.

2. Insurance ⇐377(2)

Insurer could resist recovery on accident and health policy on ground of material representations in application which were discovered to be false after policy was issued, notwithstanding that insurer may have overlooked or considered as inconsequential an incorrect or incomplete answer in application concerning another matter.

3. Appeal and error ⇐1056(1)

Where insurer sought rescission of policy on ground that insured falsely represented in application that he had never had gonorrhea, refusal to permit insured to testify whether he had had gonorrhea after testimony of insurer that insured had been treated for gonorrhea *held* reversible error as against contention that such question could be answered only by experts.

4. Witnesses ⇐208(1)

At common law, communications between physician and patient were not privileged.

5. Witnesses ⇐212

In action on health and accident policy, admission of testimony of internes in hospital in which insured had been treated concerning statements made by insured when his history was taken as to his previous physical condition *held* not error where internes were employed by hospital and were not under supervision of physician who treated insured, and history was taken by internes in accordance with hospital rule and not for purpose of treatment (Code Civ. Proc. § 1881, subd. 4).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Fred J. Frederick against the Federal Life Insurance Company, wherein the defendant filed a cross-complaint. From the judgments, the plaintiff appeals.

Reversed.

W. I. Gilbert, of Los Angeles (Burton Briggs Crane, of Los Angeles, of counsel), for appellant.

Joe Crider, Jr., of Los Angeles (John J. Ford, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Plaintiff sought to recover judgment under the provisions of an accident and health insurance policy issued to him by defendant on October 19, 1928. In its answer defendant denied liability upon the ground that certain answers and statements made by plaintiff in his application for the policy were false. Defendant filed a cross-complaint for rescission of the contract of insurance based upon the facts which it set up as a defense to the complaint. A trial by jury resulted in a verdict and judgment for defendant, and the trial court rendered judgment for defendant on the cross-complaint. Plaintiff appeals from both judgments.

Plaintiff contends that defendant is estopped from denying liability and from canceling the policy for the reason that, as alleged, the defendant waived the misrepresentations pleaded in the answer when it issued the policy with knowledge that plaintiff had failed to set forth in his application certain matters mentioned in the report of the medical examiner. In the application for the policy plaintiff answered a number of questions propounded to him. In question (4) he was asked whether he had "ever had any of the following complaints, symptoms, or diseases" followed by an enumeration of about forty complaints or diseases. To this question he answered "No" in each instance. The next three questions and answers appear in the application as follows: "Question—(5) Have you within ten years consulted or been treated by a physician or any other practitioner for any ailment or disease not included above? (If so, give dates and full particulars.) Answer—Influenza 1918. No complic or sequellae. Fever, which he thinks was malaria, once or twice about ten years ago. Mild attacks. In bed a few days. Question—(6) Have you ever had any serious illness? Answer—None only as above stated. Question (7)—Have you ever been under observation, care or treatment in any hospital, sanitarium, asylum or similar institution? (If so, give details.) Answer—No." Plaintiff also answered "None" to the following question: "Have you ever had or have you now any bodily or mental infirmity or deformity (including hernia and rupture) or have you impaired hearing, any disease of either eye, lost a limb or the sight of an eye, or are you in any respect maimed or in unsound condition mentally or physically? (Give particulars.)" In the report of the medical examiner for the company, the following appears: "I certify that I have this day carefully examined Fred Jack Frederick (applicants Full Name) of Los Angeles, California in private, and that the applicant's answers are in my own handwriting. Four years ago he was offered a few drinks of liquor and developed thereafter pains in the back for which he consulted a Dr. C. H. Woods, West 16th St., Los Angeles, a chiropractor who treated him with some form of lights for a few weeks —applicant not confined to home. Complete uneventful recovery." Plaintiff points out that no mention was made in the application of the treatment by Dr. Woods for "pains in the back" and he now argues that the defendant corporation having received this information in the medical examiner's report and having chosen to issue the policy, cannot deny liability by reason of the false statements relied upon by defendant to defeat recovery on the policy, statements which bore no relation whatever to the item reported by the medical examiner. The false statements claimed by defendant to have been made by plaintiff are set forth in its answer as follows: "That during a period beginning at least ten (10) years prior to the giving of said answers, and particularly during all of the year 1927, and from the first day of January, 1928, up until a very short time before said policy was executed, said Frederick was, and continuously had been, suffering from gonorrhea and from nephritis and from urethral discharges and from a severe discharge of a gonorrheal nature from his eyes and from severely inflamed and swollen joints, particularly in the ankles and in the hip joints and knees and groin, from arthritis, urethritis, and from conjunctivitis, all brought on by sexual exposure. That during said period of time said Frederick was treated for said ailments and diseases by at least three physicians and surgeons, and that, during the year 1927, said Frederick was, for a long period of time, confined to a hospital for the treatment of said diseases, and was, for a long period of time during the year 1927 and the first six months of the year 1928, permanently disabled by said diseases."

[1, 2] Defendant contends that "an analysis of the statement made to the medical examiner shows that it was one calculated to allay suspicion rather than to excite suspicion and was in entire harmony with the application"; also that the medical examiner's report was not properly before the trial court. We need not pass upon these questions, for it is clear that plaintiff's contention cannot be sustained. Plaintiff must have given the information contained in the medical examiner's report at the same time that the questions contained in the application were answered. His disclosure to the medical examiner negatives the charge of fraud in the particular referred to and is sufficient to refute the charge that defendant had knowledge that plaintiff was making false representations. Even if it be considered that defendant, upon receipt of the medical examiner's report, had knowledge that, as regards the treatment by Dr. Woods, plaintiff had not fully answered the questions in the application, it does not follow that defendant cannot resist recovery on the policy on account of other and serious representations which defendant thereafter learned to be false. The application and report of the medical examiner were forwarded to company headquarters where the officials of defendant company decided whether they cared to issue the policy. It was their right to reject the application if upon the information before them they desired to do so. The fact that they might have overlooked or considered as inconsequential an incorrect or incomplete answer contained in the application does not prevent their defense against fraudulent statements, the falsity of which was discovered after the issuance of the policy. The defendant had no knowledge at the time the policy was issued of the misrepresentations now relied upon to defeat recovery. In Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.(2d) 263, 266, it is stated: "But the evidence is clear that the appellant did not have any knowledge of the falsity of any of these misrepresentations except that relating to the illness of the insured five years prior to the date of the policies. This may have been sufficient to raise a suspicion as to the truth of other representations relied on; but cause for suspicion does not constitute knowledge. Hence there could be no estoppel of the insurer's right to 'set up the fraud by way of defense to an action brought to enforce the apparent liability.'" By referring to the language just quoted we do not mean to say that defendant had sufficient knowledge "to raise a suspicion as to the truth of other representations relied on."

[3] Witnesses testified on behalf of defendant that plaintiff, while a hospital patient in 1930, had made statements to them in which he described his physical condition before the issuance of the policy. Only one inference could reasonably be drawn by the jury from these statements, the inference that plaintiff was in the hospital for treatment for an aggravated case of gonorrhea. Upon rebuttal plaintiff was asked: "Have you at any time in your life had a disease commonly known as gonorrhea?" The court's ruling sustaining defendant's objection was erroneous and of such a nature as to call for reversal of the judgments. Defendant attempts to justify the ruling by arguing that the question could be answered only by an expert. It is apparent that defendant takes the position that it may require plaintiff in his application for a policy to answer the question whether he has had a certain disease; that after his answering such a question negatively in the application defendant may present to the jury evidence to show that he in fact did have that disease and thereafter deny plaintiff the privilege of testifying that he had not in fact suffered from such disease. The position taken by the defendant at the time the application was received is not consistent with the position taken in court. Moreover, it has been held that the precise question may be asked of a party litigant even though he is not an expert. In North Elk Oil Co. v. Industrial Acc. Comm., 81 Cal.App. 582, 254 P. 582, 584, the court said: "Walters testified that he had never been ill in his life. He said, specifically, that he had never had a venereal disease of any kind. This is the lay evidence to which petitioners refer, as stated above, as not being proper for consideration in opposition to the testimony of the experts. The testimony given by Walters was not upon a subject which is for experts alone. 22 C. J. 618. Without the citation of authority, it would seem that a witness may testify whether he has had a particular disease as a matter of fact known to himself, and not as a matter of opinion." In Kinner v. Boyd, 139 Iowa, 14, 116 N.W. 1044, it was held that plaintiff, a layman, was competent to testify that he had suffered a broken breastbone. In Ferguson v. Davis

County, 57 Iowa, 601, 10 N.W. 906, it was held that plaintiff, although not an expert, could testify that his ribs had been fractured. In Dolan v. Moberly, 17 Mo.App. 436, it is stated: "There was no error in admitting that portion of plaintiff's testimony in which she stated that she had two abscesses and falling of the womb." In view of the allegations contained in the answer and the evidence presented by defendant, it is obvious that plaintiff was prejudiced by the ruling of the court by which he was denied the right to testify concerning whether he had previously suffered from gonorrhea. It is difficult to see how plaintiff could refute the charge except by his own testimony. It is entirely probable that the verdict was returned because the jury believed plaintiff had been afflicted with this disease.

A question has been argued in the briefs which will probably arise upon a retrial of the issues, and we deem it appropriate to pass upon this question for the guidance of the trial court. Two witnesses testified that in August, 1930, plaintiff was a patient in hospitals in which they were employed as internes. One of the internes was a graduate physician and the other a senior medical student. One of these witnesses, Dr. J. H. Marcus, testified that he took the history of plaintiff for the purposes of the hospital records in accordance with a rule of the hospital and not for the purpose of treatment. Dr. Marcus was employed by the hospital and was not under the supervision of the private physician who did in fact treat plaintiff. Dr. Marcus had no personal recollection of the statements made by plaintiff, but depended on the hospital records to refresh his memory. The testimony of Dr. Marcus was presented for the purpose of impeaching the testimony of plaintiff. Dr. Marcus related certain statements made by plaintiff when his history was taken concerning his previous physical condition. The testimony of the other interne was similar to that of Dr. Marcus.

[4, 5] Counsel for plaintiff now argues that the testimony of the two internes was privileged and therefore inadmissible. It is provided in section 1881, subdivision 4, of the Code of Civil Procedure: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." At common law, communications between physician and patient were not privileged, and we must look to the statute to determine the extent of the privilege which has been provided. The internes did not give their testimony from "information acquired in attending the patient." Nor was the information necessary to enable them "to prescribe or act for the patient." The internes did not prescribe or act for the patient. The court did not err in admitting their testimony.

The judgments are reversed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

KEY NUMBER SYSTEM

13 Cal.App.2d Supp. 755

PEOPLE v. REHM.

Cr. A. 1306.

Appellate Department, Superior Court, Los Angeles County, California.

April 18, 1936.

Rehearing Denied April 24, 1936.

Lotteries ⚷3

Enterprise whereby contestants on payment of $1 for ticket picked titles for cartoons from suggested lists which contained many titles, any one of which might be equally appropriate, contestants who picked titles most nearly corresponding to those selected by judges being entitled to receive prizes ranging from $25,000 downward *held* "lottery," so that accused who had possession of tickets in such enterprise was guilty of possession of lottery tickets.

Appeal from Municipal Court of city of Los Angeles; Leo Aggeler, Judge.

Robert W. Rehm was convicted of violation of section 1, Ordinance No. 37737 (N. S.), of the city of Los Angeles, prohibiting the possession of lottery tickets, and he appeals.

Affirmed.

Benjamin Elconin, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

BISHOP, Judge.

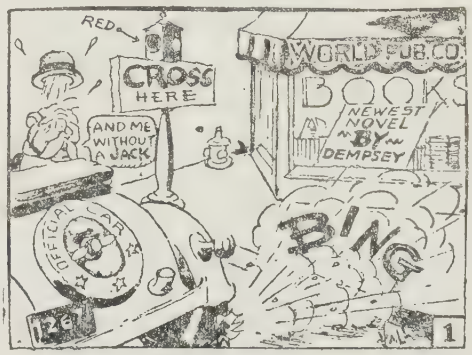
Appellant was charged with the offense of having in his possession a lottery ticket and a ticket purporting and understood to be a share and interest in a lottery. The only debatable question presented by this appeal from the judgment following his conviction is whether or not the enterprise, to which the ticket in appellant's possession opened the door, was proved to be a lottery. It is our opinion that the explanation of the scheme given by appellant's own witness, accepted at its face value, proved it to be a lottery, and the judgment should, therefore, be affirmed.

This witness testified that in September he had been appointed local agent for the Grand National Treasure Hunt of New York City. Based on the instruction he had received by mail from headquarters, he had passed on to the agents he had employed, one of whom was the appellant, and he gave from the witness stand, the following understanding of the rules of the "hunt": Tickets, such as were found in the possession of the appellant, were to be sold for a dollar a piece. A ticket permitted the holder to enter the Grand View Park, located at Singac, N. J., until December 23, and also to enter the "Grand National Treasure Hunt contest for $50,000.00." The prizes offered in the contest ranged from a first prize of $25,000 down to two hundred prizes of $50 each.

To each purchaser of a ticket, a sheet of paper was forwarded. On one side were six cartoons, under each being a list of twenty-four or twenty-five suggested titles for the cartoon above. "The object of the game," the printed instructions on the sheet declare, "is to select the best or most appropriate title for each cartoon." Across the top of the cartoons appears the statement: "Select correct cartoon titles and write answers in coupon. See other side." On the other side is the "answering coupon" with six blanks where the titles selected by the holder of any ticket were to be placed.

When filled out, the coupons were to be mailed to reach New York by December 10. A committee of competent judges was to be selected by the association in charge of the contest, to award the prizes among the contestants according to "the order of the excellence of their answers in the opinion of the judges." In the event of a tie for any prize an essay of not to exceed one hundred words was to be submitted and the tie determined by the relative merits of the essay.

No. 1 cartoon, with its suggested titles, may be taken as a fair example of those involved in the contest.



The titles suggested for this cartoon are: The Big Shot, Jack Dempsey, Sir Prize, Cross-Roads of the World, Bing Crosby, Mr. Otis Regrets, Red Cross Drive, Racket-Tears, Star Reporter, Jack Dempsey's Corner, Dangerous Corner, Signs Of The Times, False Alarm, Damaged Goods, The Book-Worm Turns, Time to Retire, Booming Business, Auto-Biography, Embarrassing Moments, Miniature World War, Sunday Driver, Round-the-World with No "Jack," World History, The Shot-that-was-heard-'round-the-World.

Our conclusion that the scheme thus proposed is a lottery is not founded upon a suspicion that the committee of competent judges will not be appointed, nor upon a doubt that when appointed they will deliberate and determine which ones of the thousands of contestants presented the "best and most appropriate" titles for the six cartoons. Our conclusion is based on the conviction that even if the judges are appointed and do deliberate, nevertheless, the prizes will be distributed by chance, because the elements of a bona fide contest of skill are not present.

If, instead of having titles suggested for these cartoons, we had names of states, Arizona, Utah, Vermont, and so on, whether or not the six answers put in by any individual agreed with those selected by the judges would obviously be a matter of pure chance, for there would be no basis in reason whereby one name should be preferred over another. In essence, that is just the

situation here. None of the titles suggested is descriptive of or applicable to the whole cartoon to which they apply. Almost every title suggested is possible because of its relation to one or more of the ideas which can be found in the hotchpotch of its cartoon. Under each cartoon are several titles, each one as apt to be given first place as any other one, because it, as the others, embodies one or more of the many ideas scattered around in the cartoon. There is no standard by which one title can be said to be either "best" or "more appropriate" than all others. It follows that some one of the many contestants will receive first prize, his selection depending not on his skill in picking titles, but upon the chance that the six he selected happened to be also the six that the judges selected. If we eliminate all but the nine "best" titles under each cartoon, the chance a contestant has of selecting the same six the judges do is less than one in half a million.

So far as we are aware, this precise attempt to escape the widespread laws against lotteries has not been before any court of review. Schemes, in which ratiocination was given a part in the hope that it would dress the chance up sufficiently so that it would not be recognized, have been discussed, however. As stated in National Thrift Ass'n v. Crews (1925) 116 Or. 352, 241 P. 72, 73, 41 A.L.R. 1481: "In determining whether the contract is in the nature of a lottery, we look, not to the name, but the game. Courts will not tolerate subterfuge, however ingeniously may be the scheme devised to evade the law." So it has been that contests wherein, seemingly, deductive reasoning would play a great part, have been held lotteries.

In the case of Hudelson v. State (1884) 94 Ind. 426, 48 Am.Rep. 171, a gold watch was the prize for the one who came nearest to stating the number of beans in a glass globe. It was conceded that an expert mathematician could, by his calculations, come nearer to figuring out the possible number of beans in the globe than one not skilled, but, because of the elements of uncertainty of necessity present in his calculations, it was held that at best the mathematician's answer would be a guess, and the gold watch would be awarded by chance.

Five thousand dollars was to go to the one who most nearly estimated the number of cigars upon which the federal government would collect taxes in a certain month. Holding this contest a lottery, the court in People ex rel. Ellison v. Lavin (1904) 179 N.Y. 164, 71 N.E. 753, 755, 66 L.R.A. 601, 1 Ann.Cas. 165, stated: "A lottery does not cease to be such and become a mere contest because its result may be affected to some slight extent by the exercise of judgment."

In Stevens v. Cincinnati Times-Star Co. (1905) 72 Ohio St. 112, 73 N.E. 1058, 1061, 106 Am.St.Rep. 586, the question to be determined in the contest was the total vote to be cast for Secretary of State. In holding the scheme unlawful, this definition of chance, found in 11 C.J. 279, was characterized as an intelligent one: "Possibility, hazard, risk, or the result or issue of uncertain and unknown conditions or forces, neither understandingly brought about by one's act, nor pre-estimated by one's understanding." The opinion continued: "This element of chance is not at all incompatible with the presence of an element of calculation, or even certainty. * * * There is an element of skill, possibly certainty, involved, but it is clear that the controlling, predominating element is mere chance." So also, in Waite v. Press Pub. Co. (C.C.A. 6, 1907) 155 F. 58, 11 L.R.A.(N.S.) 609, a contest involving an estimate of the total popular presidential vote was held to be a lottery.

In the contest before us we find that while the outcome could be foreseen in a measure by the exercise of thought, although "fancy" would be a more accurate word, nevertheless thought played so small a part that the controlling force remained chance. So understood, the scheme appears a lottery, in which one stood a chance of winning $25,000 by the expenditure of $1, a half hour's time, and a 3-cent stamp.

No ruling complained of merits discussion. The judgment is affirmed.

SHAW, Presiding Judge.

I concur. It is obvious from the explanation of the scheme furnished by defendant's evidence that no contest to be determined by the exercise of skill or judgment is set up thereby. None of the cartoons has any apparent unity of thought or subject. Each cartoon depicts a mere congeries of objects, combined for no apparent purpose other than that each may serve as a clue to which one or more of the titles suggested below may be connected. If there is any opportunity at all for

the exercise of skill or judgment in selecting a set of titles for the cartoons from those suggested, it is clearly but slight, and the agreement of one person's selection with that of another must depend mainly on chance. The scheme is therefore within the rule recognized in several of the authorities cited in the main opinion and stated in 38 Corpus Juris 291 as follows: "The rule generally followed in the United States is that the word 'lottery' includes those schemes wherein chance is the dominant factor in determining the result, although it may be affected to some degree by the exercise of skill or judgment."

SCHAUER, Judge.

I concur in the judgment, not upon the theory that the scheme disclosed by the evidence is inherently incapable in any event of being conducted as a bona fide contest of skill, but solely upon the ground that the evidence is sufficient to support a finding that such scheme in this case was understood by the defendant to possess all the necessary attributes of, and to operate as, a lottery. Some of the suggested cartoon titles appear to me to be more appropriate than others and I am not prepared to hold that some one title in each instance may not rationally be shown to be most appropriate of all. If one title only were obviously descriptive of each cartoon, then the elements of keen observation, skill, and industry in differentiation would indeed be absent and such fact might be inferential of the character assigned to the enterprise.

As disclosed by the authorities cited in the opinion of Judge BISHOP and the concurring opinion of Presiding Judge SHAW, which need not here be reiterated, the fact that skill may enter into a "contest" is not necessarily determinative of its character. The project in this case readily admitted of use as a lottery and the fact that it was understood that it was to be so used and that the tickets were understood to represent chances therein and were purchased for that consideration rather than for gaining admission to, and privileges in, Grand View Park, Singac, N. J., may I think be inferred circumstantially from the evidence. That the plan portrayed is a subterfuge is suggested by the statement in Defendant's Exhibit 2, "The Grand National Treasure Hunt Contest gives one an opportunity to win large cash prizes with the protection to the participant of entering a contest which conforms with all the laws of the government," when considered in its relationship to all the other circumstances shown.

To establish defendant's guilt of the offense with which he is charged, it was not necessary to prove that he possessed a ticket to an actual lottery drawing. The ordinance (city of Los Angeles No. 37,737, N.S.) provides in material part: "Section 1. It shall be unlawful for any person to have in his possession any lottery ticket, or any ticket, bill, paper * * * or any other object purporting or understood to be * * * a ticket, chance, share, or interest in, or depending upon the event of, a lottery. * * *"

I am satisfied that the evidence is sufficient to have warranted the trial court in finding, as it impliedly did find, that the defendant understood and believed that he possessed tickets in and to an enterprise which encompassed all the factually essential elements of a lottery, but which he thought was cleverly enough devised to escape the onus of penal sanction. Upon such finding, the judgment is proper.

On Petition for Rehearing.

PER CURIAM.

Appellant's petition for a rehearing after judgment in the above-entitled cause having been filed, and said petition having been duly considered, it is now ordered that the said petition be, and the same is, hereby denied.

trial court adopting one and rejecting the other *held* binding upon reviewing court.

3. Appeal and error ⇐931(1), 996

All intendments are in favor of judgment arrived at upon conflicting testimony, and where contradictory inferences can be drawn from facts, appellate court will not substitute others for those adopted by trial judge, although court might have reached different conclusion.

4. Appeal and error ⇐995

Reviewing court may disregard inherently improbable testimony, but to warrant such action there must exist either physical impossibility of evidence being true, or its falsity must be apparent without resort to inferences or deductions.

5. Appeal and error ⇐1011(1)

Holding in regard to whether mortgagee had lost its lien rights by refusing tender of amount due on mortgage *held* conclusive on appeal, where supported by substantiality of conflicting evidence.

6. Appeal and error ⇐110

Order denying motion for new trial *held* not appealable (Code Civ.Proc. § 657, and § 963, as amended by St.1933, p. 2472).

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action by the Marion Machine, Foundry & Supply Company against Arthur Gould and others, copartners doing business as Stillion & Hillegas, the Argo Oil Company and others. Judgment for plaintiff, and defendants Arthur Gould and the Argo Oil Company appeal.

Affirmed.

Wendell P. Hubbard and R. R. Colby, both of Los Angeles, for appellants.

A. S. Goldman, and Charles I. Rosin, both of Los Angeles, for respondent.

WHITE, Justice pro tem.

Respondent brought this action to recover certain personal property alleged to be wrongfully detained by appellants. The cause was tried before the court, sitting without a jury, resulting in a judgment for respondent, from which judgment and from an order denying a motion for a new trial, this appeal is prosecuted.

The facts germane to this proceeding are, that during the year 1930 the firm of

15 Cal.App.2d 716

MARION MACHINE, FOUNDRY & SUPPLY CO. v. GOULD et al.

Civ. 10535.

District Court of Appeal, Second District, Division 1, California.

July 31, 1936.

1. Bankruptcy ⇐150

In action by mortgagee to recover mortgaged property claimed by defendants under sale by trustee in bankruptcy of mortgagor, evidence of disclaimer by trustee on behalf of bankrupt estate of any interest in such property and of order of referee in bankruptcy to same effect signed prior to confirmation of sale *held* to support finding that mortgagee was owner of property.

2. Appeal and error ⇐996

Where evidence supporting certain finding was such that conflicting inferences might be drawn by reasonable minds, decision of

Stillion & Hillegas, as copartners, were engaged in the drilling of an oil well on premises located in the city of Inglewood. As such copartners, they purchased of respondent, from time to time, certain oil well supplies and accessories, including the personal property in question here. To secure their indebtedness to respondent the copartners, on December 2, 1930, executed a promissory note to the former in the sum of $2,000, together with a chattel mortgage securing the same, covering the property described in the first amended complaint herein. In April, 1931, the firm of Stillion & Hillegas went into bankruptcy, and on June 16, 1931, respondent filed proof of its claim against said copartners in the sum of $1,444.24, due on conditional sales contracts, and for $12.65 due on the chattel mortgage. In December, 1932, an agreement was entered into between the appellant Gould and the trustee in bankruptcy for Stillion & Hillegas, which agreement received the approval of the bankruptcy court, and under the terms of which the trustee in bankruptcy conveyed to appellant Gould "all the right, title and interest of the bankrupt estate in and to the equipment, derrick, machinery, fixtures on the said real property, which is at present covered by a chattel mortgage or contracts, subject to all liens, mortgages, contracts and charges thereon." This contract, and all the rights of appellant Gould thereunder, was subsequently assigned by him to appellant Argo Oil Company. On March 7, 1934, the trustee in bankruptcy, with the approval of the bankruptcy court, conveyed to appellant Argo Oil Company the real property upon which the oil well was situated, together with "the personal property, machinery and equipment located thereon."

[1] Appellants assail the judgment on the ground that the record is without substantial evidence to support the findings of the trial court that respondent was the owner of the personal property in question, and that appellants were without any rights entitling them to the possession thereof. In support of this claim it is urged that title to the personal property here in question was vested in appellant Argo Oil Company by reason of the transfer of the bankrupt estate's title therein through execution of the instruments mentioned above. This claim, however, is negatived, in our opinion, by the notice of disclaimer executed by the trustee in bankruptcy, through his attorney, and introduced in evidence at the trial as Plaintiff's Exhibit 6, under the plain terms of which the trustee in bankruptcy specifically disclaims, on behalf of the bankrupt estate, any right, title, or interest in and to the identical personal property mentioned in the first amended complaint herein. There also appears in the record as Plaintiff's Exhibit 3 at the trial, an order made by the referee in bankruptcy under date of March 8, 1934, declaring that inasmuch as the trustee in bankruptcy had no right, title, or interest in or to the property in question here, that the sale thereof under date of March 6, 1934, did not include the personal property about which this litigation centers. This order was signed by the referee in bankruptcy March 8, the day before the confirmation of sale to appellants was made. Surely, it cannot be contended that the trustee in bankruptcy intended to or did invest appellants with title to property in which the former disclaimed any right, title, or interest.

[2-4] Appellants next contend that the court's finding was erroneous because the evidence shows that the chattel mortgage in issue here was fully paid and satisfied. It would serve no useful purpose to here set out the evidence in detail, because a careful perusal of the testimony convinces us that it merely presents mathematical computations from which the trial court would be justified in concluding, as it did, that a default had occurred under the terms of the chattel mortgage, which gave to respondent, under the provisions thereof, the right to recover the property. Conceding that conflicting inferences may be drawn by reasonable minds from the state of facts presented by the record herein, the trial court having adopted one and rejected the other, its decision is binding upon the appellate court; the case being in substance the same as where the trial court decides upon the weight of contradictory evidence. Boland v. Gosser, 5 Cal.App.(2d) 700, 43 P.(2d) 559; MacDermot v. Hayes, 175 Cal. 95, 104, 170 P. 616; Haight v. Haight, 151 Cal. 90, 90 P. 197; Paine v. San Bernardino, etc., Co., 143 Cal. 654, 77 P. 659. All intendments are in favor of the judgment arrived at upon conflicting testimony. Where the facts are such that contradictory inferences can reasonably be drawn from them, an appellate court will not substitute other inferences for those adopted by the trial judge. Hughes v. Quackenbush, 1 Cal.App.(2d) 349, 354, 37 P.(2d) 99; Ketelhut v. Gunther, 100 Cal.App. 409, 279 P. 1083; Coats v. Hathorn, 121 Cal.

App. 257, 8 P.(2d) 1038. This is the rule even where the reviewing court might have reached a different conclusion. Conness v. McCarty, 216 Cal. 415, 14 P.(2d) 507; Foxe v. Southern Pacific Co., 121 Cal.App. 633, 9 P.(2d) 514; McGlothin v. Larussa, 122 Cal.App. 324, 10 P.(2d) 116. Of course, testimony which is inherently improbable may be disregarded (Neilson v. Houle, 200 Cal. 726, 254 P. 891), but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions. Powell v. Powell, 40 Cal.App. 155, 180 P. 346; Stahmer v. Stahmer, 125 Cal.App. 132, 13 P.(2d) 833.

[5] Much of what we have just said is applicable to appellants' next claimed ground for reversal of the judgment, in which appellants earnestly urge that assuming the mortgage was not fully paid, and that there was some unpaid balance thereon remaining, nevertheless respondent lost its lien rights by refusing the tender of the amount believed by appellants to be due, or the tender of any amount that might be shown to be due. The evidence on this point, consisting as it does of claims and disputed credits due, and payments made, merely raises a conflict which the trial court resolved in favor of respondent, and which, by reason of the substantiality of evidence to support the holding of the trial court thereon, is conclusive on appeal. As stated above, the trial court in weighing the evidence was also authorized to draw reasonable inferences therefrom.

[6] The attempted appeal from the order by which the motion for a new trial was denied is dismissed, for the reason that the same is an ordinary motion for a new trial under section 657 of the Code of Civil Procedure, and the same, being denied, is not appealable under section 963 of the Code of Civil Procedure, as amended by St.1933, p. 2472, because this may be reviewed on the appeal from the judgment. Wilcox v. Hardisty, 177 Cal. 752, 171 P. 947; Conlin v. Coyne (Cal.App.) 59 P.(2d) 884.

We believe the foregoing disposes of the principal points urged by appellants, and the judgment should be, and it is, therefore, affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

6 Cal.2d 218

In re CRANE'S ESTATE.

CRANE v. CRANE.

L. A. 15051.

Supreme Court of California.

April 30, 1936.

Rehearing Denied May 28, 1936.

1. Wills ⇐481

Property settlement agreement whereby wife relinquished all right or claim to any interest in property of husband by virtue of her status as wife or widow or as heir of husband did not preclude wife from taking bequest under husband's will, notwithstanding will had been drawn prior to property settlement, since will speaks as of date of testator's death (Civ. Code, §§ 1292, 1298, 1299).

2. Wills ⇐764

Consideration received by wife pursuant to property settlement agreement whereby wife relinquished all claim in estate of husband by virtue of her status as wife or widow or heir of husband *held* not an ademption of bequest to wife (Civ.Code, § 1351).

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Proceeding in the matter of the estate of Emmett C. Crane, deceased, by Kathryn F.

Crane against Burton Briggs Crane, as executor of the last will of Emmett C. Crane, deceased. From an order in probate for final distribution of estate of deceased, Kathryn F. Crane appeals.

Reversed.

Prior opinion, 47 P.(2d) 344.

Clarke & Bowker, Don G. Bowker, and Robert M. Clarke, all of Los Angeles, for appellant.

Burton Briggs Crane, of Los Angeles, in pro. per.

CONREY, Justice.

This is an appeal from an order in probate for the final distribution of the estate of the above-named decedent. By the terms of the decedent's will, the appellant, who is surviving widow of the decedent, was bequeathed the sum of "one thousand dollars in money, or value from residue interests for every year or major fraction thereof of our married life." The trial court decreed that the widow was not entitled to take the bequest for the reason that she had entered into the property settlement agreement hereafter described.

The parties were married on October 21, 1925. The will was made on November 4, 1926. The parties separated January 21, 1927, and they entered into the property settlement agreement on February 21, 1927. They resumed marital relationship on January 1, 1928, and again separated March 7, 1928. The date of decedent's death was June 26, 1929. The will was an holographic will.

The pertinent parts of the property settlement agreement are as follows: "It is further expressly covenanted and agreed that neither of the parties hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, his or her heirs or assigns, in the exercise of the rights of property herein agreed to; that neither of them will at any time hereafter assert any right, interest or title as heirs at law of the other or as against the estate of the other, and all claim or right as surviving husband or wife, and all right to contest or oppose the last will of the other is hereby expressly waived, together with all right to administer, or to apply for letters of administration, or letters of administration with the will annexed, upon the estate of the other. * * * It is the true intent and purpose of this agreement that the parties hereto have settled and forever adjusted, and that they do hereby settle and forever adjust, by and between themselves, all present and future property rights of every kind and nature, whether community or separate, wheresoever the same is or may be located, and all other rights and claims which either may have or claim to have against the other, so far as their property rights are concerned, and in addition thereto that the said parties hereto have settled and adjusted, and do hereby settle and adjust, and forever determine, all of their respective rights to, of and in any inheritance the one from the other, respectively, or in or to the estate of either."

[1] Appellant's statement of the questions involved in this appeal assumes that the trial court's decision in favor of respondent was based upon the proposition that the property settlement, when made, revoked the prior will of the husband. During the period of time to which this case relates, the manner in which a will could be revoked was governed by the provisions of sections 1292, 1298, and 1299 of the Civil Code. It is conceded by respondent that there was no revocation of the will, and that the contract of property settlement, or separation agreement, did not operate to produce a revocation of the will. The real contention of respondent is that the making of the agreement resulted in a surrender by each party of all property and property rights, present or future, in the estate of the other. Respondent states the question thus: "If by the terms of such agreement, the spouses make reference and contract with relation to their existing wills, and by the terms thereof each agrees as against the other and their respective heirs not to assert 'any right, title or interest' as against the estate of the other, and thereby agree, forever determining their respective rights in or to the estate of the other, is each thereby estopped as against the surviving heirs of the other to take, assert, or make a claim to a legacy made in their respective, prior and existing wills filed for probate?"

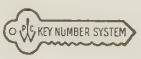
To the foregoing question neither an affirmative answer nor a negative answer would be possible without more accurately defining those parts of the question which, as stated by respondent, are not certain. In this case the parties by the terms of their agreement did make reference and contract with relation to the will or wills of both or either of them, whether then existing or thereafter to be made. But the agreement

in relation to such wills was not unlimited. The agreement of each party was, first, not to oppose the probate of the other's will; second, not to contest or oppose such will; and, third, not to apply for letters of administration or letters of administration with the will annexed upon the estate of the other. Both parties agreed that by said contract they had settled, adjusted, and forever determined "all of their respective rights to, of, and in any inheritance of the one from the other, respectively, or in or to the estate of either." Reading the terms of the contract as thus limited, it took away from appellant all right or claim to any interest in the property of her husband either by virtue of her status as wife or widow or as heir of her husband. But, as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to the one from the other whether by way of gift inter vivos, by devise, or by bequest. As applied to such gift, we find in the agreement no basis for an estoppel against appellant with respect to the legacy claimed in the will. It is to be remembered that although the will in which the legacy is contained had been executed prior to the date of the contract, the testator lived more than two years thereafter. And a will speaks from and as of the date of the testator's death. If the testator had not executed this will until after the date of the property settlement agreement, it would not be reasonable to say that he was without right to make such subsequent will and thereby give additional property to his wife. But in substance and effect he did the same thing by leaving his will unchanged after the date of said contract. The reasonableness of his conduct in this respect is reinforced by the evidence, which shows a continuance of affectionate relations between the parties—not to mention that for a period of at least two months after making said contract, they actually lived together.

[2] Respondent further contends that the consideration received by appellant pursuant to the terms of the property settlement agreement was an ademption of the legacy, and that appellant's claim was thereby satisfied, so that she is not entitled to further distribution of such legacy to her in the course of administration. By reference to section 1351, Civil Code, now superseded by section 1050 of the Probate Code, it appears that a gift before death is not to be "taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such." Respondent is consciously aware of the requirements of the statute, but he attempts to meet its limitations by claiming that the property settlement agreement in this case was a "writing" sufficient to disclose the intention of the decedent, "taking into consideration the circumstances under which the writing was made," that both legacies should be adeemed. We are of the opinion that the language of the contract is not capable of the construction put upon it by respondent respecting the asserted ademption.

The conclusions which have been herein stated are sufficient for determination of the merits of this case. The trial court was in error in its determination that appellant should take nothing under the will of the decedent. For that reason, the order described in the notice of appeal is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



6 Cal.2d 222

SKAGGS et al. v. CITY OF OAKLAND et al.

S. F. 15437.

Supreme Court of California.

April 30, 1936.

1. Constitutional law ⇐240(1), 296(1)

Municipal ordinance prohibiting delivery of bakery goods between hours of 6 p. m. and 6:30 a. m. *held* invalid as unreasonable interference with carrying on of lawful business as based on arbitrary classification and as depriving bakeries of their property without due process of law and denying them equal protection of law (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

2. Food ⇐1

Fact that city food inspector would have better opportunity to detect violations of health requirements *held* not to justify municipal ordinance prohibiting delivery of bakery goods between hours of 6 p. m. and 6:30 a. m.,

which otherwise constituted unreasonable interference with bakery business (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

3. Food ⇐1

Municipal ordinance prohibiting delivery of bakery goods between hours of 6 p. m. and 6:30 a. m. *held* not justified as reasonable sanitation regulation on ground that it removed danger of having foodstuffs exposed to contaminating influences between time of delivery and time removed by consumer from doorstep, since it purported to prohibit any method of delivery during certain hours (Const. Cal. art. 1, § 13; Const.U.S. Amend. 14).

4. Health ⇐20

Before Supreme Court may invalidate attempted legislative exercise of police power for protection of public health, it must be able to say on its judicial knowledge that legislative body could not have had any reasonable ground for believing that regulation as enacted was necessary measure of protection to public health.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by V. R. Skaggs, doing business under the firm name and style of Oakland Doughnut Company and others against the City of Oakland and others. Judgment for defendants, and plaintiffs appeal.

Reversed and remanded, with directions.

William H. Hollander and I. Richard Gladstein, both of Oakland, for appellants.

F. Bert Fernhoff, City Atty., and Hilton J. Melby, Asst. City Atty., both of Oakland, for respondents.

CONREY, Justice.

The sole question here involved is that of the validity of section 5-13.024 of an ordinance enacted by the Oakland city council relating to regulation of the bakery business (ordinance 463 C.M.S. adding sections 5-13.021, 5-13.022, 5-13.023 and 5-13.024 to the Oakland Municipal Code, adopted December 18, 1934), which section reads as follows: "Sec. 5-13.024 hours and times of delivery of bakery goods. It shall be unlawful for any person to deliver within the City of Oakland any bakery goods on the following holidays: Sunday, New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, or on other days between the hours of 6 p. m. and 6:30 a. m."

Plaintiff doughnut and bakery companies instituted this action against the city of Oakland, its city council, and certain city officials, to obtain an injunction restraining enforcement of the above provision and to have it adjudged null and void. The trial court issued a temporary restraining order, but sustained without leave to amend defendants' demurrer to the first amended complaint. Judgment was entered accordingly, and plaintiffs appealed.

Plaintiffs allege that they are engaged in the business of manufacturing and supplying doughnuts and bakery products in the city of Oakland and that they manufacture, sell, and deliver approximately 75 per cent. of all fresh, wholesome doughnuts, as well as a substantial portion of all other baked goods consumed in said city. They claim that the effect of enforcement of the above provision would be virtually to destroy their business, for the reason that the major portion of their deliveries, both to retailers and direct to the consuming public, must be made during early morning hours in order to have the fresh product reach retailers, such as restaurants and bakeries, in sufficient time to permit of a resale to breakfast patrons, and, in case of direct sales, reach consumers' tables before the breakfast hour, which begins at any time from 2:30 to 7 a. m. To start deliveries at 6:30 a. m. would be too late. Attention is called to the fact that the section does not deal with both manufacture and delivery, but solely with delivery of baked products. Plaintiffs submit that the delivery of baked products in no way differs from delivery of other food products prepared for immediate consumption, such as ice cream, confectioneries, milk, butter, etc., all of which may be delivered at any hour without restriction.

[1] Plaintiffs' contention that the provision was not a valid exercise of the city's police power should be sustained. It is clear that the restriction constitutes an unwarranted and unreasonable interference with the carrying on of a lawful business, and is based upon an arbitrary classification, and that it is violative of the State Constitution, article 1, § 13, and the Fourteenth Amendment of the Constitution of the United States. It deprives the plain-

tiffs of their liberty and property without due process of law, and denies to them the equal protection of the law.

[2, 3] Respondents attempt to justify the enactment as a reasonable health and sanitation regulation, upon the ground that it serves a twofold purpose: First, that it restricts deliveries to reasonable times within which the food and sanitary inspectors employed by the city of Oakland may reasonably be expected to be on duty, thus enabling them to detect violations of health requirements and trace to their source impure bakery goods. Second, that it prevents door-to-door delivery of baked goods before 6:30 a. m., thus removing any danger of having such foodstuffs exposed to contaminating influences between the time of delivery and the time the consumer removes them from his doorstep. As to the first argument, it is not a valid exercise of police power to restrict unnecessarily a lawful occupation conducted in a reasonable manner, merely that it may accord with the convenience of inspectors. As to the second argument, if the regulation was designed to prevent unsanitary deliveries, in this respect it exceeded its proper scope, in that it does not merely prohibit such delivery as might expose the product to contaminating influences, but it purports to prohibit any method of delivery, sanitary or unsanitary, of baked products during certain prebreakfast hours.

The cases of In re Lowenthal, 92 Cal. App. 200, 267 P. 886, and In re Gatsios, 95 Cal.App. 762, 273 P. 826, cited by defendants, are not controlling. They concern only uncooked products, such as fresh uncooked meats, which are easily infected. See, also, discussion of said decisions in Ganley v. Claeys, 2 Cal.(2d) 266, 40 P. (2d) 817, a recent case which lends support to the holding above announced.

[4] We assume that, other than the reasons which have been suggested by respondents, as hereinabove stated, there is no possible justification for the questioned regulation. If there was any other, doubtless it would have been brought up for consideration. We agree, of course, that before this court appropriately may pronounce invalid an attempted legislative exercise of police power, we must be able to say on our judicial knowledge that the legislative body could not have had any reasonable ground for believing that the regulation as enacted is a necessary measure of protection to the public health. See Dominion Hotel v. Arizona, 249 U.S. 265, 39 S.Ct. 273, 63 L.Ed. 597, as quoted in West Coast Theatres v. City of Pomona, 68 Cal.App. 763, 230 P. 225. Here it appears to us that no such reasonable ground exists.

These views make it unnecessary to pass upon the question of whether the section here involved conflicts with the general state law regulating the bakery business. Deering's Gen.Laws, vol. 1, p. 209, Act 610.

The judgment is reversed, with directions to the court below to overrule the demurrer and permit defendants to answer.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



6 Cal.2d 206

ATKINS CORPORATION v. TOURNY et al. (WAIZMAN, Intervener).

S. F. 15347.

Supreme Court of California.

April 30, 1936.

Rehearing Denied May 28, 1936.

1. Appeal and error ⇐971(2)
Evidence ⇐498½

Whether one is an intimate acquaintance within meaning of statute authorizing such a person to give his opinion concerning sanity of party, rests largely in discretion of trial judge, but, if there has been an abuse of discretion, it may be corrected on appeal (Code Civ.Proc. § 1870, subd. 10).

2. Evidence ⇐474(4)

In action to compel performance of stock owner's agreement to exchange stock, permitting of party who had negotiated exchange to testify as an "intimate acquaintance" concerning sanity of stock owner at time transaction was consummated *held* error, where party had met stock owner prior to that date on five occasions only and had on each occasion merely discussed proposed exchange (Code Civ. Proc. § 1870, subd. 10).

[Ed. Note.—For other definitions of "Intimate Acquaintance," see Words & Phrases.]

3. Evidence ⇐135(2)

In action to compel performance of stock owner's agreement to exchange bank stock for oil stock, testimony of party who negotiated exchange that lands of oil company were in proven field and that well on adjoining land was a producing well *held* sufficient to sustain finding of fraud where well on adjoining land had never produced oil in paying quantities, as respects right of stock owner to introduce evidence of similar transactions by such party with same stock.

4. Evidence ⇐135(2)

Where fraud is charged, evidence of other fraud, or fraudulent representations of like character, committed by same parties at or near same time, is admissible to prove intent.

5. Appeal and error ⇐1056(1)

In action to compel performance of stock owner's agreement to exchange valuable bank stock for speculative oil stock, wherein stock owner had produced evidence which would have sustained finding that party negotiating exchange was guilty of fraud, refusal to permit stock owner to offer evidence of similar transactions of such party in respect to same oil stock *held* reversible error, especially where stock owner had to develop fraud by cross-examination of such party.

6. Lost instruments ⇐3

Action against trustees of voting trust of bank stock to compel restoration of lost trust certificates of which plaintiff claimed ownership as assignee, and execution by trustees of certificates in place of those lost, was not controlled by statute authorizing action against corporation to compel corporation to issue new certificate where old one was lost, and hence power of equity court to grant relief sought was required to be found in its general powers (Civ.Code, § 330.18).

7. Lost instruments ⇐10

In action against trustees of voting trust of bank stock to compel restoration of lost trust certificates of which plaintiff claimed ownership as assignee, and execution by trustees of certificates in place of those lost, equity court possessed full power to order physical re-execution of certificates, and was not limited to simple judicial decree declaring contents of lost documents.

8. Lost instruments ⇐10

In proper case, where a document has been lost, equity court may require physical re-execution of document on such terms as may be fair to both parties, but, where owner of lost document will be fully protected by simple judicial decree declaring contents of lost document, equity court will not grant relief beyond that necessary.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Atkins Corporation against George Tourny and others, as trustees, and others, in which Olga Waizman, an incompetent, by Frank J. Waizman, guardian of her person and estate, intervened and filed a cross-complaint. Judgment for plaintiff, and defendants and the intervener appeal separately.

Reversed.

Carl Westerfeld, of San Francisco, for appellant Waizman.

Thomas Ashby and Hugh Goodfellow, both of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant Goodfellow.

Edgar C. Levey, of San Francisco, for respondent.

THOMPSON, Justice.

The plaintiff commenced this action against the trustees of a voting trust of shares of the capital stock of the San Francisco Bank to compel the restoration of lost trust certificates of which plaintiff, as assignee, claims ownership and the execution by the trustees of certificates in place of those lost and the transfer to plaintiff by the trustees of all the right, title, and interest of the intervener, Olga Waizman, who was originally named a party defendant. On September 12, 1930, Olga Waizman had been induced by one Simons to exchange two trust certificates representing two shares of stock in the bank mentioned, and of the value of over $25,000, for 3,000 shares of stock in the Security Petroleum & Royalty Corporation, Limited. When she sought the certificates for the purpose of making the assignment, they could not be found. This action was commenced. When Miss Waizman was served with process, she telephoned Simons, who took her to his counsel, who explained the action to her and then sent her to an attorney whom he recommended. This attorney, after talking

with Miss Waizman and with plaintiff's attorney, filed a disclaimer of Miss Waizman's interest, on November 24, 1931. The complaint had been filed November 8. On December 1, 1931, Miss Waizman was adjudged incompetent by an order of the superior court, and Frank Waizman was appointed guardian of her estate and person. The latter, on December 14, served notice of rescission of the agreement of exchange and offered to restore the oil stock, and also very shortly thereafter (December 22) filed a notice of a motion to vacate, set aside, and strike out the disclaimer and permit him to file, on behalf of his ward, an answer and cross-complaint. Before the motion could be heard, plaintiff dismissed as against Olga Waizman. The guardian, by this maneuver, was compelled to take another course, which he did by securing an order to file a complaint in intervention, in which it was alleged that the purported exchange agreement was null and void because of the incapacity of Olga Waizman, the inadequacy of the consideration, and because of the fraudulent representations practiced upon her. The plaintiff answered, denying inadequacy of consideration, incompetency, and fraud. The trustees answered the complaint and admitted the issuance of the trust certificates but, for want of information and belief on the subject, denied the assignment alleged in the complaint. The answer of the trustees to the complaint in intervention admitted the incompetency of Olga Waizman, the inadequacy of the consideration, and fraud. For lack of information and belief, the trustees denied loss of the certificates or that they had not been sold, assigned, pledged, or otherwise hypothecated. Judgment was rendered for the plaintiff to the effect that the trustees execute, issue, and deliver two voting trust certificates in the place of those issued to the intervener, and in her name, and ordering Miss Waizman or her guardian to indorse and assign these certificates to plaintiff. It also adjudged that the intervener had no right in the certificates and that the agreement of exchange was valid and binding. From this judgment there are two appeals, the one by Olga Waizman, an incompetent, and the other by the trustees.

For purposes of convenience, we will consider first the appeal of the intervener.

The court found against the intervener on all the issues. It is the contention of her guardian that the evidence is insufficient to justify the findings, and, further, that the court erred in excluding evidence of other frauds committed by plaintiff, and erred also in permitting the witness Simons to testify concerning the soundness of mind of the appellant Waizman.

[1] We shall treat the contentions in their reverse order. Was the witness Simons competent, under section 1870, subd. 10, of the Code of Civil Procedure, to give his opinion concerning the sanity of the appellant? Was he an "intimate acquaintance" within the meaning of that section? It was Simons who negotiated with Miss Waizman for the exchange of stock. He secured her name from a "stock list" and called upon her for the first time on or about September 5, 1930, for from thirty to forty-five minutes. He saw her again a day or two later and, in order that he might talk his business with her, took her for a ride covering a period of "an hour and a half or two hours." On the following day, he again took her for an automobile ride and talked business with her. A day or two later he saw her for the fourth time, and they went to a bank, where some men asked Simons a few questions. He could not remember who the man was or what position he was supposed to have with the bank. Miss Waizman told him on this occasion that she thought she would "make the deal." On the day following, Simons called upon her, drove with her just around the corner, and secured Miss Waizman's signature. Hence, according to his own testimony, he had seen Miss Waizman five times before the agreement was signed, each time earnestly engaged in endeavoring to make an exchange of stocks. We are not unmindful of the rule that the question of whether one is an intimate acquaintance within the meaning of section 1870, subd. 10, of the Code of Civil Procedure, rests largely in the discretion of the trial judge, and his ruling will not be disturbed in the absence of an abuse of discretion. But the Legislature must have intended, when it authorized laymen to give their conclusions as to mental condition, and then qualified this permission by providing that only "intimate" acquaintances should so testify, that the class who might thus testify should be considerably limited. In a rather early case, that of Estate of Carpenter, 94 Cal. 406, 29 P. 1101, this court attempted to define what is meant by the term "intimate," and also to show that in this state we have endeavored, so far as this precise question is concerned, to travel the middle road between two widely divergent views. We there read, at page 414 of 94 Cal., 29 P. 1101, 1103:

"What is an 'intimate acquaintance' has not been very clearly settled. The requirement that such an acquaintance shall be an intimate acquaintance does not seem to exist elsewhere. In State v. Pike, 49 N.H. 399 [6 Am.Rep. 533], Mr. Justice Doe, in a dissenting opinion, which has since been followed in that state, considers the question as to whether persons not experts can be allowed to testify in regard to mental sanity. He seems to assert that in England the rule has always been to receive such testimony, and he shows by numerous citations that such, too, has been the rule in most of the states. The witnesses are only required to have had sufficient opportunity to observe the person whose sanity is in question. Different rulings have been made as to what shall be considered a sufficient showing of opportunity of observation to enable a witness to form an opinion which can be received as evidence; or, expressed in the language of our Code, what degree of intimacy there must be. In general, the idea seems to be that no rule can be prescribed on this subject, and therefore, as in regard to handwriting, if it appear that there has been some opportunity, and the witness has an opinion, he may state it. The value of it will depend upon circumstances. In some states such evidence is not received at all from nonexperts. Our Code provides that intimate acquaintances may give their opinions, and, of course, the converse will follow that no others can. The phrase 'intimate acquaintance' cannot include all acquaintances. Worcester, under the word 'acquaintance,' has the following: 'Aquaintance expresses less than familiarity; familiarity less than intimacy. Acquaintance springs from occasional intercourse, familiarity from daily intercourse; intimacy from unreserved intercourse. Acquaintance, having some knowledge; familiarity, from long habit; intimacy, by close connection.'

"In People v. Levy, 71 Cal. 618, 12 P. 791, it is said: 'It is often a difficult question to determine whether the witness is sufficiently acquainted with the party to entitle him to speak. That the witness should be familiar with the temperament and habits of mind of the person whose soundness is in question there is no doubt.' Sir John Nicholl, in Kinleside v. Harrison, 2 Phillim Ecc. 449, says: 'Persons who see a testator only occasionally will form different opinions from those who have better opportunities of judging. We know that little appearances occurring in this way are extremely fallacious, yet we often find occasional observers depose with great confidence. It often happens that the most ignorant are the most confident. * * * This kind of opinion is still more various where the testator's capacity is fluctuating, where he is sometimes better and sometimes worse, and this is generally the case with old age or other infirmities.'

"An intimate acquaintance would appreciate these varying moods and temperaments, and be able to judge the acts of a testator with full knowledge of his peculiarities. A mere acquaintance who only casually meets one who has some infirmities, and perhaps also some striking idiosyncrasies, although quite often, and yet without special interest in him, might think strangely of conduct which to one better acquainted would seem rational and natural. No two persons are exactly alike, and many, in fact nearly every one, has some weakness which, perhaps like physical infirmities, they endeavor to favor or hide. Our thoughts run in different channels; our mental processes follow different methods. An intimate acquaintance, who is familiar with all these, can better judge of mental conditions.

"Now, when we take into consideration the rule, as it exists in most jurisdictions where the common law prevails, we must conclude that our Code has attempted what has been said to be impracticable, to establish a rule as to what opportunities of observation shall entitle a witness to speak. A nonexpert may testify, but only if he has had these advantages which I have attempted briefly to specify, notwithstanding the statutory attempt. Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is and must remain more or less indefinite. A very large discretion must be conceded to the trial court. If the conclusion reached is one which can be reasonably entertained, consistently with the above idea of intimacy, this court cannot review the ruling.

"Some of the witnesses who were allowed to give their opinions as to the sanity of the deceased evidently were not intimate acquaintances, within this rule, and the objection is not avoided by varying the form of the question,—asking the witness how he appeared mentally. If anything, this adds to the objection, for it fails to require the witness to give the reason for his belief."

Other cases could also be referred to. See Estate of Loveland, 162 Cal. 595, 123 P. 801; Huyck v. Rennie, 151 Cal. 411, 90 P. 929. It is true that all of the cases recognize that the determination of who is an "intimate" acquaintance, within the meaning of the section, rests largely in the discretion of the trial court. See Wheelock v. Godfrey, 100 Cal. 578, 35 P. 317; In re Estate of Lenci, 106 Cal.App. 171, 288 P. 841. But, necessarily, if there has been an abuse of discretion, it may be corrected on appeal. In State v. Leakey, 44 Mont. 354, 120 P. 234, at page 238, the Montana Supreme Court, in reversing a trial court, had the following to say on this question: "The court also erred in permitting the witness George Albert to express an opinion that the defendant was sane. According to his own statement he had known the defendant but a short time and had formed only a casual acquaintance with him and had limited opportunity to observe his conduct. The acquaintance had covered about three weeks while the two were employed at a cattle roundup near Wibaux. He met the defendant only at meals and never had a conversation with him in person. It was said in State v. Penna, 35 Mont. 535, 90 P. 787, that the determination of the question what an intimate acquaintance is, within the meaning of the statute, must be left to the trial court, and that its conclusion will not be reviewed except in case of a clear abuse of discretion. Nevertheless its discretion must in all cases be used in a reasonable way. It must be called into exercise by the facts presented in each case. The acquaintance must be more than casual. The term 'intimate' means 'close in friendship or acquaintance; familiar; confidential;' also: 'near; close; direct; thorough; complete.' Webster's International Dictionary. A moment's consideration leads to the conclusion that it was the purpose of the Legislature in enacting the statute, to settle the rule by restricting the class of laymen who may be permitted to state an opinion, to those who are or have been so closely related in their associations with the person the soundness of whose mind is in question, that they have become familiar with his temperament or habits of mind. Otherwise a mere passing acquaintance woud be held a qualified witness."

[2] The importance of Simons' testimony is made apparent when the facts of the case are considered. Intervener presented many witnesses—relatives and friends of many years standing—all of whom testified that on September 12, 1930, Miss Waizman was of unsound mind. All these witnesses gave logical and convincing reasons for their conclusions. Undoubtedly the intervener established a strong prima facie case on the incompetency issue. The only testimony produced by plaintiff to rebut this prima facie case was that of Simons, the alleged perpetrator of the fraud, his wife, and the attorney who filed the disclaimer above mentioned, and who was secured for Miss Waizman by Simons. Mrs. Simons testified that she first met Miss Waizman September 17, 1930, five days after the perpetration of the alleged fraud. Thereafter, and prior to trial, she had met her a few times on "social" visits. In her opinion, on these occasions, Miss Waizman's conversation "was very rational." The attorney who filed the disclaimer first met Miss Waizman almost a year after the 12th of September, 1930, and then saw her on but two occasions. He testified that, when he met Miss Waizman, her conduct, conversation, and appearance were rational. Neither of these witnesses knew Miss Waizman on the date the transaction was consummated, and so, of course, knew nothing of her mental condition on that date. Simons, over strenuous objection, was permitted to qualify as an intimate acquaintance and to testify that, in his opinion, on September 12, 1930, Miss Waizman was sane. As already stated he had met Miss Waizman, prior to that date, on five occasions, on each of which he discussed business. In that period he induced her to agree to exchange her valuable bank stock, worth in excess of $25,000, for some speculative oil stock. Simons knew at that time that Miss Waizman was entirely dependent on the dividends from that stock for her living. Simons was the only witness who testified that on September 12, 1930, Miss Waizman was sane.

[3-5] We are not unmindful of the rule that a presumption of sanity exists and that the trial court had the opportunity of observing both Simons and Miss Waizman. We are not holding that the finding as to sanity is totally unsupported. We do feel, however, that to permit Simons to testify on this issue, under the circumstances here disclosed, was an abuse

of discretion. Whether this error, standing alone, would require a reversal, we do not find it necessary here to decide, for the reason that we are of the opinion that the trial court refused to admit certain testimony that should have been admitted, which refusal seriously prejudiced intervener's case. It was the theory of intervener that the exchange here complained of was consummated at a time Miss Waizman was incompetent or, if competent, that the transaction was induced by reason of the fraud of Simons. In view of the retrial, we do not deem it proper completely to review the evidence on this fraud issue. A reading of the record convinces us that intervener produced evidence which, if believed, would have sustained a finding that the exchange was induced by reason of certain fraudulent misrepresentations on the part of Simons and upon which Miss Waizman relied. It must be remembered that at the time of the trial Miss Waizman had been judicially declared incompetent. Although called as a witness, she could remember none of the details of the transaction. She was obviously incoherent and suffering from a loss of memory. Under such circumstances, intervener was compelled to prove the fraud by cross-examination of Simons, the alleged perpetrator of the fraud, and obviously an adverse and hostile witness. Simons admitted that he represented to Miss Waizman that the lands of the corporation whose stock he exchanged for the bank stock were in a "proven field," and that the Shell Oil Company well, on lands adjoining the corporation's lands, was a "producing well." Reading Simons' testimony as a whole, we think that it is susceptible of the interpretation that by these representations he intended to convey to Miss Waizman, and did in fact convey to her, the impression that the Shell Oil Company well was then producing oil in paying quantities and that this proved that the adjoining land would likewise produce oil in paying quantities. As a matter of fact, the log of the Shell well shows that the well had been "killed with mud on September 11, 1930 [the day before the exchange was consummated], preparatory to deepening well." The well was not then producing, nor had it ever produced oil in paying quantities, and was subsequently abandoned. The evidence, so interpreted, clearly would sustain a finding of fraud. Pohl v. Mills, 218 Cal. 641, 24 P.(2d) 476; Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Tracy v. Smith, 175 Cal. 161, 165 P. 535; De Garmo v. Petitfils Confiserie, 93 Cal.App. 261, 269 P. 692. Under such circumstances, to strengthen his case, intervener offered evidence of similar transactions of Simons at or about the same time, dealing with the same oil stock. This the trial court excluded on the theory that intervener had failed to prove any fraud. The evidence should have been admitted. Cases of fraud are exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge. Where fraud is charged, evidence of other frauds or fraudulent representations of like character, committed by the same parties at or near the same time is admissible to prove intent. Evans v. Gibson, 220 Cal. 476, 31 P.(2d) 389; Kornblum v. Arthurs, 154 Cal. 246, 97 P. 420; 12 Cal.Jur. 831.

Under the circumstances of this case, the error in excluding this evidence was serious and prejudicial. As already stated, the intervener was forced to prove his case on the fraud issue, his ward being incompetent, largely from the testimony of a highy interested and adverse witness. Under such circumstances, it was error of a most serious nature to have excluded evidence of other similar transactions of Simons at or about the same time.

In view of the retrial of this case, some mention should be made of the legal issues presented by the appeal of the defendant trustees. The decree ordered that the trustees execute and deliver to the plaintiff the voting trust certificates in the form set forth in the judgment and identical with the certificates lost by Miss Waizman. It is also provided that an indemnity bond in the sum of $30,000 shall be furnished by the plaintiff to the defendant trustees, indemnifying against loss or liability which may be suffered by reason of the execution of these new certificates.

It is the main contention of the trustees that the trial court had no authority to order the physical re-execution of the certificates, that the action was merely the old common-law action of restoration, and that the decree should have been limited to an adjudication that these certificates had been issued to Miss Waizman, and to a judicial declaration of the contents of the certificates.

[6] The position of the trustees is untenable. It should first be mentioned that these trustees are correct in their contention that this is not an action against a corporation and that shares of stock do not constitute the subject of the action. It therefore follows that the provisions of section 330.18 of the Civil Code, providing for exactly the remedy here decreed by the court, have no application to this case. Whatever power the equity court had to render the decree here complained of must be found in the general powers of equity courts and not in the statutory law.

[7, 8] We are of the opinion that in a proper case the equity court, where a document has been lost, may require the physical re-execution of the document on such terms and conditions as may be fair to both parties. In many cases, the owner of the lost document will be fully protected by a simple judicial decree declaring the contents of the lost document. In such a case, the equity court will not grant relief beyond that necessary. But in many cases, of which the present case is a good example, in order that the owner of the lost document may fully enjoy the benefits of ownership, it is necessary that the document be physically restored. In such a case, an equity court possesses full power physically to restore the document. That such power exists is evidenced by the case of Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 190 P. 797, where a bond was ordered to be physically restored. There are many other cases illustrating the exercise of a like power. Thus, in Cummings v. Coe, 10 Cal. 529, a deed was ordered physically restored. See, also, Conlin v. Ryan, 47 Cal. 71; Kent v. Church of St. Michael, 136 N.Y. 10, 32 N.E. 704, 18 L.R.A. 331, 32 Am.St.Rep. 693; Cade v. Walker, 214 Ala. 675, 108 So. 594.

The cases cited by the trustees to the effect that in those particular cases the relief granted was limited to a judicial declaration of the contents of the document are not necessarily contra. All that was there held was that, under the facts there presented, the owner of the document would be fully protected by such a decree. Such is not the situation in the present case, where, if the owner of the voting certificates is to enjoy all the benefits of ownership, he must possess the documents. We find nothing contrary to the views herein expressed in McKeon v. Neuschwander, 209 Cal. 283, 286 P. 1010.

In view of the retrial, we do not deem it proper to discuss the sufficiency of the evidence offered to prove that the certificates were lost. Of course, such proof is required as a condition precedent to the exercise of the power.

The judgment against intervener and against the defendants is reversed.

We concur: WASTE, C. J.; CONREY, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.



6 Cal.2d 340

KENNEDY v. STATE PERSONNEL BOARD et al.

Sac. 4995.

Supreme Court of California.

May 1, 1936.

Rehearing Denied May 28, 1936.

1. Officers ⇐69

Subdivision of constitutional amendment protecting persons theretofore serving in state civil service *held* to exclude persons formerly holding positions exempt from civil service system, as against contention that words "civil service" referred merely to employment in civil, as distinguished from military or other noncivil, capacity (Const. art. 24, § 5 (d), adopted Nov. 6, 1934).

[Ed. Note.—For other definitions of "Civil Service," see Words & Phrases.]

2. Officers ⇐69

Under constitutional amendment extending civil service system and authorizing board to fix probationary term of from two to eight months, attorney for board of dental examiners, having been dismissed about four months after effective date of amendment, *held* not to have acquired permanent status, where board fixed probationary period of eight months, even though board did not fix such period until six months after date of amendment (Gen.Laws 1931, Act 1400, § 7, subd. 5; Act 2048, § 5; Const. art. 24, § 5(a, e) adopted Nov. 6, 1934).

3. Mandamus ⇐154(5)

Petition for writ of mandate by former attorney for board of dental examiners, alleging that his dismissal was for improper motives and that his services were originally declared satisfactory, and that, after his dismissal, board passed another resolution charging him with unsatisfactory conduct and improper political activity, *held* not to present appropriate case for judicial review (Gen. Laws 1931, Act 1400, § 7, subd. 5; Act 2048, § 5).

4. Mandamus ⇐172

On petition for writ of mandate to compel reinstatement, inquiry into extraneous facts to determine possible improper motive of executive or administrative board in dismissing employee is unjustified.

In Bank.

Petition by Anthony J. Kennedy for a writ of mandate against the State Personnel Board and others to compel respondents to reinstate petitioner to his former position as attorney for the Board of Dental Examiners.

Alternative writ of mandate discharged and peremptory writ denied.

Norris J. Burke, of Sacramento (Anthony J. Kennedy, of Sacramento, of counsel), for petitioner.

Keith & Creede, of San Francisco, and Shreck & Morse, of Sacramento, amici curiæ for Bennett E. Pemberton.

U. S. Webb, Atty. Gen., and Jess Hession and Ralph H. Cowing, Deputy Attys. Gen., for respondent State Personnel Board.

H. E. Lindersmith, of Los Angeles, for respondent Board of Dental Examiners of California.

E. P. Bromley, of Los Angeles, for respondent H. E. Lindersmith.

Carroll S. Bucher, of San Francisco, amicus curiæ.

PER CURIAM.

This is a petition for a writ of mandate. On October 1, 1932, petitioner was appointed attorney for the board of dental examiners, under the provisions of the Dentistry Practice Act (Deering's General Laws, 1931, Act 2048, § 5). His position at that time was exempt from the state civil service system, by express provision of the Civil Service Act (Deering's Gen. Laws, 1931, Act 1400, § 7, subd. 5). In November, 1934, at the general election, our Constitution was amended by the adoption of article 24, which broadened the scope of civil service and included within the system the position then held by petitioner. The amendment went into effect December 20, 1934.

On April 15, 1935, petitioner was dismissed from his position by the dental board, for reasons filed with the state personnel board. There is no doubt as to the power of the appointing body, the dental board, to dismiss its appointee, under the former law. Petitioner, however, contends that the constitutional amendment, which is self-executing by the terms of section 5 (a) thereof, brought him under the state civil service system, and that he acquired a permanent status and was subject to removal only for good cause. On July 11, 1935, he filed this petition, seeking reinstatement and salary payments subsequent to his dismissal.

The validity of this contention depends upon the interpretation of two subdivisions of the amendment, under either of which petitioner claims that he acquired his status. The first is subdivision (d) of section 5, which provides: "All persons other than temporary appointees heretofore serving in the State civil service shall continue so to serve without change of class or grade of position heretofore acquired save as such class or grade may be changed by said board in the exercise of its powers herein conferred or as may be hereafter provided by law."

[1] Petitioner argues that the term "state civil service" in this section refers simply to state employment in a civil capacity, as distinguished, for example, from a military capacity. Under this view, petitioner was a "civil" employee, serving in the "state civil service," and therefore was entitled to "continue so to serve without change of class or grade of position heretofore acquired," except by a proper exercise of the power of dismissal under the rules applicable to the civil service system. But this interpretation is contrary to the usual meaning given to the term "civil service," and is manifestly opposed to the purposes of the amendment. Reference to the argument submitted to the voters shows that the provision was designed to bring numerous positions, formerly exempt, under the civil service system, and thereby to make them

subject to examination and selection on the basis of merit. The term was obviously used to describe the established merit system, and not merely the "civil" character of the employment. The distinction between "civil service" employees and "non-civil service employees" is clearly made in the above-mentioned argument to voters, and it must be concluded that the proper construction of subdivision (d) excludes persons who formerly held positions exempt from the civil service system.

[2] Subdivision (e) of section 5 is the other provision upon which petitioner relies. It provides: "All persons not hereinbefore provided for in subdivision d hereof, holding positions subject hereto for more than six months immediately preceding the effective date hereof, shall continue to hold such positions subject to the provisions hereof save that the board in adopting rules relative to classes or grades of the position held by such person shall give each such person such class or grade as it may deem just and such probationary term to commence on the effective date hereof of not less than two months nor more than eight months in the class or grade assigned as it may fix."

Under this provision, which seems clearly to apply to petitioner, who had served in his position for more than six months prior to the amendment, he might have become a permanent civil service employee upon uninterrupted service of his probationary term. It is equally clear that he was subject to dismissal during the period of such probationary term, for otherwise the term "probationary" would be meaningless, and the distinction between civil service employees with permanent status and probationary employees with temporary status would be obliterated. Hence the only question is whether in fact petitioner served his probationary period and obtained permanent status, or was dismissed during such period. Under the amendment, the state personnel board was empowered to fix the period at not less than two nor more than eight months. On June 24, 1935, six months after the amendment went into effect, the board by resolution fixed the term at eight months. It follows that petitioner was dismissed within the period of his probation, and was not entitled to the protection accorded to a civil service employee.

Petitioner argues, however, that, assuming that he had probationary status only under subdivision (e), supra, he was nevertheless not dismissed within the period of his probation. The theory he advances is that, when the board failed to fix the probationary period prior to the expiration of two months from the adoption of the amendment, the minimum period of two months became automatically the period of probation, and that consequently his permanent status began at that time. The answer to his argument is simply that the amendment gives the board power to fix the period within specified limitations, but does not require that it fix that period at any particular time. The board might have adopted its resolution at the time the amendment went into effect, or one month thereafter, or at any time up until the end of the eight-month maximum period. After the conclusion of such eight-month period, it would apparently be futile to fix the same. But the amendment does not in terms place any other limitations on the board's power to act, and we are unable to see how any such limitation as is proposed can be implied.

[3, 4] The only remaining contention of petitioner which requires mention is that his dismissal was for improper motives. In this connection he alleges that his services were declared to be satisfactory by the dental board in a resolution adopted at the time of his dismissal, and that subsequently another resolution was passed charging him with unsatisfactory conduct and improper political activity. In our opinion, these allegations do not present an appropriate case for judicial review. There is no sufficient affirmative showing of fraud or bad faith on the part of the board, and it has been a recognized rule that an inquiry into extraneous facts to determine the possible improper motive of an executive or administrative board in dismissing an employee is not justified. See Livingstone v. MacGillivray, 1 Cal.(2d) 546, 36 P.(2d) 622; State v. Kennelly, 75 Conn. 704, 55 A. 555.

The alternative writ of mandate heretofore issued is discharged, a peremptory writ is denied.

6 Cal.2d 227

PEOPLE v. CARR.

Cr. 3969.

Supreme Court of California.

April 30, 1936.

Rehearing Denied May 28, 1936.

1. Criminal law ⇐1218

Statute prohibiting committal to county or city jail for more than one year in any case on conviction of misdemeanor refers to single offense, and purpose of statute is not to prevent any single period of incarceration in such jail for longer than one year, and hence defendant convicted on four counts of rape could be sentenced to county jail for consecutive terms of one year on each count (Pen. Code, § 19a, as added by St.1933, p. 2217, § 2; Pen.Code, § 669).

2. Criminal law ⇐1216(1)

Separate crimes which may be charged in single indictment should ordinarily be treated as separate crimes for purposes of punishment.

3. Criminal law ⇐1216(1)

Crimes, and punishment therefor, are unaffected by procedural choice of single or separate informations (Pen.Code, § 19a, as added by St.1933, p. 2217, § 2; Pen.Code, § 669).

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph Vickers, Judge.

Lee R. Carr was convicted on four counts of rape, and he appeals.

Affirmed.

Prior opinion, 52 P.(2d) 489.

F. H. Bowers and Gladys T. Root, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

LANGDON, Justice.

Defendant was charged with rape. The information was in four counts alleging the commission of four separate offenses. The jury returned a verdict of guilty on each count, and also in each instance recommended punishment by confinement in the county jail. Judgment was thereupon pronounced, sentencing the defendant to confinement in the county jail for a period of one year on each count, the sentences to run consecutively. Defendant appeals, claiming that the court had no jurisdiction to impose sentence to the county jail for more than one year.

The case turns upon the construction of section 19a of the Penal Code, enacted in 1933 (St.1933, p. 2217, § 2), which provides in part: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year." It is defendant's contention that the purpose of this section is to prevent any single period of incarceration in the county jail for longer than one year; in other words, that the Legislature sought to prohibit long periods of confinement in the county jail, and intended that any period longer than one year should be served in the state penitentiary.

[1] If this was the legislative purpose, it was certainly not made clear; and we do not believe that such is the effect of the statute. Doubtless the section will result in shorter county jail sentences in many cases, e. g., where a confinement in excess of one year was formerly permitted for a particular offense. But there is nothing in the statute to suggest that it was intended to obliterate the distinction between one crime and several crimes. On the contrary, it refers to a "case," not cases; and to "conviction of misdemeanor," not misdemeanors. The language plainly has reference to a single offense. A person who commits two or more misdemeanors is subject to the possible imposition of two or more separate punishments. He may be tried separately and sentenced separately on each; or he may be charged with a number of crimes in separate counts in one information. The use of a single information is sanctioned by law and is a decided convenience, but in no way does it change the separable character of the offenses charged, nor does it alter the rules governing punishment. Section 669 of the Penal Code provides that when a person is convicted of two or more crimes, "the judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the

termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be." This section clearly governs the instant case, and there is nothing in the language of section 19a which purports to limit it.

[2] Defendant urges that our decision in Green v. Superior Court, 2 Cal.(2d) 1, 37 P.(2d) 694, supports his view. In that case we construed article 7 of the California Constitution, which requires a recommendation of a majority of the justices of the Supreme Court as a basis of commutation of sentence of a person who has been previously "twice convicted." The petitioner had been found guilty upon two counts of an indictment. This court held that he was not "twice convicted," but the decision was based upon the intent of the framers of the provision, in the light of circumstances then existing. We said [2 Cal.(2d) 1, at page 3, 37 P.(2d) 694, 695]: "We think it unlikely that the framers of the Constitution had in mind a situation like the case now before us, and looked forward more than a third of a century to a time when an indictment or information might charge two or more different offenses, as permitted since the amendment of section 954 in 1915." The foregoing excerpt indicates our present view, namely, that today, when separate crimes may be charged in a single indictment, they should ordinarily be treated as separate crimes for purposes of punishment.

There are two decisions of the District Court of Appeal which bear directly on this problem. In one, the defendant was sentenced for three offenses to a period longer than one year, by three separate commitments in three separate cases. The court held that this was proper. In re Stein, 4 Cal.App.(2d) 267, 40 P.(2d) 934. In the other, the defendant was convicted of three offenses charged in three counts of a single information, and was sentenced to serve over a year. The court held that this was improper. In re Buchanan, 4 Cal. App.(2d) 269, 40 P.(2d) 935. The latter case is, of course, precisely in point here, and the District Court of Appeal in these two decisions has laid down the rule that where separate misdemeanors are charged in a single information, one year is the maximum sentence; while the same offenses, charged in separate informations, permit sentences beyond one year.

[3] We are unable to see how this interpretation follows from section 19a, or how it may be reconciled with section 669. We are likewise unable to understand how the mere choice of one method of proceeding against a defendant, i. e., the single information, can have so substantially different an effect from the other method, separate informations. In our opinion the crimes, and the punishment therefor, are unaffected by the procedural choice of single or separate informations, and until the Legislature expressly declares otherwise, the rules governing punishment must be the same in each situation. Language in the cases of In re Stein, supra, and In re Buchanan, supra, in conflict with these views, is hereby disapproved.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CONREY, J.



6 Cal.2d 285

THOMPSON v. CLARK et al.

S. F. 15500.

Supreme Court of California.

May 1, 1936.

1. Municipal corporations ⇐519(6)

Provision of Street Improvement Bond Act of 1911 that lien therein created should be first lien *held* construable as giving such lien priority over private liens and having no reference to other liens in favor of public agency or created for public use (St.1923, p. 280, § 66).

2. Municipal corporations ⇐519(6)

Provision of 1911 Street Improvement Bond Act that lien created by street improvement bonds is first lien *held* not to determine whether bonds issued under 1911 act or bonds previously issued under 1915 Street Improvement Bond Act have priority (St.1911, p. 730, as amended; p. 744, § 23, as amended; St.1915, p. 1441, as amended; St. 1923, p. 280, § 66).

3. Municipal corporations ⇐950

Under Street Improvement Bond Act of 1915 providing that payments on assessment

made against particular parcel are to be placed in bond redemption fund for pro rata distribution among bondholders and that unpaid assessments constitute trust fund for redemption and payment of bonds, all unpaid assessments constitute trust fund for payment of all bonds (St.1915, p. 1441, as amended).

4. Municipal corporations ⇐519(6)

Provision in Street Improvement Bond Act of 1915 that liens created therein should be superior to all other liens except liens for state, county, and municipal taxes and public improvement assessments having priority thereover *held* not to give priority to assessment liens under 1915 act over special assessment liens arising under 1911 Street Improvement Bond Act (St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St. 1923, p. 414, § 11 (a).

5. Municipal corporations ⇐519(5)

Under amendment to Street Improvement Bond Act of 1911 declaring assessments to be liens, which provided that assessment lien should continue "until it be discharged of record," lien is "discharged of record" only after bonds subsequently issued to represent unpaid assessments are paid in full and not when bonds are issued; no new lien being created by issuance of bonds (St.1923, pp. 109, 280, §§ 18, 66; St.1927, p. 1407, § 23; St.1929, pp. 1655, 1656, 1661, §§ 19–21).

6. Liens ⇐1

It is not essential to existence of lien that an immediate right of foreclosure exist.

7. Municipal corporations ⇐519(5)

Under Street Improvement Bond Act of 1911, a lien arises upon recordation of assessment, even though bonds are to be issued for unpaid assessments (St.1927, p. 1407, § 23).

8. Municipal corporations ⇐519(6)

Prior issue of bonds under Street Improvement Bond Act of 1915 *held* to have priority over bonds of subsequent issue under Street Improvement Bond Act of 1911 (St. 1911, p. 730, as amended; St.1915, p. 1441, as amended; St.1923, p. 280, § 66; p. 414, § 11 (a); St.1927, p. 1407, § 23).

In Bank.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by W. W. Thompson against Minerva E. Clark and others. From the judgment, the plaintiff appeals.

Affirmed.

Eugene K. Sturgis, of Oakland, for appellant.

John L. McNab and S. C. Wright, both of San Francisco, for respondents Minerva E. and George D. Clark.

Albert Mansfield, of Redwood City, for respondent Town of San Carlos.

SEAWELL, Justice.

Plaintiff W. W. Thompson brought this action to foreclose the liens upon seventy-seven lots in the town of San Carlos securing seventy-seven bonds issued by defendant town of San Carlos on April 19, 1930, for street improvement assessments levied under the Street Improvement Act of 1911 (St.1911, p. 730, as amended). Defendants Minerva E. Clark and George D. Clark are the owners of street improvement bonds issued on June 15, 1926, under the Bond Act of 1915 (St. 1915, p. 1441, as amended). The assessments for which defendants' bonds were issued also constitute liens on the lots described in the complaint. The court below adjudged the liens of plaintiff subordinate to the liens of the assessments represented by bonds previously issued on June 15, 1926, and now owned by defendants Clark. The judgment decreed foreclosure of plaintiff's liens subject to said other liens.

In Balaam v. Pacific States Savings & Loan Company, 219 Cal. 612, 28 P.(2d) 1053, we held that where there are two issues of bonds under the Street Improvement Act of 1911, the liens securing the bonds issued last in time have priority over the liens securing the bonds issued first in time. Appellant contends that the same rule as to priority should obtain where the subsequent bond issue is under the 1911 act and the prior bond issue under the 1915 act.

At the time of both bond issues in the Balaam Case section 23 of the act of 1911 provided that upon recordation of the assessment in the office of the superintendent of streets, "the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; such lien shall be subordinate to

all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property." Stats.1923, p. 115. Until amendment of said section in 1921 (Stats.1921, p. 292), it had simply provided that the several amounts assessed should be a lien, omitting the provision for determining priority as between successive special assessment liens. Stats.1911, pp. 730, 744, § 23; Stats.1915, p. 1468.

Section 66 of the act of 1911 provided at the dates pertinent in the Balaam Case, and still provides, that "the city treasurer * * * shall report all payments of coupons or penalties upon said bonds, with the dates thereof, to the street superintendent, who shall forthwith endorse the same upon the margin of the record of the assessment to the credit of which the same are paid, and said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon and the penalties, if any, shall be fully paid according to the terms thereof." Stats.1923, p. 280.

From a reading of section 23, quoted above, as amended in 1921, it is apparent that the assessment lien therein referred to is expressly made subordinate to special assessment liens previously imposed, but superior to special assessment liens thereafter created. Thus the rule prior in time prior in right is expressly declared as to these liens. The question in Balaam v. Pacific States Savings & Loan Company, supra, was whether said section 23 as amended in 1921 regulated priority of liens when bonds had been issued to represent unpaid assessments. In reaching the conclusion that section 23 did not regulate priority where bonds had been issued, we found that two different and distinct assessment liens are created under the act of 1911, the one the lien which exists where bonds are not issued, and the other, the lien "which arises and is created by the issuance of the bond itself." Section 23, as it then stood, did not regulate the priority where bonds had been issued, but section 66 was the lien provision which applied where the assessments were represented by bonds. That section provided only that the assessment should be a first lien until the bonds were paid. On the authority of Woodill & Hulse Electric Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296, we held that in such a situation the lien imposed last in time was a superior lien.

Woodill & Hulse Electric Co. v. Young, supra, also involved the priority of two liens arising under the act of 1911. At the time pertinent in that case section 23 had not been amended to give priority to the liens there referred to in the order of their creation, but provided only that the several amounts assessed should be liens for two years from the date of the recording of the assessment. The court there declared that on reason the rule prevailing as to conflicting tax liens—that the lien last imposed is paramount—should be the rule as to priority betweeen conflicting street assessments. The court held that section 66, providing that the assessment should be a first lien until the bonds should be paid, was not intended to apply to conflicting assessment liens under the same statute, with the result that as the statute contained nothing regarding the ranking of conflicting assessment liens, the general principle of inverse priority applicable to tax liens should be the rule. That this was the attitude of the court in the Woodill Case is indicated by the following quotation:

"Finally, the point is made by amici curiæ, arguing in support of the respondent's position, that the statute provides that the 'assessment shall be a first lien * * * until * * * fully paid. * * *' They argue that, if the assessment is to be a first lien until paid, it necessarily follows that any subsequent lien must be subordinate to it. But this result is but one horn of a dilemma which presents itself, if we assume that the language quoted was intended to include the case of conflicting liens under the statute. The language is just as applicable to an assessment for subsequent work as to the one first imposed. In other words, the statute declares equally as well in the case of the second assessment as in the first that the lien shall be a first lien. But such lien can be first only if it is superior to the lien of the first assessment. The only escape from the dilemma thus presented is to conclude that the statute intended that, when once a lien for street work is imposed on property, no further improvement of a similar character can properly be made until such lien has been discharged by payment. Such a result, of course, would be subversive of the very purpose of the act, and it is inconceivable that it was intended.

"The true answer to the dilemma is that the language quoted was not intended to apply to the case of conflicting liens, both under the same statute. It cannot so apply, since it would make both liens, though in conflict, first liens, a manifest impossibility. The correct construction of the statute is that by the language quoted nothing more was intended than to declare the general proposition that a street assessment lien should be a first lien on the property. The *result is that the statute contains nothing governing the ranking of conflicting liens, each imposed under the statute, and such ranking must be determined by the general principles applicable to liens of that character.* [Italics ours.] As to those general principles we have no doubt. Such liens, so far as any phase of the matter here material is concerned, are essentially tax liens imposed by public authority for a public purpose upon a res, and the same compelling reasons which have led to the practically universal recognition of the rule that a subsequent lien for general taxes is superior to a prior lien of the same sort lead to the same conclusion with regard to street assessment liens." 180 Cal. 667, 674, 182 P. 422, 424, 5 A.L.R. 1296.

In so far as our decision in Balaam v. Pacific States Savings & Loan Society, supra, declares that section 66 establishes the rule of inverse priority for conflicting assessment liens represented by bonds, it is to be understood as meaning that said section, by declaring that the lien is a first lien, indicates an intention to prefer it over private liens, prior or subsequent, that is, a purpose to place it in the general class of tax liens given priority, as to which the rule is, in the absence of statutory modification, that the last in time is first in right.

[1] Not only did section 66 fail to expressly regulate the ranking of conflicting liens arising under the same statute, that is, the act of 1911, but it did not determine the ranking of assessment liens arising under said statute with general tax liens and assessment liens arising under other statutes. The declaration in the section, that the lien therein referred to shall be a first lien, cannot be construed as giving said lien priority over all general tax liens and other assessment liens whether imposed previously or subsequently. The provision should be construed as referring to private liens, rather than to those existing in favor of a public agency or created for a public purpose. Webster v. Board of Regents, 163 Cal. 705, 126 P. 974; Bolton v. Terra Bella Irr. District, 106 Cal.App. 313, 327, 289 P. 678; La Mesa, etc., Irr. District v. Hornback, 216 Cal. 730, 739, 17 P.(2d) 143; Inglewood v. County of Los Angeles, 207 Cal. 697, 707, 280 P. 360. The lien referred to in section 66 has priority over private liens, whether earlier or later in time. It is thus placed by statute in the class of tax liens, and such liens, according to Woodill & Hulse Electric Co. v. Young, rank in the inverse order of their creation, the last in time being first in right.

The Woodill case was followed in Barber Asphalt Paving Company v. Armstrong, 48 Cal.App. 70, 191 P. 954, and Balaam v. Pacific States Savings & Loan Company, supra, in line with the Woodill Case, is followed in Conley v. Hawley, 2 Cal.(2d) 23, 38 P.(2d) 408.

In the light of the above decisions we come now to examine the instant case, in which the bonds prior in time were issued under the Bond Act of 1915, the later bonds under the Street Improvement Act of 1911. The work of street improvement was in both instances done under the Act of 1911. Stats.1911, p. 730, as amended; see 3 Deering's Gen.Laws 1931, p. 4519, Act 8199. Said act, commencing with section 59 (St.1911, p. 758, § 59 et. seq., as amended), makes provision for bonds to be issued for unpaid assessments. The Bond Act of 1915 (Stats.1915, p. 1441, as amended; see 3 Deering's Gen.Laws 1931, p. 4644, Act 8209) provides an alternative plan for issuing bonds for work done and assessments levied under the act of 1911. Each bond issued under the bond provisions of the act of 1911 is for the specific amount of an assessment levied against a particular lot, and is secured by a lien on said lot. Upon default in payment, the bondholder may direct the city treasurer to sell the lot in satisfaction of the lien. Since 1929, section 76a of the act (St.1929, p. 1306) has provided that the bondholder as a separate and distinct and cumulative remedy may file suit to foreclose the lien of the bond and recover the amount due thereon. Bonds issued under the Bond Act of 1915 are in amounts fixed by the city council. Each bond is not a lien on a specific lot, but payments upon bonds are made into a bond redemption fund, from which the city treasurer pays bondholders pro rata. Hence it is provided in section 1 of the Act of 1915 that the unpaid assess-

ments secure the bonds, and in section 11 (a), as amended by St.1923, p. 414, that the unpaid assessments constitute a trust fund for the payment of the bonds. In the event of a default by a property owner, the city treasurer causes the lot of the defaulting owner to be sold, and the proceeds of sale are paid into the bond redemption fund. Or the city may file suit to foreclose the lien of the delinquent assessment.

If bonds are to be issued under either act, the resolution of intention by which the city council initiates the work of street improvement must declare the act under which they are to be issued. Section 61, act of 1911 (as amended by St.1927, p. 1410); section 4, act of 1915 (as amended by St.1923, p. 302). Bonds, whether issued under the act of 1911 or act of 1915, represent unpaid assessments. The Bond Act of 1915 does not provide a special procedure for making the assessment where bonds are to be issued under the act of 1915, but the assessment is made as provided in the Street Improvement Act of 1911. The assessment is the determination of the proportion of the cost of the improvement which shall be chargeable against each lot or parcel in the assessment district. Sections 18–21 of the Act of 1911 (as amended [St.1923, p. 109, § 18; St.1929, pp. 1655, 1656, 1661, §§ 19–21]) provide for the making of the assessment by the superintendent of streets, or the city engineer where the power is delegated to him. Said sections make no distinction in the manner in which the assessment is to be made depending on whether bonds are to be issued, or depending on the act under which the bonds are to be issued.

The assessment is made after the contractor has fulfilled his contract. A warrant, which is the contractor's authorization to collect individual assessments, is attached to the assessment, which is then recorded in the office of the superintendent of streets. After recordation the warrant and assessment are delivered to the contractor, who then is authorized to collect individual assessments. The contractor must return the warrant on or after thirty days from its recordation to the superintendent of streets, with a statement of all payments received. If bonds are to be issued under the act of 1911, the superintendent of streets certifies to the city treasurer a list of all unpaid assessments. Section 62 (as amended by St.1927, p. 1410). The city treasurer then issues bonds to represent unpaid assessments. Section 63 (as amended by St.1923, p. 278). If bonds are to be issued under the act of 1915, the superintendent of streets files the list of unpaid assessments with the clerk of the city council, a hearing is held, and the council makes its order for the issuance of the bonds. Section 5, Act of 1915 (as amended by St.1923, p. 302).

Bonds issued under the 1915 act represent and are secured by assessments levied under the act of 1911. It is section 23 of the act of 1911, providing for recording of the assessment and delivery of the warrant to the contractor, which also provides that the several amounts assessed shall be a lien which is subordinate to earlier special assessment liens, but superior to later special assessment liens. In Balaam v. Pacific States Savings & Loan Company, supra, we held that when bonds were issued under the act of 1911 to represent unpaid assessments, under section 66 a distinct and different assessment lien arose than that declared in section 23, and section 23 did not determine the priority of such bond assessment lien with reference to other special assessment liens. On the contrary, as held in the Woodill Case, supra, the Bond Act of 1911 as it then stood failed expressly to regulate the priority of the lien referred to in section 66 over other special assessment liens, with the result that on general principles by analogy to tax liens, the special assessment lien last in time was prior in right. Section 11(a) of the Bond Act of 1915 corresponds in a measure to section 66 of the Bond Act of 1911. In 1926, when the bonds held by defendants Clark were issued under the 1915 act, section 23 of the Act of 1911 read as it did at the times pertinent in the Balaam Case. Is there such a difference in the provisions of the Bond Act of 1915, including section 11(a), that it can be said that section 23 of the act of 1911 may be looked to to determine the priority of the assessment lien existing where bonds were issued in 1926 under the act of 1915.

Section 11(a) of the act of 1915 (as amended by St.1923, p. 414) is as follows: "In the event of such bonds being so issued, then the assessments, which shall be unpaid, as shown on the list filed by the superintendent of streets and determined by the city council, and any reassessments which may be issued thereon or in lieu thereof, together with interest

thereon, shall remain and constitute a trust fund for the redemption and payment of said bonds and of the interest which may be due thereon. Such assessments and reassessments and each installment thereof and the interest and penalties thereon shall be and shall continue to constitute a lien against the lots and parcels of land on which made, until the same be paid, but for a period not exceeding the time within which an action might be brought on the last series of bonds issued upon the security of such unpaid assessments. *Such lien shall be prior and superior to all other liens, except the lien for state, county, and municipal taxes and public improvement assessments and reassessments which may have priority thereover." (Italics ours.)*

It is apparent that the words "prior" and "priority" as used in said section do not refer to time of creation, but to superiority of right. The sentence italicized above expressly recognizes that there may be liens for public improvement assessments which may have priority over the lien of a particular assessment for such improvements which is represented by bonds issued under the act of 1915. But said sentence does not declare the rule to be followed in determining superiority of conflicting public improvement assessment liens. It does not state whether the earlier or the later lien shall be superior. In this respect this sentence of section 11(a) is like section 66 of the Act of 1911, which only provided that the lien therein referred to should be a first lien until the bond was paid, without declaring the rule to be followed in determining the priority of conflicting assessment liens.

The preceding sentence of section 11(a) of the Act of 1915, as amended, provides that the "assessments and reassessments * * * shall be and shall continue to constitute a lien against the lots and parcels of land on which made, until the same be paid, but for a period not exceeding the time within which an action might be brought on the last series of bonds issued upon the security of such unpaid assessments." This language is closely similar to that of section 66 of the Act of 1911 (as amended by St.1923, p. 280) that the "assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon and the penalties, if any, shall be fully paid according to the terms thereof." The bonds under both statutes are issued to represent unpaid assessments. Under both statutes it is the unpaid assessments which shall be a lien. The declaration that the unpaid assessments shall be a lien is equivalent to a statement that a lien shall exist against each parcel assessed in the amount of the unpaid assessment against it. Under neither act does the mere issuance of the bonds to represent unpaid assessments constitute a discharge and payment of said assessments. The Bond Act of 1915 repeatedly describes the assessments as unpaid assessments after bonds have been issued, and under the act of 1911 the assessment against a particular parcel is not marked paid on the record of the assessment until the bond issued to represent it is paid in full. Section 60 (as amended by St.1923, p. 276). Section 62 of the Act of 1911, as amended, provides that where bonds are issued under the act of 1911 all "unpaid assessments" are to be paid in annual payments corresponding to the number of serial payments provided to be made on the principal of the bonds issued to represent said unpaid assessments.

In the act of 1911 it is declared that the assessment shall be a lien until the bond is paid, in the act of 1915, that the assessments shall be and continue to constitute a lien until the same be paid. The fact that under the act of 1911 the assessment is a lien until the bond is paid, and under the 1915 act the assessment is a lien until the same, that is, the assessment is paid, makes no substantial difference between the two provisions as affects their relation to the lien provision of section 23 of the Act of 1911. The difference in wording is due to the fact that each bond issued under the 1915 act is not in the amount of a separate assessment and secured by a lien on a particular parcel assessed. Payments made on a particular assessment are not applicable to a single bond, as are payments made under the Bond Act of 1911, but are paid into the bond redemption fund, from which all bondholders are paid pro rata. Hence the lien against a parcel assessed is discharged when an assessment against said parcel is paid in full.

[2] We can find no distinction between the wording of section 66 of the Act of 1911 and section 11(a) of the Bond Act of 1915 which would justify a holding that section 23 of the Act of 1911 as it read in 1926 determined the priority of liens existing when bonds were issued in 1926 under the act of 1915. If upon issuance of bonds under the act of 1911 as it stood prior to 1927, a new lien came into existence, as de-

clared in the Balaam Case, different and distinct from the lien existing where no bonds had been issued, then it must be held that likewise upon issuance of bonds prior to 1927 under the act of 1915 a new lien came into existence. Although but one assessment is made in the manner prescribed in sections 18–21 of the Act of 1911, whether or not bonds are to be issued, and it is the assessment which is declared to constitute a lien, it is the theory of our decision in the Balaam Case that the lien for the amount of the assessment which exists where bonds have been issued is a different lien, with different characteristics, than the lien for the amount of the assessment which exists where no bonds have been issued.

[3] The first sentence of section 11(a) of the Act of 1915 declares that the unpaid assessments shall constitute a trust fund for the redemption and payment of bonds. All unpaid assessments constitute a trust fund for the payment of all bonds for the reason that under the Bond Act of 1915 payments on an assessment against a particular parcel are not applicable to a particular bond, but are paid to the city treasurer to be placed by him in the bond redemption fund for pro rata distribution among bondholders. Where bonds are issued under the Act of 1911, payments are likewise made to the city treasurer, who must place them in a special bond fund, which is certainly a trust fund for the bondholders, with the distinction that payments made on an assessment against a particular parcel go to the holder of the bond which is a lien on that parcel.

[4] Respondents also argue that bonds issued under the act of 1915 should have priority over bonds issued under the act of 1911 because it is provided in the 1915 act that if there is no purchaser when property is offered for sale for delinquent assessments, the city shall become the purchaser, and in the event there are no available funds in the treasury, the amount necessary to purchase may be raised by levy of a special tax upon the taxable property of the city. See American Co. v. City of Lakeport, 220 Cal. 548, 32 P.(2d) 622. By reason of the fact that tax-raised funds may be used by the city to purchase upon foreclosure of street assessment liens under the act of 1915, respondents contend that the last sentence of section 11(a) should be construed as giving priority to assessment liens existing under the 1915 act over special assessment liens arising under other acts. Said last sentence of section 11(a), as amended, provides: "Such liens shall be prior and superior to all other liens, except the lien for state, county and municipal taxes and public improvement assessments and reassessments which may have priority thereover." Respondents argue that "public improvement assessments" in its application "is limited to 1915 act bonds, and refers to prior 1915 Act assessments." In this construction the lien of assessments represented by 1915 act bonds would be superior to all other improvement assessment liens, presumably whether such liens arose before or after issue of the 1915 act bonds. There are other public improvement and bond acts which provide for purchase by the city with its general funds upon foreclosure of assessment liens. For example, Stats.1903, p. 376, § 25; Stats. 1915 (Improvement Act of 1901) p. 383; Stats.1913, p. 954, § 14. No reason is suggested why the legislature should wish to make the lien existing under the Bond Act of 1915 superior to all other public improvement assessment liens, including other assessment liens arising under acts providing that the city may or must purchase upon sale for delinquency, and it cannot be held that this position of superiority has been accorded liens under the 1915 act by the general language quoted above.

[5] We hold herein that section 23 of the Act of 1911 and section 11(a) of the Act of 1915, considered together as said sections read when the bonds owned by defendants Clark were issued in 1926, did not give priority to the assessment liens represented by said bonds over special assessment liens thereafter imposed. On the authority of Woodill & Hulse Electric Co. v. Young, supra, followed in Balaam v. Pacific States Savings & Loan Company, supra, it must be held that said sections as they read in 1926 did not expressly regulate the priority of conflicting assessment liens represented by bonds, with the result that on the principles declared in the cited cases, the lien last in time would be prior in right. But it does not follow in the instant case that the court below erred in decreeing that the liens of plaintiff Thompson for bonds issued in 1930 under the act of 1911 were subordinate to the lien of the assessment represented by the bonds issued in 1926 under the act of 1915, and now owned by defendants Clark. The bonds owned by plaintiff Thompson were not issued until 1930. In 1927 section 23 of the Act of

1911 was amended (Stats. 1927, p. 1407). The bonds issued in the Balaam Case were issued before said amendment, and the decision was there rendered with reference to the act of 1911 as it stood at the time of issuance of the bonds. Prior to the 1927 amendment, section 23 of the act of 1911 provided that the amounts assessed upon the recordation of the assessment should be a lien "for the period of two years from the date of said recording unless sooner discharged." This sentence was followed by the provision heretofore noted that such lien should be subordinate to all special assessment liens previously imposed, but have priority over all later special assessment liens. By the 1927 amendment it was provided that the several amounts assessed should be a lien, and that such lien should continue "until it be discharged of record." The following sentence regulating priority was retained in the section as amended in the form in which it previously stood.

The bonds of plaintiff Thompson were issued in 1930, subsequent to the 1927 amendment of section 23. For reasons which we will hereafter state, we are of the view that as a result of said amendment, the lien of assessments for which bonds are issued under the 1911 act are subordinate to prior assessment liens, such as the lien of the assessments represented by the bonds owned by defendants Clark, which were issued in 1926 under the act of 1915.

Under both sections 23 and 66 of the Bond Act of 1911 it is the assessment which is declared to be a lien. The assessment is levied in the same manner whether or not bonds are to be issued, that is, in the manner prescribed in sections 18–21, as amended. Under section 23 as amended in 1927, the lien in the amount of the assessment, which arises upon recordation of the assessment in the office of the superintendent of streets, continues "until it be discharged of record". Under section 66, the lien in the amount of the unpaid assessment continues until the bond is paid in full. When can it be said that the lien arising under section 23 "is discharged of record"?

There is no provision in the act of 1911 that said lien arising under section 23 is discharged of record when bonds are issued to represent unpaid assessments. We have heretofore pointed out that by the terms of the act of 1911 the issuance of bonds does not constitute payment or discharge of the assessment. The assessment is not paid in full until the bond which represents it is paid in full. Section 60 of the Act of 1911 provides that when a bond is paid in full to the city treasurer he shall report that fact to the street superintendent, who is then required to mark paid, on the margin of the recorded assessment, the particular assessment to represent which the bond was issued, and "thereupon the lien of said assessment shall cease." Stats. 1923, p. 276.

The lien under section 23 arises upon recordation of the assessment in the office of the superintendent of streets. We are of the view that it can be said "to be discharged of record" only when the assessment is marked paid by the superintendent of streets on his record of the assessment, and, as provided by section 60 above, this is done only when the bond is paid in full. It follows that the lien of the assessment arising under section 23, which at the time the bonds in the Balaam Case were issued continued for only two years, now continues until the bond issued to represent the assessment is paid in full. It is a characteristic of said lien, as declared in section 23, that it is subordinate to prior special assessment liens, but superior to later liens. This characteristic persists throughout the life of the lien until the bond which represents the assessment is paid in full. Section 66 also describes the lien of the assessment as continuing until the bond is paid.

We are of the view that by virtue of this change in section 23 the lien declared in said section is the lien referred to in section 66, and that a new lien for the amount of the assessment does not arise upon the issue of bonds. It is true that the lien possesses certain incidents after the issue of bonds which it does not possess before the bonds are issued, which incidents are among those relied on in the Balaam Case as indicating that a new and distinct lien arose upon the issue of bonds. But in view of the amendment made in section 23 since the issue of the bonds in the Balaam Case, which amendment has the effect of continuing the lien arising under section 23 until the bonds are paid in full, it must be held that although said lien has certain incidents after the issue of bonds which it did not possess before, a new lien is not created. The incident that it shall be subordinate to prior assessment liens, superior to subsequent assessment liens, is one which is declared in section 23 creating

the lien, and this incident persists throughout its life.

It is stated in the Balaam Case that the filing of the assessment and issuance of the warrant create no liability against the property owner to pay his assessment in cash, and hence there can be no lien against the property arising under section 23 when bonds are to be issued; that in such cases a lien does not arise until bonds are issued. This observation was not essential to our decision in the Balaam Case. If, as sections 23 and 66 then read, a distinct and different lien arose upon the issuance of bonds, as held in the opinion, which did not have the priority characteristics of the lien referred to in section 23, then it was not necessary to decide that no lien at all could arise upon recording of the assessment when bonds were to issue. The distinct and different lien arising upon the issue of bonds would, as the sections then read, displace the earlier lien. Even if no bonds are to be issued, the recording of the assessment and issuance of the warrant do not create an immediate liability in the sense that an action may be brought immediately to recover the assessment. Prior to 1927 an action could not be brought where bonds were not to issue until thirty-five days after the date of the warrant, and since 1927 the action may not be brought until after the first day of July next succeeding nine months following the date of the recording of the assessment.

[6, 7] That a lien arises upon recordation of the assessment even though bonds are to issue for unpaid assessments, seems clear from a reading of the statute. Section 23 does not declare that the lien shall arise only when bonds are not to be issued. Even though bonds are to issue, the warrant, which is the contractor's authorization to collect and receive assessments, is delivered to him after recordation of the assessment, and he is authorized to make collections and give receipts. On or after thirty days from the recordation of the warrant and assessment, the contractor returns the warrant to the superintendent of streets, with a statement of payments made on the assessment. Section 25 (as amended by St.1929, p. 1663). Section 62, as amended, provides that after the full expiration of thirty days from the date of the warrant, the street superintendent shall certify to the city treasurer a list of all unpaid assessments over $25, and bonds are then issued to represent unpaid assessments. Section 62 clearly indicates that even though bonds are to be issued under the act of 1911 it is contemplated that during the thirty-day period the contractor shall collect and receipt for assessments. The lien in the amount of the assessments attaches upon recordation of the assessment before delivery of the warrant, and under section 23 as amended in 1927 continues "until it be discharged of record," that is until payment of the bond in full, and the marking of the assessment as paid upon the record of the assessment by the superintendent of streets. It is not essential to the existence of a lien that an immediate right of foreclosure exist. Real property taxes become a lien as of the first Monday in March, although they are not delinquent until a later date.

[8] That a lien arises under section 23 upon the recording of the assessment even though the resolution of intention provides that bonds are to be issued, is further indicated by the fact that the property owner, at his option, may stop the issuance of bonds under the act of 1911 for his assessment by notifying the city treasurer that he desires no bond to be issued. Section 65, St. 1911, p. 760. It is not provided that a lien arises upon the property owner giving notice that he does not desire a bond to issue. The lien which exists in such cases, and which the contractor may foreclose, is the lien arising under section 23, and this lien arises by the terms of the section upon recordation of the assessment. It must be held that such a lien arises as to all parcels assessed even though the resolution of intention by which the improvement is initiated by the council has provided that bonds are to be issued. This lien under section 23 as amended in 1927 continues "until it be discharged of record," that is, where bonds have issued, until the bond is paid in full and the record of the assessment marked paid by the superintendent of streets. Under section 23 said lien is subordinate to prior special assessment liens, such as the lien of the assessment represented by the bonds issued in 1926 under the act of 1915, and owned by defendants Clark. Since the 1927 amendment, the lien under section 23 and the lien referred to in section 66 as continuing until the bonds are paid in full is the same lien.

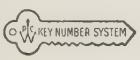
Other improvement acts have modified the rule that the last special assessment in time is first in right. Section 28 of the Act of 1913 expressly provides for the priority

of assessments which are earlier in time (Stats.1913, p. 954; 3 Deering's General Laws, 1931, p. 4626, Act 8205); sections 8 and 21 of the Act of 1901, as amended in 1915, also make the lien prior in time prior in right (3 Deering's General Laws, 1931, p. 4477, Act 8197).

By reason of the 1927 amendment the rule that the first lien in time is first in right has now become the law as to the bonds involved in this case. We conclude that sections 23 and 66 of the act of 1911, considered together as said sections read in 1930, when the bonds owned by plaintiff were issued, made the lien of the assessment represented by said bonds subordinate to all prior special assessment liens. It follows that the judgment for defendants, who are the owners of bonds issued in 1926 under the act of 1915, must be affirmed.

Judgment affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CURTIS, J.; CONREY, J.



6 Cal.2d 777

W. W. THOMPSON, Plaintiff and Respondent, v. Minerva E. CLARK, George D. Clark, and Town of San Carlos (a Municipal Corporation), Defendants and Appellants.

S. F. 15595.

Supreme Court of California.

May 1, 1936.

In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

John L. McNab and S. C. Wright, both of San Francisco, for appellants Minerva E. and George D. Clark.

Albert Mansfield, of Redwood City, for appellant Town of San Carlos.

Eugene K. Sturgis, of Oakland, for respondent.

PER CURIAM.

This action involves the same questions this day decided in Thompson v. Clark (Cal.Sup.) 57 P.(2d) 490. In that action plaintiff Thompson brought suit to foreclose liens securing bonds for street improvement assessments levied by defendant town of San Carlos. The trial court decreed that plaintiff's liens were subordinate to the liens securing bonds of defendants Clark on the same property, and plaintiff Thompson appealed. The instant action, S. F. No. 15595, involves other lots in the same assessment district, and the same bond issues are involved. As to the lots which are the subject of this action, plaintiff Thompson had already caused the liens securing his bonds to be foreclosed, and brought this action to quiet his title against defendants Clark and town of San Carlos. The court below entered judgment for plaintiff, from which said defendants Clark and town of San Carlos have appealed.

On the authority of Thompson v. Clark, this day decided, the judgment for plaintiff must be, and it is, reversed.



6 Cal.2d 344

MARKET ST. RY. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15440.

Supreme Court of California.

May 1, 1936.

Rehearing Denied May 28, 1936.

Master and servant ⇐398

Claim of dependent child to have reassigned to him, after mother's death, compensation awarded to mother for death of father, which was made more than one year after father's death, *held* not barred by limitation (St.1917, pp. 841, 850, 875, §§ 11 (a), 20 (d), 65 (b); St.1919, pp. 917, 918, §§ 14 (e), 17 (c).

In Bank.

Petition by the Market Street Railway Company to review an award of the Industrial Accident Commission in favor of Frank Henry Hopkins and another.

Award affirmed.

Prior opinion, 49 P.(2d) 588.

Wm. M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco (Alfred C. Skaife, of San Francisco, of counsel), for respondents.

PER CURIAM.

This is a proceeding to review an award of the Industrial Accident Commission.

On July 24, 1930, Alfred Hopkins, an employee of petitioner, suffered a compensable injury from which he died the same day. On July 30, 1930, his widow, Minnie Hopkins, applied for a death benefit. The commission awarded her the sum of $4,695, payable in weekly installments of $19.56. On July 12, 1933, she died, having received the sum of $2,894, with $135 accrued but not paid.

Thereafter, on June 27, 1934, Frank Hopkins, a son, filed a petition seeking reassignment to him of the sum of $1,666, the unaccrued portion of the award. The commission, on August 27, 1934, found that he was wholly dependent on his father at the time of his death, and reassigned to him the amount due. The petitioning employer attacks the order on the ground that the claim of Frank Hopkins, made more than one year after the employee's death, was barred by the statute of limitations. This is the only issue, for the commission clearly has power to reopen a proceeding within 245 weeks, and to reassign or redistribute benefits, under section 14(e) of the Workmen's Compensation Act (St.1917, p. 844, as amended by St.1919, p. 917).

In our opinion the commission had jurisdiction to make the order. The Workmen's Compensation Act, § 11 (a), St.1917, p. 841, provides for the tolling of the statute of limitations by the filing of an application for benefits under the act. The section declares that such an application renders inoperative the limitation provisions "as to all further claims of *any person or persons* for compensation arising from the *same transaction*," and the right to present such further claims is governed by the provisions of sections 20 (d) and 65 (b) of the act (St. 1917, pp. 850, 875). Section 17 (c), St.1917, p. 846, as amended by St.1919, p. 918, provides that there shall be "but one cause of action for each transaction." It is perfectly clear that under these sections there is but one claim or "cause of action" for a compensable injury, and that when any person files an application for an award, the commission has jurisdiction over the cause, and for 245 weeks thereafter has power to determine dependency and amount of benefits, and to distribute or redistribute the same. This certainly includes the power to determine the rights of dependents who come in after a year from the death. The statute of limitations runs against the *claim* or cause of action, not against the *persons* who are to receive the award or any portion thereof. If the claim is filed in time, nothing more is necessary to give jurisdiction over a party who comes in later.

The case of Great Western Power Company v. Industrial Accident Commission, 196 Cal. 593, 238 P. 662, is in point. There an award was made by the father of a deceased employee, and over a year later the deceased's grandfather applied for a portion of the sum given. This court held that he could come into the proceeding. It is urged by way of distinction that in the foregoing case the original application of the father mentioned the grandfather as a dependent, whereas in the present case there was no mention of the son in the original petition. But this is an immaterial difference. Mention of a person in another's application does not of itself make him a party to the proceeding, and in our former decision this was recognized, for the opinion states that Savercool (the applicant) "was not originally a party claimant," "was not present at the hearing; no appearance was made for him," and "no order was made in the matter of bringing [him] into the proceeding as an applicant until more than 1½ years after the death." 196 Cal. 593, 601, 602, 238 P. 662, 665. The ground of the decision is thus stated in the opinion (196 Cal. 593, 602, 238 P. 662, 666):

"Going one step further, we see no reason why the Legislature may not have intended to provide, in the proviso to section 11 (a), that, when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject-matter of the controversy, including the further claims of the applicant, *or of any and all other persons,* should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented *within the life of the continuing jurisdiction* of the commission. That, we conclude, was the legislative intent, and the effect of the proviso added to section 11 (a). From this conclusion it results that the respondent did not exceed its jurisdiction in adding William W. Savercool as a party claimant in the proceeding." (Italics ours.)

In view of the language and decision in the foregoing case, the case of Jones v. Industrial Accident Commission, 85 Cal.App. 201, 259 P. 73, in which our former decision was not discussed, cannot be regarded as controlling.

The award is affirmed.



6 Cal.2d 314

MERRITT-CHAPMAN & SCOTT CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15562.

Supreme Court of California.

May 1, 1936.

1. Master and servant ⊂419

Existence of some circumstance which warrants conclusion that challenged award is inequitable is a necessary element to the exercise of continued jurisdiction of Industrial Commission under statute relative to commission's right to rescind, alter, or amend its orders, decisions, or awards on good cause appearing (St.1917, p. 850, § 20 (d).

2. Master and servant ⊂419

Alleged newly discovered evidence that employee's disability after designated date was caused or exacerbated by injury arising out of employment *held* insufficient to show "good cause" within statute for reopening case and granting employee increased award, especially where employee could with reasonable diligence have discovered and produced much of such evidence at hearing (St.1917, p. 850, § 20 (d); p. 874, § 65 (a) (4).

[Ed. Note.—For other definitions of "Good Cause," see Words & Phrases.]

In Bank.

Proceeding under the Workmen's Compensation Act by Ralph B. Smith, claimant, opposed by the Merritt-Chapman & Scott Corporation, employer, and Travelers Insurance Company, insurer. To review an order of the Industrial Accident Commission setting aside a previous order and vacating the award therein granted to claimant and granting claimant increased award for permanent disability, the employer and insurer petition for writ of review.

Reversed and rendered.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

CURTIS, Justice.

This is a proceeding to review an order of the Industrial Accident Commission, setting aside a previous order of the commission and vacating the award therein granted to the injured employee against his employer and the employer's insurance carrier, and granting to said injured employee an increased award for permanent disability.

Petitioners seek the annulment of this latter award upon the ground that the commission acted without and in excess of its jurisdiction in reopening the cause under the claimed authority of section 20 (d) of the Workmen's Compensation Act (St.1917, p. 850). We are of the opinion that petitioners' contention is clearly correct and the award must be annulled. Although other grounds are also presented for a reversal of the award, as this is the main ground presented and is determinative of the matter, we do not deem it necessary to discuss them.

Section 20 (d) of the Workmen's Compensation Act, which furnishes the authority for the continuing jurisdiction of the commission, provides that: "The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it *upon good cause appearing therefor,* such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury. Any order, decision or award

rescinding, altering or amending a prior order, decision or award shall have the same effect as is herein provided for original orders, decisions or awards." (Italics ours.)

[1] The leading case defining the power of the Industrial Accident Commission under this section is the case of Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P. 195. Prior to the decision in this case it was held under the authority of Georgia Casualty Co. v. Industrial Accident Commission, 177 Cal. 289, 170 P. 625, which defined the continuing jurisdiction of the commission under the 1913 statute, that the power of the commission was limited to alter or amend its awards to the situation where the disability of the person in whose favor such award was made had either increased, diminished, or terminated. The case of Bartlett Hayward Co. v. Industrial Accident Commission held that the Legislature, in enacting section 20 (d) of the Workmen's Compensation Act in 1917, intended thereby to broaden the power of the commission and to enlarge and expand the continuing jurisdiction of the commission beyond the power theretofore possessed by it merely to review, grant or regrant, diminish, increase, or terminate any compensation awarded upon the ground that the disability had recurred, increased, diminished, or terminated, and to embrace the power to rescind, alter, or amend its orders, decisions, and awards within the period of 245 weeks "upon good cause appearing therefor." Since the decision in the Bartlett Hayward Company Case, the appellate courts have consistently held that the continuing jurisdiction of the commission under section 20 (d) of said act is only limited by the expiration of the period of time therein prescribed and by the requirement that "good cause appear" for rescinding, altering, or amending the former decision of the commission. Despite the fact, however, that this section has been liberally construed by the appellate courts in an effort to secure full justice to injured employees, the section itself contains a definite limitation upon the power of the commission. This is the requirement that good cause appear for rescinding, altering, or amending the former award of the commission. It is self-evident, we think, that, if the words, "good cause appearing" are to have any place or purpose in said statutory provision, the power of the commission to change its former orders or awards may not be predicated upon a mere change of opinion by the commission as to the correctness of its original decision, but there must exist some good ground, not within the knowledge of the commission at the time of making the former award or orders, which renders said original award or orders inequitable. In the absence of any such circumstance justifying a re-examination of the controversy, the commission is powerless to act, and the former award or orders are final and invulnerable. In other words, the existence of some fact or circumstance which warrants the conclusion that the challenged award is inequitable is a necessary element to the exercise of the continuing jurisdiction of the commission under the authority of section 20 (d).

In the case of Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 532, 265 P. 195, 199, the question of what constitutes good cause was discussed. The court said: "What constitutes 'good cause' depends largely upon the circumstances of each case. The term is relative. It may be assumed that the determination of the commission as to what constitutes 'good cause,' while entitled to great weight, would not be conclusive." The court therein held that, upon the facts presented in that case, the mistake or inadvertence of the commission in giving to an injured workman a rating of 25 per cent. permanent disability, when as a matter of law on the undisputed facts he was entitled to a rating of one hundred per cent. permanent disability, constituted "good cause." The mistake of the commission was occasioned by the fact that, subsequent to the granting of the award, this court upon application for a review of a similar award in another case held that an injured employee who at the time of his injury was blind in one eye was entitled to 100 per cent. permanent disability rating for the loss of his remaining eye. The good cause, therefore, upon which the award was amended in the Bartlett Hayward Company Case consisted of a decision of an appellate court disclosing the error of a rule for disability rating theretofore applied by the commission. A change in the physical condition of an injured employee is also, of course, such a circumstance. Hines v. Industrial Accident Commission, 215 Cal. 177, 8 P.(2d) 1021. The offer of new evidence has also been held to warrant the reopening of a cause by the commission. Brunski v. Industrial Accident Commission, 203 Cal. 761, 265 P. 918; Ingram v. Department of Industrial Relations, 208 Cal. 633, 284 P. 212, 214; Western Pipe, etc., Co. v. Industrial Accident Commission, 126 Cal.

App. 225, 14 P.(2d) 530. In the case of Ingram v. Department of Industrial Relations, a warning with reference to the reopening of causes upon the ground of newly discovered evidence, which is applicable to the case now before us, was given. The court there said: "We are not to be understood as indicating that the power of the commission under section 20(d) may not be invoked on this ground, but we desire to state that such power, invoked on the ground of newly discovered evidence, should be exercised with great caution, and when fraud, inadvertence, mistake, or excusable neglect are clearly shown. Otherwise the process of introducing evidence before the commission would be interminable, and the commission might be held to abuse its discretion in the exercise of its power under section 20 (d)." This warning is quoted with approval in the case of Mantyla v. Industrial Accident Commission, 130 Cal. App. 139, 141, 19 P.(2d) 799.

No claim is made in the instant case that any extraneous circumstance other than the production of new evidence existed which warranted a reopening of the cause. The sole question presented, therefore, is whether or not the "newly discovered evidence" offered by applicant justified the commission in reopening the cause and reversing its original award.

The chronological order of events leading up to the questioned award is as follows:

June 15, 1932. Ralph B. Smith sustained an injury which consisted of a strain in the region of the left sacroiliac joint.

November 9, 1932. Smith went to work at Mare Island Navy Yard, and worked intermittently until January 11, 1933.

January 17, 1933. Smith filed application for compensation for injury suffered on June 15, 1932. He had theretofore been furnished medical care by the insurance carrier of his employer, and had also received certain payments for his disability.

February 24, March 20, and March 25, 1933, hearings were held before referees of the commission.

July 28, 1933. An award was made by the commission. Findings of fact were made to the effect that the injured employee suffered temporary total disability continuing from June 15, 1932, to and including October 22, 1932 (which was approximately the time at which he went to work at the navy yard); and that said injury also caused temporary disability continuing from October 22, 1932, to and including January 16, 1933 (which was the time his work at the navy yard terminated). A further finding was made that "the disability suffered by the employee after January 16, 1933, was not caused or exacerbated by injury arising out of the employment."

August 4, 1933. Smith filed petition for rehearing upon the ground that the finding that the disability after January 16, 1933, was not caused or exacerbated by the injury was not supported by the evidence.

October 2, 1933. The commission denied the petition for a rehearing.

No proceedings were taken to obtain a review of this award of the commission by an appellate court.

January 14, 1934. Smith filed a petition for reopening and adjustment of his claim.

February 8, 1934. Hearing held on application to reopen.

April 3, 1934. The commission denied petition to reopen.

May 8, 1934. Smith filed petition to reopen case.

June 13, 1934. Commission denied petition for reopening.

August 13, 1934. Smith filed another petition to reopen.

August 31, 1934. Commission denied his petition to reopen.

November 21, 1934. Smith filed his fifth petition to reopen the case upon the identical grounds upon which the former petitions were based.

November 30, 1934, and February 28, 1935. Hearing held on said application.

April 30, 1935. Former award and orders were set aside and vacated, and there was substituted a finding and award in which Smith was found to be suffering from permanent disability as a result of his injury suffered on June 15, 1932, and that he was entitled to compensation in the sum of $1,700, less payments made, by reason of his disability, which was rated at 17 per cent.

June 20, 1935. Petition for rehearing by the employer and insurance carrier was denied.

A reference to the above résumé of the proceedings before the commission shows that, after the making of the original award, the applicant some five different times applied for a reopening of the case before the commission and attempted to secure a change in the original award, made after a three-day hearing of the original application

and with ample opportunity afforded applicant to produce evidence in support of his claim. All of these petitions involved the same question at issue, the industrial causation of applicant's disability. Upon the second of these petitions to reopen another hearing was had, and further opportunity afforded the applicant to introduce new evidence. All of these petitions to reopen were denied by the commission except the last one, which was granted. It was only upon the fifth attempt that the case was reopened, all of the proceedings theretofore had annulled, and new findings and award entered. Not only was the original award a denial that the disability of the applicant suffered after January 16, 1933, was industrial in origin, but all of the denials of subsequent petitions to reopen were reiterations of this same conclusion.

A careful search of the record brought to us on this writ of review fails to disclose any newly discovered evidence sufficient to afford any adequate reason for a reopening of the case upon the fifth application and a reversal of the conclusion originally arrived at by the commission that the disability of the injured employee subsequent to January 16, 1933, was not caused or exacerbated by the injury of June 15, 1932. At the first hearing it was an admitted fact in the case that Smith on June 15, 1932, while in the employ of the Merritt-Chapman and Scott corporation, as a pile setter, suffered injuries which arose out of and occurred in the course of his employment. At said hearing the issue developed was whether the continuation of the pain in Smith's lower left back was due to the injury or whether Smith was in fact suffering from systemic infections which caused intermittent disabilities and symptoms to appear which were not caused by or related to the injury of June 15, 1932. It was the position of the employer and insurance carrier that the injury of June 15, 1932, resulted only in a moderate strain which in the normal course of events would have cleared up within a few weeks, but that the continued pain in the lower left back claimed by Smith, which was at times more pronounced than at other times, and which flared up upon extra physical exertion or emotional disturbances, was due to an infectious arthritis arising out of existing focal infections. The reports of the several different doctors who had treated and examined Smith during the period between the injury and the hearing strongly substantiated this position. A clinical laboratory report of Lucien D. Hertert and an examination by Dr. James McClelland confirmed the presence of focal infections. Smith, in his support of his claim that his back condition was caused by the injury, filed medical reports by Dr. W. C. Eidenmuller and Dr. E. L. Blackmun, which stated that Smith's disability was caused by traumatic arthritis due to the injury. Dr. Blackmun based his conclusion upon the fact that, although there was a history of focal infections, it had been cleared up for some time. In addition to the medical reports, there was introduced evidence by Smith that during the time he was working at the navy yard he had complained of his back hurting him and that he had quit work on January 11, 1933, because of pain in his back, rather than because he had received a notice that he and other workmen were to be laid off the next day because of lack of work.

It is obvious from the original findings made that, upon the conflict of evidence thus developed, the commission agreed with the position taken by the employer and the insurance carrier. The findings and award made were to the effect that the employee had suffered an injury on June 15, 1932, by which he was totally disabled until October 22, 1932, that during the period of time he worked at the navy yard he was partially disabled and was entitled to receive compensation for such partial disability, but that subsequent to January 16, 1933, the disability which he suffered was not "caused or exacerbated by injury arising out of the employment." It is to be noted in this regard that the finding does not state that Smith was no longer suffering from a disability subsequent to January 16, 1933. In fact, the words "the disability suffered by the employee after January 16, 1933," necessarily carries the implication that subsequent to that date the employee did continue to suffer a disability. The findings concede that Smith was for a time totally disabled by the injury and that for the period of time during which he worked at the navy yard he was partially disabled. For both of these periods he was granted compensation. Any subsequent evidence offered of testimony of coworkers at the navy yard that he suffered from pain in his back while at work merely confirmed the award already made by the commission and adds nothing to the main issue decided by said award; that is to say, that the disability suffered after January 16, 1933, was not industrial in causation. Likewise any testimony with reference to whether or not he quit work at the navy yard be-

cause of pain in his back or because he was laid off for lack of work is also irrelevant to this particular issue. Unless, therefore, Smith could produce new evidence relevant to the particular issue of whether or not the disability suffered by him subsequent to January 16, 1933, was industrial in causation, the finding that it was not of industrial causation must stand as the final determination of the commission. The only testimony offered by Smith upon this particular issue subsequent to the original hearing was the report of two doctors, Dr. Kilgore, dated November 9, 1933, and Dr. Neill P. Johnson, dated December 30, 1933. The report of Dr. Kilgore was filed as an exhibit in conjunction with Smith's fourth application to reopen the case. The report contains a statement that "examination of this man shows still well marked limitation of motion and sensitiveness of the spine in the lumbar region and he claims persisting pain in his back especially upon exertion." As before noted, the issue involved was, not whether the disability continued, this was conceded, but whether or not it was caused by the injury. This report simply shows a continuance of the disability. In any event, this application to reopen the cause was subsequently denied by the commission. The report of Dr. Neill P. Johnson, which had been filed upon the hearing of the fifth application to reopen the cause, was favorable to Smith's position. However, it had already been offered and received in evidence upon the hearing of February 8, 1934, held upon Smith's second application to reopen the case, and subsequent thereto said application had been denied by the commission. The letters of H. W. Foreman and P. D. Barry, officials of the Western Pacific Railroad Company, to the effect that Smith's name had been dropped from the seniority roll of the company for the reason that he was not in physical condition to return to train service and his disability was brought on during the time he was working for another company, were only laymen's opinions as to the continuance of the disability, and obviously offer no competent proof that the disability claimed to exist actually resulted from the injury of June 15, 1932.

To sum up the above discussion, after a careful examination of the record, we are satisfied that upon its final determination and reversal of the original award the commission did not have before it any competent, relevant evidence which had not theretofore been before it and passed upon by it either by the original award or by its orders denying the various subsequent applications to reopen. If there are any slight exceptions to this statement, they concern facts and events occurring long prior to the previous hearings, and the various petitions presented do not contain any allegation nor give any good reason why such evidence was not produced at an earlier hearing. Section 65 (a), subd. 4, St.1917, p. 874, specifies that in making application for a rehearing—and the same rule is applicable, we think, to applications to reopen the cause under section 20 (d)—the applicant may apply for a rehearing upon the ground "that the applicant has discovered new evidence, material to him, *which he could not, with reasonable diligence, have discovered and produced at the hearing.*" (Italics ours.) This record is replete with instances of offers of evidence, claimed to be newly discovered, which, in the absence of most unusual circumstances, must have been available to the applicant at a former hearing. In one instance, at least, evidence was offered as newly discovered upon the petition for rehearing when the witness had already testified to the same effect at the previous hearing. This practice of offering evidence before the commission piecemeal is certainly to be discountenanced.

We think the language used by Stephens, J., in his concurring opinion in the case of Western Pipe, etc., Co. v. Industrial Accident Commission, supra, 126 Cal.App. 225, 229, 14 P.(2d) 530, 531, is peculiarly appropriate here. It is as follows: "Any break in the rule of finality of decision is regrettable. Courts presided over by trained judges are very strictly limited in their power of opening cases after judgment. The value of knowing that a certain judgment is final is greater in most cases than the possibility of advantageous change. The temptation to present perjured or colored testimony to meet a condition revealed in the first trial is often too great to be successfully resisted. These are good reasons, and there are others, supporting the doctrine of finality of decision as applied to courts. They certainly apply with equal force to judgments rendered by commissions untrained in our system of jurisprudence."

[2] We are constrained to hold that the record before us fails to disclose any good cause for a reopening of the case by the commission and a reversal of the original findings and award. The commission was therefore without jurisdiction to make the "Order Altering and Amending Findings and Award for Good Cause appearing under

section 20 (d)," made and entered on April 30, 1935. Said order is therefore annulled, and the original award of July 28, 1933, is hereby reinstated.

We concur: WASTE, C. J.; CONREY, J., LANGDON, J., SHENK, J.



6 Cal.2d 197

SACRAMENTO MUNICIPAL UTILITY DIST. v. ALL PARTIES AND PERSONS, etc. (two cases).

Sac. 5021, 5013.

Supreme Court of California.

April 29, 1936.

Rehearing Denied May 28, 1936.

1. Municipal corporations ⇐35

Inclusion of county water district within territorial limits of municipal utility district did not affect legal existence of included district.

2. Municipal corporations ⇐29(1)

Limitation in Municipal Utility District Act providing that validity of proceedings for annexation of any county water district to a municipal utility district shall not be contested in any action not brought within three months of such proceedings is not unconstitutional (Gen.Laws 1931, Act 6393, § 6e).

3. Municipal corporations ⇐29(1)

Limitation in Municipal Utility District Act providing that validity of any proceedings for annexation of any county water district to municipal utility district shall not be contested in any action not brought within three months after such proceedings, regarded as curative statute, will cure all defects and proceedings not in violation of Constitution (Gen. Laws 1931, Act 6393, §§ 6a, 6e).

4. Waters and water courses ⇐183½

County water districts are merely "taxing districts" by their nature and organization subject to plenary control by Legislature over matters pertaining to their organization and change of boundaries.

[Ed. Note.—For other definitions of "Taxing District," see Words & Phrases.]

5. Municipal corporations ⇐34

Assent of electors of county water district to inclusion within municipal utility district is only essential element to be considered in determining whether inclusion was proper, provided no constitutional provisions or guarantees were violated (Gen.Laws 1931, Act 6393, § 6a).

6. Municipal corporations ⇐29(4), 918(5)

Inclusion of county water district within municipal utility district *held* not illegal and hence bonds issued on approval of voters of municipal utility district was not invalid because county water district was included in utility district, where contention was raised in suit to validate bond issue after time for testing validity of annexation proceedings had expired (Gen.Laws 1931, Act 6393, §§ 6a, 6e).

7. Municipal corporations ⇐918(2)

Proposition calling for bond issue as submitted to electors of municipal utility district *held* not invalid as submitting an alternative and uncertain purpose, since public bodies may submit bond propositions in broad and general terms and may make its submission just as broad or as narrow as they are willing to be bound by (Gen.Laws 1931, Act 6393, §§ 6a, 15).

8. Appeal and error ⇐1122(2)
Constitutional law ⇐46(3)

In action to validate bonds issued by municipal utility district, finding of trial court negativing allegations of defendant that taxes to pay bonds would be confiscatory and violative of due process and equal protection *held* beyond issues and was stricken by Supreme Court pursuant to statutory power (Code Civ. Proc. § 956a; Const.U.S. Amend. 14).

9. Process ⇐106

That summons in suit to validate bonds issued by utility district notifying defendants to appear and answer within ten days after full publication of such summons was published for one week more than required by order for publication did not invalidate publication and service thereby.

In Bank.

Appeal from Superior Court, Sacramento County; J. O. Moncur, Judge.

Separate actions by the Sacramento Municipal Utility District against All Parties and Persons, etc., the Pacific Gas & Electric Company, a corporation, and

Frank P. Brendel, and against All Parties and Persons, etc., and Lester H. Hough. From judgment for the plaintiff, defendants appeal.

Affirmed.

McCutchen, Olney, Mannon & Greene and Thomas J. Straub, all of San Francisco, for appellant Pacific Gas & Electric Co.

Clifford A. Russell, of Sacramento, for appellant Frank P. Brendel.

Henry & Bedeau., of Sacramento, for appellant Lester H. Hough.

Robert L. Shinn, Stephen W. Downey, Downey, Brand & Seymour, and David F. Rawson, all of Sacramento, for respondent.

WASTE, Chief Justice.

These actions were instituted by the plaintiff Sacramento Municipal Utility District to validate bonds issued by the district for the purpose of constructing works to supply the territory within the district with electric power. Judgment validating the issue was entered in each case in the court below, and these appeals followed.

A fundamental objection to the bonds, stressed in briefs and oral argument, is that a portion—in fact, the larger portion—of the territory to be served by the works to be constructed under the bond issue is not within the district at all. The district, as organized in 1923, consisted only of the city of Sacramento and the immediately adjoining territory, and comprised in all about 80 square miles. The act to provide for the organization of municipal utility districts in section 6a provides that any municipality or county water district not included within the boundaries of a utility district at the time of its creation may be subsequently annexed thereto. In 1934, proceedings were taken by the district to annex two large additional areas. One of these, known as the "South Territory," with an area of 410 square miles, was assumed to have been annexed by the proceedings and to have been thenceforth included within the district. The territory thus assumed to have become a part of the Sacramento Municipal Utility District included within its bounds a county water district known as the Galt County Water District. The result, appellants argue, is that the annexation proceedings were utterly void as to the territory of the Galt County Water District, and that territory was not annexed, is no part of the plaintiff district, and therefore the bonds approved by the voters of the entire district are invalid and void.

[1] Section 6a of the Municipal Utility District Act (Stats.1921, p. 245, and acts amendatory thereof; Deering's Gen.Laws 1931, vol. 2, Act 6393) provides that "annexation or inclusion of any * * * county water district" to a utility district shall not "operate to dissolve or terminate the legal existence of the * * * county water district so annexed," but such water district shall "retain its corporate existence until otherwise dissolved pursuant to provisions of law * * * enacted for that purpose." Following the annexation by plaintiff district of the Galt County Water District, as herein narrated, the secretary of the water district refused to execute certain bonds duly authorized for the district on the ground that the annexation of the water district by the plaintiff utility district precluded the water district from the exercise of the power to incur a bonded indebtedness. On proceedings in mandate to compel the performance by the secretary of his official duty in the premises, the court held that the Galt County Water District still retained "power to incur a bonded indebtedness" Galt County Water Dist. v. Evans (Cal.App.) 51 P. (2d) 202. We do not accept appellants' view that the case of Capuchino Land Co. v. Board of Trustees, 34 Cal.App. 239, 167 P. 178, presents facts so "almost identical with those of the present case" as to carry conviction as against the above-quoted provision of section 6a, as construed by the court in the Galt County Water District Case, supra. The inclusion of the Galt County Water District within the territorial limits of the Municipal Utility District has not affected the legal existence of the included district. We find in the provisions of the statute no inhibition against the inclusion of the county water district within the boundaries of the Utility District, and none has been pointed out to us. The trial court found that "there has been no error, irregularity or omission with respect to said annexation [of the small County Water District] which prejudices or affects the substantial rights of anyone; that if defendants [and appellants are defendants] ever had any right to contest the annexation of the territory added [by the annexation election] * * * these rights were and are barred by section 6c of the Municipal Utility District Act." No attack on the validity of the annexation proceedings had been made prior to the contentions now being advanced by the appellants in the present proceedings.

[2-5] Section 6e provides in substance that the validity of any proceedings for the annexation of any county water district to a municipal utility district shall not be contested in any action not brought within three months of such proceedings. Such limitation as to the time for commencing an action to test the validity of the annexation proceedings is not subject to attack on the ground that it is unconstitutional. Miller & Lux v. Secara, 193 Cal. 755, 227 P. 171; People v. Los Angeles, 93 Cal.App. 532, 269 P. 934. Even if section 6e be regarded as a curative act, it will cure all defects and proceedings not in violation of the Constitution. Golden Gate Bridge, etc., Dist. v. Felt, 214 Cal. 308, 5 P.(2d) 585. County water districts are, by nature and organization, merely "taxing districts," and therefore the Legislature has plenary control over matters pertaining to their organization and change of boundaries. In re Bonds of Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004. In many decisions of this court it has been held that the extent of annexed territory, and similar questions, are political and not judicial questions—purely questions of policy and expediency. For example, see People ex rel. v. City of Los Angeles, 154 Cal. 220, 224, 225, 97 P. 311; Reclamation Dist. v. Superior Court, 171 Cal. 672, 680, 154 P. 845. The assent of the electors of the territory concerned is practically the essential element to be considered, provided no constitutional provisions or guaranties are violated. Chase v. Trout, 146 Cal. 350, 359, 80 P. 81; see, also, 18 Cal.Jur. 775. In this case, the vote of the electors in both the annexing and the annexed territory was overwhelmingly in favor of the annexation.

[6] For the foregoing reasons, we are of the view that the inclusion of the territory within the boundaries of the Galt County Water District in the territorial boundaries of the Sacramento Municipal Utility District was not illegal, and, as to the points raised by appellants, does not affect the validity of the issue of bonds voted for the purpose of constructing the works for furnishing electric power within the district.

[7] Appellants' next attack is directed against the provisions of the proposition calling for the bond issue as submitted to the electors. It submitted, argue appellants, an alternative and uncertain purpose. The resolution adopted, the ordinance calling the election, and the ballots used by the voters each set out the purpose as being "the acquisition and construction by the said District of a certain revenue-producing municipal utility improvement, towit: works, or parts of works, within or without, or partly within and partly without, said District for supplying the inhabitants of said District and any municipality therein with light, power and heat, including lands, structures, rights, machinery, apparatus, rights of way, lines, conduits and other property necessary therefor; that said works, or parts of works, within or without, or partly within and partly without, said District, for supplying the inhabitants of said District and any municipality therein with light, power and heat, including lands, structures, rights, machinery, apparatus, rights of way, lines, conduits and other property necessary therefor are necessary and convenient to carry out the objects, powers and purposes of said District. * * *" We do not agree with appellants. The rule is that public bodies may submit bond propositions in broad and general terms. Such a body may make its order of submission "just as broad, and just as narrow," or just as specific as it is willing to be bound by. O'Farrell v. Sonoma County, 189 Cal. 343, 347, 208 P. 117. When the authorities having the power and responsibility of proposing the bond issue have not, by the forms employed in submitting the proposition to the electors, confined themselves to an absolutely definite and inflexible plan of construction and expenditure, and have proceeded, free from fraud and in good faith, in accordance with the program based upon estimated costs, no good reason appears why they should not be permitted to carry on the improvement to the extent of the funds available. Williams v. City of Stockton, 195 Cal. 743, 756, 235 P. 986. This language was used in construing the requirement of the act relating to incurring indebtedness by municipalities for municipal improvements (Stats. 1901, p. 27), which provides (section 2) that in submitting the proposition to the electors the ordinance shall recite "the estimated cost of the proposed public improvements." The Public Utilities Act we are considering requires (section 15) that the ordinance shall recite "the estimated cost of the utility, works * * * to be acquired, constructed or completed." The proposition as submitted to the electors satisfied all legal requirements.

[8] Appellant Pacific Gas & Electric Company pleaded in its answer, as a special

defense, that if district taxes should be levied on its plant to pay the bonds such taxes would be confiscatory, and would deprive it of its property without due process of law, and deny to it the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States. The trial court sustained objections to all evidence offered in support of this issue, and no evidence was offered against it; but the court made a specific finding on the issue against appellant, negativing the allegations. Appellant now contends that the judgment validating the bonds should be reversed because of the finding. That is not necessary. This action is one to validate the bond issue voted by the electors of the district, and nothing more. No issues as to liability of property in the district, for any tax levied is involved in the cause. Assuming, but only for the purpose of this discussion, that justiciable controversies may arise in future over such questions, a present consideration of the issue attempted to be raised by the special defense is clearly beyond the scope of the action. Pursuant to the power conferred on this court by the provisions of section 956a of the Code of Civil Procedure, finding XVIII is stricken out, and in lieu thereof the following is inserted:

"XVIII. The issue sought to be tendered by appellant Pacific Gas and Electric Company, that the issuance of the bonds herein validated, or the construction of the improvements contemplated under the bond issue, will deprive the defendants of their property without due process of law, and will deprive defendants of the equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States, is premature. No evidence was received in response to said issue, and the court makes no finding thereon."

[9] Appellant Lester H. Hough, owner of property within the district, presents a separate appeal from the judgment. On the day the action to validate the bonds was filed, the trial court made an order directing that summons be published for at least once a week for three successive weeks. It was published for four weeks. It notified all defendants to appear and answer within ten days "after the full publication of such summons," specifying that the period of ten days would expire on the 4th day of February, 1935. The publication was on January 3, 10, 17, and 24, one more publication than was legally required. From these facts appellant Hough contends that the summons fixed an erroneous appearance day, and the court never obtained jurisdiction over him, for which reason, he argues, the judgment against him is void and should be set aside. In short, Mr. Hough is complaining that he was given too much time in which to appear in the action. He appeared specially, and sought by motion to quash the summons. We are not impressed with his exceedingly technical point, or his tenacious discussion of the law on the subject. When the full period of three weeks elapsed after the first publication, on January 3, the service was complete. The defendant sustained no injury due to the fact that a longer notice was given than was legally required. In Municipal Improvement Co. v. Thompson, 201 Cal. 629, at page 632, 258 P. 955, a thirty-day notice was held good when only twenty days was required by the statute. Although we deem it unnecessary to go to foreign jurisdictions in discussing such a technical point, we cite Armstrong v. May, 55 Okl. 539, 155 P. 238, 239, where it was held, on facts similar to those here, that the party had his full number of days in which to answer, and "therefore he was not deprived of any substantial right, and the position urged is not tenable."

The judgment validating the bond issue is affirmed.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; CONREY, J.; THOMPSON, J.

6 Cal.2d 230

FITTS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 15256.

Supreme Court of California.

April 30, 1936.

Rehearing Denied May 28, 1936.

1. Officers ⇨74

Constitutional provision, that civil officers should be tried for misdemeanor in office in such manner as Legislature should provide, empowered Legislature to prescribe procedural steps, including manner of pleading, essential to prosecution for removal for misdemeanor in office (Const. art. 4, § 18).

2. Constitutional law ⇨26

State Constitution is limitation on powers of Legislature, and not grant of power to Legislature.

3. Constitutional law ⇨50

Legislature is vested with whole of legislative power of state, unless restrained by constitutional provision.

4. Indictment and information ⇨10

"Accusation," referred to in statute providing for presentation of accusation against certain officers for misconduct by grand jury, is not an indictment or a presentment, as respects validity of accusation returned by 11 grand jurors (Pen.Code, §§ 758, 940; Const. art. 4, § 18).

[Ed. Note.—For other definitions of "Accuse; Accused; Accusation," see Words & Phrases.]

5. Indictment and information ⇨10

At common law, number of grand jurors required to present indictment was 12.

6. Grand jury ⇨3

Common-law grand jury consisted of not less than 12 nor more than 23 persons; maximum limit of 23 being fixed because, if body was larger, person might be indicted by less than majority, in view of rule that 12 jurors could present indictment.

7. Grand jury ⇨3

At common law, grand jury could only act on concurrence or agreement of 12 of their number.

8. Grand jury ⇨1

All questions affecting grand jury required by Constitution to be summoned at least once a year in each county, which were not expressly covered by Constitution, were left to Legislature (Const. art. 1, § 8).

9. Grand jury ⇨1

"Grand jury," which Constitution provided should be summoned at least once a year in each county, was common-law grand jury (Const. art. 1, § 8).

[Ed. Note.—For other definitions of "Grand Jury," see Words & Phrases.]

10. Indictment and information ⇨10

Accusation against district, county, township, or municipal officer for willful or corrupt misconduct in office must be concurred in by 12 grand jurors (Pen.Code, § 758; Const. art. 1, § 8; art. 4, § 18).

11. Prohibition ⇨10(2)

Accusation for removal of district attorney from office which was returned by 11 grand jurors was invalid, and did not confer jurisdiction on superior court to remove district attorney, warranting issuance of writ of prohibition restraining superior court from proceeding in the cause (Pen.Code, § 758; Const. art. 1, § 8; art. 4, § 18).

WASTE, C. J., dissenting.

In Bank.

Prohibition proceeding by Buron Fitts against the Superior Court of the State of California in and for the County of Los Angeles.

Peremptory writ issued.

Harold Judson, J. Q. Gilchrist, Joseph Scott, Jerry Giesler, Roland G. Swaffield, and Walter K. Tuller, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, Clyde C. Shoemaker, and Joseph L. Lewinson, all of Los Angeles, for respondent.

CURTIS, Justice.

In the above-entitled proceeding it is sought to procure a writ of prohibition to restrain the respondent court from proceeding in a cause now pending therein. In December, 1934, the grand jury of Los Angeles county returned and filed in the respondent court what purported to be an accusation under the provisions of section 758 of the Penal Code, praying for the removal from office of the petitioner as district attorney of that county. Thereafter petitioner filed certain motions in the respondent court to

quash and set aside said accusation. These several motions were based, in part, upon certain contentions having to do with the asserted illegal and unconstitutional formation of the grand jury and its subsequent impropriety in permitting an unauthorized person to appear before it. However, in view of the full presentation of these several contentions in another proceeding, numbered in this court, S. F. No. 15377, they were not argued at length before the respondent court nor are they presented in detail in the briefs filed in this proceeding. It is petitioner's request that these contentions be considered and determined upon the arguments submitted in relation thereto in the cited proceeding. Therefore, upon the authority of the decision in proceeding numbererd S. F. 15377 [Fitts v. Superior Court, 51 P.(2d) 66, 102 A.L.R. 290] and for the reasons therein stated, it must be held that these several contentions of petitioner do not warrant the issuance of a writ of prohibition.

The sole issue presented in detail to the respondent court in support of the motions therein made to quash and set aside the accusation, and the only point here to be determined, has to do with the validity of such an accusation when found and returned by only eleven grand jurors. The respondent court declined to hear any evidence tending to establish, as a fact, that the accusation for removal of petitioner from office had been returned by only eleven grand jurors but, for the purpose of the motions, it assumed such to be the fact. It thereupon concluded, upon a consideration of the authorities, that such an accusation may be returned by the vote of eleven grand jurors, and that the concurrence of twelve, essential to the return of an indictment, is not indispensable. This proceeding in prohibition was thereupon commenced to stay further proceedings in the respondent court upon the theory that it was without the jurisdiction of the grand jury to return an accusation for removal from office in the absence of the concurrence of at least twelve members of that body and that such an accusation returned by a lesser number failed to confer jurisdiction upon the respondent court.

In support of this position it is urged, in substance, that our State Constitution employs the words "grand jury" without definition or limitation; that these words must therefore be construed to have reference to the common law grand jury; that at common law the rule requiring the concurrence of at least twelve grand jurors was as definitely settled as the rule requiring unanimity upon the part of a petit jury; and that a misdemeanor in office warranting the removal of a public officer under section 758, supra, constitutes a public offense for the prosecution of which an accusation must be returned by at least twelve grand jurors.

By way of reply to petitioner's contentions, the respondent court argues that our grand jury is not the one known to the common law, but is a statutory body; that the constitutional history of this state indicates that the Legislature has plenary power to provide a special statutory procedure for the removal of public officers; that an accusation differs materially from an indictment; and that in the absence of express statutory requirement to the contrary an accusation may be returned upon the concurrence of eleven members of the grand jury.

We do not propose to discuss at length the propriety of the remedy of prohibition nor the rule announced thereon in the case of Bruner v. Superior Court, 92 Cal. 239, 28 P. 341. This subject received considerable attention in our decision in proceeding No. S. F. 15377, Fitts v. Superior Court, supra. If, as contended by petitioner, an accusation for removal from office may not be returned by less than twelve members of the grand jury, the accusation here returned would represent an excess of jurisdiction upon the part of that body, which would not confer jurisdiction upon the respondent court to remove petitioner from office. This, of course, would warrant the issuance of a writ of prohibition. We turn, therefore, to a discussion of the validity of an accusation returned by eleven grand jurors.

[1-3] Section 18 of article 4 of the State Constitution provides, in part, that certain officers shall be liable to "impeachment for any misdemeanor in office" and that "all other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide." In our opinion, the latter part of this constitutional provision must be so construed as to confer upon the Legislature the power to determine all matters, including preliminary procedural steps, essential to accomplish the objective, there anticipated, that certain civil officers be "tried" for misdemeanor in office. In re Marks, 45 Cal. 199, 218; Woods v. Varnum, 85 Cal. 639, 645, 24 P. 843; In re Shepard, 161 Cal. 171, 174, 118 P. 513; Cline v. Superior Court, 184 Cal. 331, 337, 338, 193

P. 929. This is the only reasonable construction that may be given to the provision. Any other interpretation would be narrow and abortive. Particularly is this so, when we consider that the State Constitution, as distinguished from the Federal Constitution, does not constitute a grant of power, or an enabling act, to the Legislature, but rather constitutes a limitation upon the powers of that body. It follows, therefore, that we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited. In other words, unless restrained by constitutional provision, the Legislature is vested with the whole of the legislative power of the state. Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288; Mitchell v. Winnek, 117 Cal. 520, 525, 49 P. 579; Jensen v. McCullough, 94 Cal.App. 382, 394, 271 P. 568; People ex rel. v. Rinner, 52 Cal.App. 747, 749, 199 P. 1066. To construe the cited section of the Constitution as a grant of power would lead to the anomalous conclusion that the Legislature, though empowered to prescribe the "manner" in which officers shall be "tried" for removal from office, is powerless to prescribe how such a proceeding may be brought to the place and time of trial. We hesitate to ascribe such shortsightedness to the framers of our Constitution. Moreover, People v. Bird, 212 Cal. 632, 643, 300 P. 23, 28, after referring to the constitutional debates, declares that: "It was finally decided to continue the grand jury system and provide for the alternative method of prosecution by information preceded by an examination and commitment by a magistrate, *the procedure in either case to be left to legislative control.*"

[4] In view of our conclusion that the Legislature may prescribe the procedural steps, including the manner of pleading, essential to a prosecution for removal for misdemeanor in office, it becomes necessary to ascertain whether, and in what manner, it has spoken. Section 940 of the Penal Code declares that "an indictment cannot be found without the concurrence of at least twelve grand jurors." A similar provision (section 931) regarding "presentments" was repealed in 1905 along with the remaining sections of the chapter on presentments (St. 1905, p. 693). An accusation under section 758, supra, is not an indictment. In re Burleigh, 145 Cal. 35, 78 P. 242. We are therefore here not concerned with the requirement of a concurrence of twelve under section 940, supra. Nor is an accusation a presentment, the latter type of pleading having been omitted from the Constitution of 1879 and all statutes dealing therewith having been repealed in 1905.

Section 758 of the Penal Code reads as follows: "An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." As appears therefrom the section is silent as to the number of jurors who must concur in order to return a valid accusation. No other section of the Code, nor does any statute of this state, fix the number of grand jurors who must concur in order to return an accusation. It is contended by respondent court that under such circumstances the general provisions of section 7, subdivision 17, of the Penal Code are applicable which provide that: "Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority." This section of the Code and its relation to the action of a grand jury was discussed by the court in the case of Coffey v. Superior Court, 2 Cal.App. 453, 83 P. 580, 582. That case involved an accusation presented by a grand jury against petitioner, who was chief of police of the city of Sacramento. The accusation was concurred in by fourteen members of a grand jury consisting of nineteen jurors. It was contended by petitioner that a concurrence of the whole nineteen members of the grand jury was necessary before a valid accusation could be presented. In passing upon this contention the court, after analyzing a number of authorities upon the subject, stated that: "No case has been cited, and we have found none, holding that all the members of the grand jury must concur before an indictment can be found where the grand jury was composed of more than 12 and the law was silent as to the number necessary to make the accusation." The court then proceeds to discuss the effect of section 7, subdivision 17, of the Penal Code and while it expresses an opinion that under this section a majority of the grand jurors may present an accusation, it expressly refused to place its decision upon that ground, and concludes its opinion by stating: "We prefer to place our decision on the ground first above stated, and that upon the concurrence of 12 or more of the grand jury legally formed a valid accusation may be present-

ed." As the only question in that case was whether an accusation concurred in by fourteen jurors, out of a grand jury of nineteen members, was a valid accusation, it seems clear that what the court had to say regarding the power of a majority of the grand jurors to present an accusation was merely dicta. The case of People v. Hunter, 54 Cal. 65, although the opinion therein does not refer to section 7, subdivision 17, of the Penal Code, or any statute analogous thereto, is also relied upon by the respondents. In that case an indictment found by twelve members of the grand jury was held valid, although owing to death or absence of one or more of its members, the jury consisted of less than nineteen members at the time the indictment was returned. The defendant in that case contended that the full number of nineteen must be present at the finding of the indictment in order to give validity to the indictment. We find nothing in that case, when we consider the facts upon which the decision therein was rendered, that is of any assistance in the decision of the question now before us. In each of these two cited cases, the accusation in the one and the indictment in the other was concurred in by twelve or more of the grand jurors.

A case that sheds some light upon the question of whether the general section of the Penal Code (section 7, subdivision 17) is applicable to a body like the grand jury is the case of People v. Lensen, 34 Cal.App. 336, 167 P. 406. In that case an indictment was presented by a purported grand jury consisting of eleven men and eight women. At that time, section 192 of the Code of Civil Procedure provided that: "A grand jury is a body of persons, nineteen in number, returned in pursuance of law, from the citizens of a county," etc. Upon arraignment the defendant moved to set aside the indictment on the ground that the indictment was not found, indorsed, and presented as prescribed by law. In support of his motion, he contended that a grand jury could be composed of men only and that a body purporting to act as a grand jury and which consisted of only eleven men and eight women, although all members of the jury were present and concurred in finding the indictment, was not a legal grand jury. His motion was denied, but on appeal the judgment was reversed on the ground stated in his motion. The Attorney General, in an effort to sustain the indictment, relied upon section 7 of the Penal Code, which provides that, "Words used in the masculine gender include the feminine and neuter," and similar sections in other Codes, but the court held that these general sections of the Code were not applicable to the term "men" as found in section 192 of the Code of Civil Procedure defining a grand jury, and that the term "men" as used in said section was not used in its generic sense as including "women." In that case, the District Court of Appeal at great pains traced the history of the grand jury from its early beginnings and pointed out that the general provisions of section 7 of the Penal Code were not applicable. That case, therefore, in interpreting a statute as applicable to the grand jury, held that the meaning of the terms used therein were controlled by the historical background of the law and customs under which the grand jury system as an integral part of our criminal procedure had been developed into its present status rather than the general provisions of any present-day Code sections.

If we trace the judicial history of the grand jury system, we arrive at but one conclusion as to the number of jurors required to present an indictment, and that number is twelve. In discussing the grand jury system, Blackstone makes the following statement: "As many as appear upon this panel are sworn upon the grand jury to the amount of twelve at least, and not more than twenty-three; that twelve may be a majority." 4 Blackstone's Commentaries, p. 302. In respect to the returning of an indictment, this eminent authority further says: "But to find a bill there must at least 12 of the jury agree; for so tender is the law of England of the lives of the subjects that no man can be convicted at the suit of the King of any capital offense unless by the unanimous voice of 24 of his equals and neighbors; that is, by 12 at least of the grand jury, in the first place assenting to the accusation, and afterwards by the whole petit jury of 12 more finding him guilty upon his trial. But if 12 of the grand jury assent, it is a good presentment though some of the rest disagree." 4 Blackstone's Commentaries, p. 306. In the first of the foregoing statements the inference is irresistible that a grand jury may consist of any number more than twelve and not exceeding twenty-three, and that the maximum number is fixed at twenty-three "that twelve may be a majority." We find no room for the contention that the number of twelve was fixed because it was a majority of twenty-three for the reason that the jury might consist of a lesser number than twen-

ty-three, even as low as twelve, in which case a much less number than twelve would be a majority. It seems perfectly clear to us that twelve was fixed as the number empowered to return an indictment, and the panel was limited to twenty-three, for twelve would not be a majority of any number in excess of twenty-three. In the second of the statements quoted from the works of Blackstone, we find the direct declaration made that "to find a bill there must be at least 12 of the jury agree." The author then goes on to explain why twelve members of the grand jury must agree before a true bill is found, and his explanation is "that no man can be convicted at the suit of the King of any capital offense unless by the unanimous voice of 24 of his equals and neighbors, that is, by 12 at least of the grand jury in the first place assenting to the accusation, and afterwards by the whole petit jury of 12 more finding him guilty at his trial." So as not to leave any question as to his meaning, the author further states, "But if 12 of the grand jury assent it is a good presentment though some of the rest disagree."

That a grand jury as it originally existed might consist of any number between twelve and twenty-three, but that at least twelve jurors must agree before a true bill or indictment was found is borne out by an early work, entitled "Complete Jurymen" by A. Miller, published in 1752, in which we find the following statement (page 12): "The number of a grand jury must be more than 12, and generally an odd number as 17, 19 or 21 is sworn to prevent the inconvenience of an equal number of voices upon a division to retard their finding or not finding a bill though 12 of them at least must agree to the finding of every bill of indictment otherwise it is void."

The views of Sir Edward Coke on this subject are stated as follows: "And it seemeth to me that the law in this case delighteth herself in the number of 12; for there must not only be 12 jurors for the trial of matters of fact, but 12 judges of ancient time for trial of matters of law in the Exchequer Chamber. Also for matters of state there were in ancient time 12 counsellors of state. He that wageth his battle must have 11 others with him which think he says true. And that number 12 is much respected in Holy Writ, as 12 apostles, 12 stones, 12 tribes, etc."

The Supreme Court of Iowa in an early decision discussed the number of grand jurors required by the common law to form a legal body and the probable reason for the requirement that more than 12 be summoned, and that a greater number than 12 be selected to compose the grand jury. In that decision the court said: "The requiring of twenty-three to be summoned, though we have found no reasons stated in the books, was probably in order to make sure of obtaining a full jury of twelve; possibly to be sure of having a few over, so that if the accused should have a friend or two upon the panel, the course of justice might not be defeated; possibly to prevent a dissolution of the jury by the death or sickness or absence of one or more of the jurors, or it may be for all of these reasons combined." State v. Ostrander, 18 Iowa, 435, 443.

[5-7] The same principle is announced in State of Alabama v. Miller, 3 Ala. 343, 344, where we find the rule stated in the following language: "At the common law, although a grand jury might consist of twenty-three jurors, the concurrence of only twelve, was essential to the finding of a bill; and we find nothing in the books to authorize the belief, that the deliberation of a greater number, is to be considered as essential. The reason why grand juries, at the common law, were constituted with a greater number than twelve, most probably, was to prevent the failure of criminal justice, that might otherwise have occurred by the dissolution of the grand jury, in consequence of the death or absence of one juror. If such a provision had ever been considered as essential to the liberty of the subject, we doubtless should have found it so stated; on the contrary, the variation of number, which was permitted, is persuasive, to show that the excess above twelve, was introduced only, to guard against the difficulties which were obvious, if only that number was impanelled." Similar statements are to be found in State v. Williams, 35 S.C. 344, 14 S.E. 819; Baldwin's Case, 2 Tyler (Vt.) 473; Commonwealth v. Sayers, 8 Leigh (35 Va.) 722, 723; State v. Davis, 24 N.C. 153, 157; State v. Barker, 107 N.C. 913, 12 S.E. 115, 10 L.R.A. 50, and People v. Hunter, 54 Cal. 65. In the last-cited case, this court used the following language: "The common law required that twenty-four be summoned to attend on the grand jury; but not more than twenty-three were sworn, because of the inconvenience which might arise in case twelve, who were sufficient to find a true bill, were

opposed by other twelve, who would be against a finding." These authorities only bear out the construction which we have given to the statements quoted above from Blackstone—that is, that a grand jury can only act when twelve of their number agree and that while a grand jury might consist of a variable number, not less than twelve nor more than twenty-three, the limit of twenty-three was fixed for the reason that with a body in excess of that number, a person might be indicted by less than a majority of the jury. From the foregoing authorities, we conclude that under the common law the grand jury could only act upon the concurrence or agreement of twelve of their number.

[8, 9] The common law was adopted in this state at the meeting of its first Legislature. Prior to that time the Constitution of 1849 had been adopted, which provided that, "No person shall be held to answer for a capital or otherwise infamous crime * * * unless on presentment or indictment of a grad jury." Article 1, § 8. The grand jury system is a product of the common law. The civil law made no provision for a body like the grand jury in its system of jurisprudence. The members of the first constitutional convention in providing for a grand jury must have had in mind the grand jury as known to the common law. This the respondents admit, but further contend that the constitutional convention of 1879 adopted an entirely different system than the common-law system provided for in the Constitution of 1849. We find nothing to justify this conclusion either in the Constitution or in the debate of the constitutional convention of 1879. The later Constitution provided for the prosecution of criminal actions, either by information after examination and commitment by a magistrate, or by indictment with or without examination. It also provided that a grand jury should be summoned at least once a year in each county. Article 1, § 8. The convention of 1879, like the convention of 1849, by failing to make further provisions as to the grand jury left to the Legislature all questions affecting the grand jury not expressly covered by the Constitution. The Constitution of 1879 did not attempt to change the historic character of the grand jury, and the system its members had in mind was evidently the same system that had come down to them from the common law. It is in no sense a statutory grand jury as distinguished from the common law grand jury as claimed by the respondents Practically the only change made by the Constitution of 1879 was to provide an additional system of prosecution for the higher grade of crimes, when before all such crimes were to be prosecuted by indictment of the grand jury. No change whatever was made in the grand jury system as such. The Legislature was given no additional powers over the grand jury than those it had under the Constitution of 1849. We must conclude therefore that the Constitution of 1879 when it refers to the grand jury refers to it as it had always been known and understood prior thereto. As we understand respondent's argument it is that as the grand jury provided for by the later Constitution was not the common-law jury, but as respondent denominates it a "statutory grand jury"; that the attributes which were conceded to attach to the former body were not possessed by the new body; and that as a consequence when the Legislature provided by section 758 of the Penal Code that an accusation against certain officers "may be presented by the grand jury," the "statutory grand jury" provided for by the Constitution of 1879 was the body in the minds of the members of the Legislature and not the common-law grand jury of historic origin. This being so, respondent argues the Legislature never intended that the body which was given power to present an accusation should be limited and controlled by the rules applicable to grand juries as previously known, and particularly that such a body was not bound by the rule that the accusation should be concurred in by twelve members of the grand jury. The force of this argument is entirely overcome when we consider that section 758 of the Penal Code, providing that an accusation may be presented by the grand jury, was adopted in 1872 under the Constitution of 1849, and some years prior to the adoption of the present Constitution. Whatever action the subsequent constitutional convention took in reference to the grand jury could have no effect upon the intent of the Legislature in the enactment of a statute some years prior thereto. In our opinion, however, the intent of the Legislature would have been the same had it acted subsequent to the adoption of the Constitution of 1879.

At the same session of the Legislature at which section 758 and other sections of the Penal Code providing for removal of civil officers by accusation were enacted, sec-

tions 931 and 940 of the Penal Code were also enacted. Section 931 was repealed in 1905. It provided that a presentment could not be found without the concurrence of twelve grand jurors, and section 940 makes the same requirement in respect to the finding of an indictment. It might be argued that where the same Legislature provided that twelve members of a grand jury must concur in finding a presentment or an indictment, and no mention was made of the number required to present an accusation, a different rule was intended to be followed by the grand jury in the case of an accusation than that prescribed for the finding of a presentment or an indictment. This argument is not without some force. However, we do not consider it conclusive of the question. The industry of counsel has failed to inform us of a single instance in which, by constitutional declaration or by statutory enactment, a grand jury composed of twelve or more persons has been empowered to present an accusation except by the concurrence of twelve grand jurors. The same is true regarding the finding of a presentment or an indictment. We have shown that the invariable rule as announced by the courts, and declared by learned law writers, is that twelve jurors must agree before a true indictment can be returned by a grand jury. We have been cited to no instance where a grand jury composed of twelve or more may act in any matter without at least twelve of their number agreeing upon the action taken. This was the case when section 758 of the Penal Code was adopted. Had the Legislature at the time of its adoption intended that a less number than twelve could act in presenting an accusation, it would have been a simple matter to have so stated. It seems incredible that if the Legislature had intended to vary this time-honored rule, its intentions would have been left in doubt and uncertainty. It was embarking upon a hitherto unknown and untried course, and it is only reasonable that we should look for some express declaration of its intention to vary such rule before concluding that such was its purpose. It is conceded that no such express declaration can be found, and in our opinion none was implied.

[10, 11] Section 758 of the Penal Code is to be found in the original Penal Code adopted in 1872. It was in turn taken from the Criminal Practice Act adopted in 1851 (St. 1851, p. 219) and is in almost the exact language of section 70 of that act. The provisions of the act, substantially as now in force, have thus been a part of the criminal procedure of our state from our earliest history. The action of the grand jury involved herein is the first occasion, in so far as the records of our appellate courts disclose, where an attempt has been made to return an accusation, presentment or indictment with the concurrence of less than twelve members of the grand jury. This fact alone is a most convincing argument that the section has not been regarded by the profession of this state as making any change in the procedure governing the grand jury in the matter of presenting an accusation from that required in the finding of an indictment. Evidently the consensus of opinion has been, as it is now our opinion, that when the Legislature in 1851, and again in 1872, conferred the power upon the grand jury of presenting an accusation, it intended that the jury in the exercise of this newly acquired authority should act as it had acted from time immemorial in all matters submitted for its consideration.

Let the peremptory writ issue as prayed for.

We concur: LANGDON, J.; SEAWELL, J.; SHENK, J.

WASTE, Chief Justice (dissenting).

I dissent.

The controversy here present arises solely from the fact that section 758 of the Penal Code, adding new powers to the grand jury, which it did not possess under the common law, fails to prescribe the number of grand jurors who must concur in order to return a valid accusation. It merely provides that "an accusation * * * may be presented by the grand jury of the county * * *." In view of the complete legislative silence on the question, why should we not turn to other recognized sources from which we gather knowledge sufficient to enable us to appraise the new situation imposed on the grand jury by the enactment of the section? Legislative enactment and judicial interpretation are not wanting for this purpose. The section (758) of the Penal Code based on the Criminal Practice Act (Stats.1851, p. 219) was incorporated in the Code in 1872. At the same time, there was enacted and incorporated in the same Code section 7, defining certain terms in the senses in

which they were to be used in the Code, and wherein it was declared that:

"The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context: * * *

"17. Words giving a joint authority to three or more public officers *or other persons,* are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority." (Italics added.) Petitioner's contention that grand jurors are not "public officers" within the meaning of this section disregards the phrase "or other persons" immediately following. I do not find any merit in petitioner's contention that grand jurors do not exercise a "joint" authority, so as to give the section application to this proceeding. In reply thereto respondent urges that when the section was made a part of the Penal Code in 1872 there were only two groups—the grand jury and the State Board of Prison Directors—given "joint," or other, authority to which the section might possibly apply. I do not think the words "joint authority" appearing in the section should be construed in the limited manner urged by petitioner. Undoubtedly what was meant was to permit a majority to act on behalf of any group having authority to act as a body. This being so, and in the absence of express statutory provision to the contrary, I am of the view that eleven grand jurors, constituting a majority of the panel of nineteen, may validly return an accusation pursuant to section 758, supra.

This reasoning finds expression, indirectly at least, in the case of Coffey v. Superior Court, 2 Cal.App. 453, 459, 83 P. 580, 582, wherein an accusation under section 758, supra, concurred in by fourteen members of the grand jury, was assailed as being invalid. The issue presented in that proceeding for a writ of prohibition was whether a lesser number than the full panel of the grand jury could return such an accusation. After declaring that it was not essential to the validity of an accusation that all members of the grand jury concur therein, the court said, so far as pertinent here, that:

"There is a further reason which is urged in support of the accusation. Section 7, subd. 17, of the Penal Code reads: 'Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority.' * * * It is the rule generally that a private trust or agency must be executed by all, as in the case of arbitrators chosen to settle a private controversy, but Mr. Mechem also says, in his work on Public Offices and Officers, § 572: 'Where, however, a trust or agency is created by law, or is public in its nature and requires the exercise of deliberation, discretion, or judgment, whether it be judicial or quasi judicial in its character, the rule is otherwise, and while all of the trustees, agents, or officers, except where the law makes a less number a quorum, must be present to deliberate or, what is the same thing, must be duly notified and have an opportunity to be present, yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit of a majority, if present, may act and that their act will be deemed the act of the body.'

"The Supreme Court by the Constitution of 1849 was composed of a chief justice and two associate justices, and it was provided that any two should constitute a quorum; but there was no provision as to the number necessary to pronounce a judgment, as was done by the amendment of 1862, when the number was increased to five, and by the Constitution of 1879. Two justices, however, pronounced judgments, being a majority of the three. See discussions of the power of the court by a majority to pronounce judgments in certain matters in Estate of Jessup, 81 Cal. [408] at page 459 [21 P. 976, 22 P. 742] 22 P. at page 1028, 6 L.R.A. 594. There have been many boards and commissions created by statute whose functions were judicial or quasi judicial. These bodies have uniformly acted through the vote of a majority. The board of railroad commissioners is a notable example. The Constitution created the board to be composed of three [now five] members. Its powers are judicial as well as administrative and executive. A majority has many times, in most important matters, such as determining rates to be charged for freight and the like, expressed the will of the board. While this view of the law would seem to safely lead us to the conclusion that a majority of the grand jury may present an accusation under the provisions of Pen.Code, § 758 et seq., and hence the present accusation was legally presented, we prefer to place our decision on the ground first above stated.

and that upon the concurrence of 12 or more of the grand jury legally formed a valid accusation may be presented."

The Coffey Case, supra, 2 Cal.App. 453, 456, 83 P. 580, 581, also states that: "The common law required that 24 should be summoned to attend on the grand jury; but not more than 23 were sworn, because of the inconvenience which might arise in case 12, who were sufficient to find a true bill, were opposed by the other 12, who should be against finding. State v. Davis, 24 N.C. [153] 157; * * * State v. Miller, 3 Ala. [343] 344; State v. Brainerd, 56 Vt. 532, 48 Am.Rep. 818; State v. Ostrander, 18 Iowa, 435; 4 Black.Com. 302; 17 Am. & Eng. Ency. of Law, p. 1290." Identical language is found in People v. Hunter, 54 Cal. 65, 66. This language tends to indicate that at common law the grand jury was a majority-controlled body. We had occasion to so declare in People v. Thurston, 5 Cal. 69, wherein it is declared: "The appellant was indicted by a Grand Jury, composed of twenty-four persons. This was erroneous. The statute provides that twenty-four shall be summoned, but limits the number of those competent to act to twenty-three. This was the rule at common law; twenty-three only being taken of the twenty-four summoned, so that twelve might constitute a majority. See 4 Blackstone, 302. If more than twenty-three persons can hold an inquest of the County, there would be no limit to the number, and a party might be indicted by less than a majority of the Jury, our statute having provided that twelve Grand Jurors may present an indictment." The portion of Blackstone referred to in the above quotation reads as follows: "As many as appear upon this panel are sworn upon the grand jury; to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority."

Here, admittedly, a majority of the grand jurors (eleven of the nineteen) concurred in returning the accusation. I do not deem it necessary, therefore, to decide petitioner's purely hypothetical case that this conclusion will ultimately permit six grand jurors, representing a majority of a quorum, to return an accusation. That case is not now before the court.

It would therefore seem to follow that petitioner has not been deprived of any of his constitutional rights.

The applications should be denied, and the alternative writ discharged.

6 Cal.2d 247

FITTS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

S. F. 15383.

Supreme Court of California.

April 30, 1936.

Prohibition ⇐10(1)

Supreme Court *held* without jurisdiction to entertain prohibition proceeding, where District Court of Appeal had jurisdiction over subject-matter of such proceeding at date of commencement of proceeding.

In Bank.

Prohibition proceeding by Buron Fitts against the Superior Court of the State of California in and for the County of Los Angeles.

Alternative writ discharged.

Harold Judson, J. Q. Gilchrist, Joseph Scott, Jerry Giesler, Roland G. Swaffield, O'Melveny, Tuller & Myers, and Walter K. Tuller, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Clyde C. Shoemaker, and Joseph L. Lewinson, special prosecuting officers appointed by order of the Superior Court, all of Los Angeles, for respondent.

PER CURIAM.

This proceeding is simply a duplication of proceeding L. A. No. 15256, (Cal.Sup.) 57 P.(2d) 510, this day decided. It was filed subsequently to the commencement of proceeding L. A. No. 15256. The only difference in the institution of the two proceedings is that the petition in proceeding L. A. No. 15256 was filed in the District Court of Appeal in and for the Second District and thereafter transferred to this court. The petition in the instant proceeding was commenced by the filing of the petition in this court but five days after the commencement of proceeding L. A. No. 15256 in said District Court of Appeal, and while said last-named proceeding was pending in said District Court of Appeal. As the District Court of Appeal had jurisdiction over the subject-matter involved in the instant proceeding, at the date of its commencement, this court was without jurisdiction to entertain the same. It is therefore dismissed upon the ground just stated. The alternative writ is hereby discharged.

13 Cal.App.2d 445

COYNE v. MASON et al.

Civ. 10953.

District Court of Appeal, Second District, Division 2, California.

April 25, 1936.

1. Appeal and error ⇐1097(1)

Appeal which was incidental and subordinate to earlier appeal in case between same parties which went against respondent was controlled by such earlier appeal, where respondent stated in her brief that merits of instant appeal would be disposed of by decision in earlier appeal.

2. Mortgages ⇐372(4)

Cross-complainant *held* entitled to damages for wrongful withholding of property based on value of use and occupancy of property for period during which it was wrongfully withheld.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Johanna Coyne against J. A. Mason and others, wherein plaintiff and another were made cross-defendants, and the California Western States Life Insurance Company filed a cross-complaint. From the judgment, the cross-complainant appeals.

Affirmed as modified.

John J. Ford, Frank M. Benedict, and Ford, Benedict & Ford, all of Los Angeles, for appellant.

D. Joseph Coyne, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

[1] This appeal is incidental and subordinate to an appeal in a case between the same parties, 56 P.(2d) 541. When that case was transferred to this court by the Supreme Court, by some inadvertence the instant case was not then transferred. The respondent states in her brief that the merits of this appeal will be disposed of by the decision in the earlier appeal. The appeal in that case went against the respondent herein and is controlling on this appeal.

[2] In the instant appeal the cross-complainant (defendant) California Western States Life Insurance Company appeals from that part of the judgment which awards it no damages for the wrongful withholding of the property based upon the value of the use and occupancy of the property for the period during which the court found cross-defendants wrongfully withheld possession from cross-complainant. The judgment should have included this item, a sum equal to $60 per month for the period from November 14, 1933, to the date of the judgment, May 24, 1934, and the trial court is directed to so amend the judgment.

The judgment as so modified is affirmed. Judgment against the respondent for costs.

We concur: WOOD, J.; GOULD, Justice pro tem.

13 Cal.App.2d 557

ROBERTS v. AIKIN.

Civ. 10940.

District Court of Appeal, Second District, Division 2, California.

April 29, 1936.

1. Bills and notes ⇐92(1)

Note executed by defendant to officer of equipment corporation at buyer's request to enable buyer to obtain bill of sale for purchased equipment which he had sold to third party who was threatening to prosecute buyer if buyer did not obtain bill of sale *held* supported by "valuable consideration," which means benefits moving to third party instead of to promisor, and hence enforceable against defendant.

[Ed. Note.—For other definitions of "Valuable Consideration," see Words & Phrases.]

2. Bills and notes ⇐104

Execution of note by defendant to prevent threatened prosecution of third party for sale of equipment without bill of sale *held* not "duress" of defendant within statute, and hence note was enforceable against defendant (Civ.Code, § 1569, subd. 1).

[Ed. Note.—For other definitions of "Duress," see Words & Phrases.]

3. Appeal and error ⇐1010(1)

Trial court's findings that note sued on was supported by consideration, and that

there was no duress of promisor, were binding upon reviewing court where sustained by substantial evidence.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Naomi Roberts against Harold W. Alkin. From a judgment for defendant, plaintiff appeals.

Affirmed.

Craig & Weller and Charles A. Deffebach, all of Los Angeles, for appellant.

Max Lewis and Laurence M. Weinberg, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff executed her promissory note secured by deed of trust payable to defendant. In this action she attempted to have the instruments canceled upon the grounds that they were executed by her entirely without consideration, and that they were obtained by means of duress. Testimony developed a situation where one Perkins, purchasing certain equipment from a corporation of which defendant was president, sold the same to a third party. When Perkins, not having paid in full for said equipment, could not deliver a bill of sale, threats against him were made by the third party purchaser, and in this dilemma Perkins appealed to plaintiff, who gave her note and deed of trust to defendant, who in turn guaranteed Perkins' obligation to his vendor, which in turn gave Perkins a bill of sale; so that Perkins was thus enabled to give his vendee a satisfactory bill of sale. While there was evidence that Perkins' vendee made threats to place Perkins in jail if he did not procure a bill of sale, there is no claim that defendant made any such threat or that any threat of any kind was made with respect to plaintiff, or even in her presence. Her entire knowledge as to the alleged duress was communicated to her by Perkins. Judgment went for defendant, and plaintiff appeals.

[1-3] There was no merit in plaintiff's original action and there is no merit in this appeal. Recital of the above facts discloses ample consideration for the note and deed of trust. A benefit moving to a third party instead of to the promisor is a valuable consideration. Yankelewitch v. Beach, 115 Cal.App. 629, 2 P.(2d) 498. No duress can arise from the facts shown herein, where plaintiff's acts were done at the request, not of defendant, but of the third party, Perkins, who was a mere friend of plaintiff, and upon whom it is alleged the duress was exercised. Civ.Code, § 1569, subd. 1. The trial court's findings that there was consideration for the note and that there was no duress are binding upon this court unless there is an absence of any substantial evidence to sustain them. Appellant makes no such claim.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

KEY NUMBER SYSTEM

13 Cal.App.2d 676

HOGAN v. RETIREMENT BOARD, SAN FRANCISCO CITY EMPLOYEES' RETIREMENT SYSTEM, et al.

Civ. 9967.

District Court of Appeal, First District, Division 2, California.

May 7, 1936.

Hearing Denied by Supreme Court July 6, 1936.

1. Mandamus ⇐70

When law gives to fact-finding body power to hear and determine question of fact, judgment of that body will not be controlled by mandamus in absence of showing that it acted arbitrarily, capriciously, or fraudulently, or without due regard for the rights of the applicant (Code Civ.Proc. § 1085).

2. Mandamus ⇐154(4)

Petition for mandamus to compel Retirement Board of San Francisco City Employees' Retirement System to award petitioner a pension as widow of a police officer *held* demurrable in absence of allegation that board acted arbitrarily, capriciously, or fraudulently, or without due regard for the rights of petitioner (Code Civ.Proc. § 1085).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action in mandamus by Jennie Hogan against the Retirement Board, San Francisco City Employees' Retirement System,

and others. From an adverse judgment, the petitioner appeals.

Affirmed.

Keith & Creede, Frank J. Creede, and Jercy J. Creede, all of San Francisco, for appellant.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioner seeks mandamus to require respondent board to award her a pension as the widow of a police officer. A demurrer to the petition was sustained and petitioner has appealed from the judgment on the demurrer.

The petition alleges that Emmett Hogan died "as the result of an injury incurred while in the performance of his duties," but that the respondent board, after hearing her application, refused to award petitioner a pension. No other facts are alleged, but a portion of the transcript of the proceedings held before the board is attached to the petition. The findings of the board upon the disputed facts thus appearing are not made a part of the record. We are asked to presume that the board for some reason acted wrongly or unfairly in denying the application, and the trial court was asked to assume the burden which the statutes place upon the board and to hear and determine the application as in the nature of a trial de novo.

[1, 2] The petition herein is demurrable for many reasons, and, though the city attorney has not referred to any of them, we will mention but one which is controlling. When the law gives to a fact-finding body the power to hear and determine a question of fact, the judgment of that body will not be controlled by mandamus in the absence of a showing that it acted arbitrarily, capriciously, or fraudulently, or without due regard for the rights of the applicant. Mogan v. Board of Police Com'rs, 100 Cal.App. 270, 279 P. 1080; Sevina v. Hickock, 113 Cal.App. 301, 298 P. 116; McColgan v. Board of Police Com'rs, 130 Cal.App. 66, 19 P.(2d) 815. The basis of the writ of mandamus is to "compel the performance of an act which the law specially enjoins." Section 1085, Code Civ.Proc. No law enjoins upon these respondents the duty to grant every application for a pension. It is the duty of the board to deny as well. The petition here pleads none of the essentials herein referred to, but merely seeks to substitute the court for the board as the fact-finding body. For this reason alone, the demurrer had to be sustained.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



13 Cal.App.2d 681

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. HIRSCH et al.

Civ. 10327.

District Court of Appeal, Second District, Division 1, California.

May 7, 1936.

Mortgages ⇐561

Action brought in latter part of 1934 to recover balance due on note after sale of certain security therefor on August 31, 1932, *held* not barred by statutes effective August 21, 1933, which limited actions to recover deficiencies to three months after foreclosure sale, since statutes were not retroactive (Code Civ. Proc. § 337, as amended by St.1933, p. 2116; § 580a, as added by St.1933, p. 1672).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Bank of America National Trust & Savings Association against U. S. Hirsch, and others. From a judgment of dismissal, plaintiff appeals.

Reversed and remanded with directions.

Freston & Files, of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson and Howard Waterman, both of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for appellant.

Farrand & Slosson, Edward W. Tuttle, and George W. Manierre, all of Los Angeles, for respondents.

ROTH, Justice pro tem.

This is an appeal from a judgment of dismissal entered after demurrers of re-

spondents Hirsch and Morton to plaintiff's amended complaint were sustained without leave to amend. The basis of the demurrers is that the action upon its face is barred by the statute of limitations, specifically by the 1933 amendment to section 337 of the Code of Civil Procedure (St.1933, p. 2116), and section 580a of the same Code (as added by St.1933, p. 1672), which, in effect, provide that the time within which an action for money judgment in the nature of a deficiency after foreclosure of a deed of trust or mortgage can be brought shall not extend beyond three months after the time of sale held pursuant to the terms of said trust deed or mortgage. The complaint alleged, among other things, that certain security for the promissory note involved had been sold on August 31, 1932. The action itself was not filed until the latter part of 1934. The question presented, therefore, is whether the present case comes within the provisions of the foregoing Code sections. The exact question has already been decided by our courts in Bank of America National Trust & Savings Association v. Dennison (Cal. App.) 47 P.(2d) 296, at page 299 (hearing denied by Supreme Court), in which case the court said: "We are constrained to hold that the amendment to section 337, and the terms of the new section 580a of the Code of Civil Procedure, were not intended by the Legislature to operate upon an action for money judgment for the balance due upon an obligation secured by a trust deed after sale thereunder where such sale had occurred before the act went into effect. We are satisfied that the Legislature intended that the operation of these practically duplicate laws should be limited to cases where the sale took place after their effective date. * * * We are equally convinced that these new laws may not fairly be construed as compelling action to be commenced within three months after such effective dates in cases where the sale has previously been made, for both these acts expressly require that action be brought within three months after the time of sale. To so construe them would in effect be judicial legislation rather than interpretation."

The applicability of said Code sections to trust deeds or mortgages involving other than real property was also disposed of in in the foregoing case, the court saying, 47 P.(2d) 296, at page 300: "The foregoing conclusions render it unnecessary herein to consider and determine the point raised by appellant that it was the legislative intent to limit the application of these new provisions to actions of the character here involved where a trust deed was the sole security for payment of the note, and not to apply to notes secured by security additional to that of a trust deed."

For the same reasons, it is unnecessary for us to pass upon the applicability of said sections to a trust deed in which the security is personal and not real property, or to determine whether the security comprised in the trust deed was personal or real property.

The judgment of the trial court is reversed, and the cause remanded with directions to overrule the demurrers and permit respondents time within which to answer.

We concur: HOUSER, P. J.; DORAN, J.

KEY NUMBER SYSTEM

13 Cal.App.2d 472

DENSON et al. v. PRESSEY et al.

Civ. 10437.

District Court of Appeal, Second District, Division 1, California.

April 27, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Fraud ⇨18

In stock buyer's action for fraud, seller's representations that stock was treasury stock, that corporation had never had difficulty in paying 7 per cent. dividend and in meeting its current obligations, and that defendant controlled large block of stock purchased for himself and his family, *held* material representations of fact.

2. Fraud ⇨11(1)

Expression of opinion which is asserted as existing fact material to transaction and has reasonable tendency to induce party to transaction to rely thereon as a fact may constitute "fraudulent representation."

[Ed. Note.—For other definitions of "Fraudulent Representation," see Words & Phrases.]

3. Fraud ⇐49

Proof of single material misrepresentation by seller of stock is sufficient to sustain buyer's cause of action for damages from fraud.

4. Limitation of actions ⇐179(2)

Stock buyer's action for fraud discovered within three years *held* not barred, although commenced more than three years after means of knowledge were open to buyer, in view of allegations of complaint and evidence showing that circumstances did not put buyer on inquiry and that seller made continuing representations after purchase of nature to divert suspicion (Code Civ.Proc. § 338, subd. 4).

5. Limitation of actions ⇐100(12)

Plaintiff may bring action for fraud discovered less than three years before, although means of knowledge were open to plaintiff more than three years before commencement of action, unless circumstances were such that inquiry became duty and failure to make inquiry a negligent omission (Code Civ.Proc. § 338, subd. 4).

6. Limitation of actions ⇐100(12)

Notice to buyer of corporate stock as to slight irregularities *held* not to require buyer to investigate truth of material representations, so as to bar action for fraud commenced by buyer more than three years after such notice (Code Civ.Proc. § 338, subd. 4).

7. Appeal and error ⇐1170(1)

Where complaint was sufficient, allegations thereof were amply sustained by evidence, there was no prejudicial error in any remarks of trial court or in instructions, and charge as a whole stated the law, reviewing court was required to sustain judgment for plaintiff (Const. art. 6, § 4½).

8. Appeal and error ⇐930(1)

Reviewing court will not presume that jury considered elements of damage not alleged in complaint in arriving at its verdict.

ROTH, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by H. C. Denson and another against H. C. Pressey and others. Judgment for plaintiffs, and some of defendants appeal.

Affirmed.

Hearing denied by Supreme Court; THOMPSON and NOURSE, JJ., dissenting.

H. E. Gleason and John F. Poole, both of Los Angeles, for appellants.

Elliott & Aberle and Robert E. Moore, Jr., all of Los Angeles, for respondents.

YORK, Acting Presiding Justice.

The plaintiffs recovered judgment in the sum of $15,000 in an action for damages as result of alleged fraud in the sale of stock made to plaintiffs by defendants. There were a number of representations alleged, and, although some of them may not be classed as actionable, there is no doubt, in view of the verdict of the jury on conflicting evidence, that there was proved by credible evidence misrepresentations of an actionable nature sufficient to legally anchor the verdict and the judgment thereon.

[1-3] Plaintiffs alleged that on May 9 and July 10, 1928, they purchased in two several blocks of 10,000 shares each stock of the Surety Mortgage Company for the sum of $20,000. Among the representations made inducing them to make the purchase were: (1) That the stock was treasury stock; (2) that it was reasonably worth and was selling for par, to wit, $1 per share; (3) that the company had been in existence a number of years, and never had any difficulty in paying, and had paid, a 7 per cent. dividend, and never had difficulty in meeting its current obligations; (4) that defendant H. C. Pressey controlled a large block of stock which he had purchased for himself and the members of his family; (5) that the stock in a short while would be paying in excess of 7 per cent. dividends, because the company was in such sound financial condition that "certain changes in the income properties were bringing in a new influx of earnings into the corporation." There can be no doubt that representations 1, 3, and 4 were representations of fact and were material. Moore v. Moore, 56 Cal. 89; Ingraham v. Lyon, 105 Cal. 254, 38 P. 892; Eachus v. City of Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147; Johnson v. Dixon Farms Co., 29 Cal.App. 52, 57, 155 P. 134, 136; Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540; Snyder v. City Bond & Finance Co., 106 Cal.App. 745, 289 P. 859. Representations 2 and 5 might be considered as expressions of opinion. It is settled that, when an expression of opinion is asserted as an existing fact material to the transac-

tion and has a reasonable tendency to induce one of the parties to the transaction to rely upon it as a fact, it falls within the definition of fraudulent representations. Harris v. Miller, 196 Cal. 8, 235 P. 981. It is also established that proof of a single material misrepresentation is sufficient to sustain a cause of action. 12 Cal. Jur. 741; MacDonald v. De Fremary, 168 Cal. 189, 142 P. 73; Stewart v. Crowley, 213 Cal. 694, 700, 3 P.(2d) 562; Jackson v. Meinhardt, 99 Cal.App. 283, 289, 290, 278 P. 462.

[4, 5] The decisive questions on appeal are whether the complaint, to which a demurrer was filed and overruled, stated a cause of action, and whether the evidence sustained the verdict of the jury upon which the judgment appealed from is based. Plaintiffs alleged that they "relied upon the statements and representations aforesaid * * * believed each and all of them * * * and by reason (thereof) * * * did purchase the * * * stock * * * at the insistence and suggestion of * * * H. C. Pressey. * * *" The present action was filed November 21, 1933. More than five years had expired since the last purchase of the stock, July of 1928, and it is apparent then that the statute of limitations (Code Civ.Proc. § 338, subd. 4) bars the action, unless facts are alleged and proved which tolled the running of the statute.

The complaint alleges that plaintiffs did not discover the fraud until July 9, 1933, "at which time the plaintiffs were called into conference by the trustee in bankruptcy for the Surety Mortgage Company and the attorney for said trustee; * * *

"That at said conference hereinabove referred to, said attorney for said trustee informed the plaintiffs that he had information indicating that the defendant, H. C. Pressey, had defrauded the plaintiffs, and that the stock purchased by the plaintiffs was not treasury stock, but was stock procured by the defendant, H. C. Pressey, from certain other stockholders at a very small sum per share, said purchase price being considerably less than the par value of said stock; that the plaintiffs discounted this rumor by reason of plaintiffs' faith in the defendant, H. C. Pressey, and it was not until on or about the month of September, 1933, that * * * the plaintiffs discovered on the books and records of the Surety Mortgage Company entries in the cash records and stock records of the Surety Mortgage Company, which indicated clearly to the plaintiffs that the defendant, H. C. Pressey, had received the benefit of the $20,000 paid by the plaintiffs to the Surety Mortgage Company. * *"

It is further alleged in the amended complaint: "* * * That the said H. C. Pressey caused the plaintiffs to receive dividends for their first year as stockholders, thereby impressing upon said plaintiffs the value of said stock; that the plaintiff, H. C. Denson, and the defendant, H. C. Pressey, *became close friends socially, and many of their frequent talks during the period from May, 1928, to February, 1932, centered around the representations by the defendant, Pressey, that the company had certain properties and assets, chiefly apartment houses, which would survive the depression and enable the plaintiffs and the defendant, H. C. Pressey, to realize 100% of the par value of their stock; that when the Surety Mortgage Company discontinued the payment of dividends, the defendant, H. C. Pressey, informed the plaintiffs that he, Pressey, was taking over the management of the Surety Mortgage Company and would protect the interests of the plaintiffs since he, Pressey, had the controlling interest in the company. This was in the year 1929.* (Italics ours.) In 1930 the plaintiffs loaned $7,000.00 to the Surety Mortgage Company at the request of the defendant, H. C. Pressey, upon his assurance that the loan was absolutely safe, and stock in the Richfield Oil Company was given by the Surety Mortgage Company, as collateral, as an apparent evidence of good faith. In July of 1930, a payment of $4,000.00 was made on this note by the Surety Mortgage Company to the plaintiffs; that the plaintiffs, from July, 1930, until January, 1931, paid several assessments upon their stock, said assessments being represented as necessary to prevent temporary financial embarrassment on the part of the company, and 16,844 shares of forfeited stock was purchased by the plaintiffs upon the statement of Mr. Pressey that he, himself, had taken up quite a number of shares of said stock and that the company's financial position merited such a step. * * *

"That the plaintiffs further allege that in July, 1930, the plaintiffs paid an assessment on the herein referred to 20,000 shares of stock of $2,000, by causing said assessment to be deducted from the balance on the note held by plaintiffs against

the Surety Mortgage Company; that thereafter, to-wit, on the 22nd day of July, 1930, and the 25th day of November, 1930, at the instance and request and suggestion of the defendant, H. C. Pressey, the plaintiffs invested the sums of $525.00 and $359.-31, respectively, in stock which had been forfeited by stockholders of the Surety Mortgage Company who had failed to meet their assessments. * * *"

In our opinion, the allegations of the complaint, all of which are sustained by ample evidence, were sufficient to prevent the barring of the cause of action by the statute of limitations, under the rules of pleading enunciated in the leading case of Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809, and such cases as Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268, which follow it. Further, the italicized allegations were of such a nature as to lure the plaintiffs into a sense of security, and thus divert any suspicion that might prompt plaintiffs to make an investigation. As said in the case of Tarke v. Bingham, 123 Cal. 163, at page 166, 55 P. 759, 760: "Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission. Bank of Mendocino v. Baker, 82 Cal. 114, 22 P. 1037 [6 L.R.A. 833]; Prouty v. Devin, 118 Cal. 258, 50 P. 380. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we think the finding of the court sufficient and sufficiently supported by the evidence." See, also, Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219; Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 P. 19; Miller v. Ash, 156 Cal. 544, 105 P. 600; Teague v. Hall, 171 Cal. 668, 671, 154 P. 851; Cameron v. Evans Securities Corporation, 119 Cal.App. 164, 170, 171, 6 P.(2d) 272; Neff v. Engler, 205 Cal. 484, 488, 271 P. 744; Adkins v. Potter, 211 Cal. 512, 520, 296 P. 285; Divani v. Donovan, 214 Cal. 447, 453, 6 P.(2d) 247; Grady v. Luy, 117 Cal.App. 292, 3 P.(2d) 577; Payne v. Clow, 114 Cal.App. 597, 600, 601, 300 P. 138.

In the case of Teague v. Hall, 171 Cal. 668, at page 671, 154 P. 851, 852, it is said: "This view of the law has been repeatedly declared in the decisions of this state. In Ruhl v. Mott, 120 Cal. 668, 676, 53 P. 304, 307, the court says: 'it is true that where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty in law is devolved upon him to employ such means of knowledge.' The same doctrine is declared in Bank of Woodland v. Hiatt, 58 Cal. 234; Wenzel v. Shulz, 78 Cal. 221, 20 P. 404; Morris v. Courtney, 120 Cal. 63, 52 P. 129; Dow v. Swain, 125 Cal. 674, at pages 683, 684, 58 P. 271; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 512, 137 P. 240; Eichelberger v. Mills L. & W. Co., 9 Cal.App. 628, 100 P. 117."

[6] The evidence clearly shows that at no time did plaintiffs have knowledge of any fact or circumstance which would have created a suspicion that defendants sold to them anything but treasury stock. The representation by plaintiffs to defendants that stock sold was treasury stock was a material representation, and in itself was sufficient upon which to predicate plaintiffs' cause of action. That defendants sold to plaintiffs their own personal stock and not treasury stock is undisputed, and, even though plaintiffs were put on notice as to some slight irregularities, such notice would not require them to investigate the truth of material representations. In Conner v. Butler, 113 Cal.App. 502, 513, 298 P. 546, 551, the court says: "Knowledge on the part of the defendant of slight misrepresentations with respect to the price of lumber will not bar his right to rely on the defense of fraud when other discrepancies exist which are so much more serious, such as the character and value of the notes and accounts, and the quantity and grades of the lumber on hand. In 12 California Jurisprudence 761, § 35, it is said:

" 'Where one conducts an investigation, he may still be entitled to rely upon certain representations as to conditions to which the investigation does not extend.' " Also see Fuhrman v. American Nat. B. & L. Ass'n, 126 Cal.App. 202, 213, 14 P.(2d) 601.

In the case of Victor Oil Co. v. Drum, 184 Cal. 226, at page 241, 193 P. 243, 249, the court said: "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part. The present case is not of that character."

[7, 8] As stated in the beginning, the primary question presented in this case is the sufficiency of the allegations of the complaint to state a cause of action. We find the complaint sufficient, and the allegations are amply sustained by the evidence. We find no prejudicial error in any remarks of the trial court called to our attention. Although a number of instructions are severely criticized, we find no prejudicial error in any, and the charge as a whole states the law. Under such circumstances, the judgment must be sustained. Article 6, § 4½, Constitution of California; Douglas v. Southern Pacific Co., 203 Cal. 390, 396, 264 P. 237; Clark v. McClurg, 215 Cal. 279, 285, 9 P.(2d) 505, 81 A.L.R. 908; Halberstadt v. Nielsen, 113 Cal.App. 313, 298 P. 37. The evidence sustains the damages found by the general verdict of the jury, and it will not be presumed that the jury in arriving at its verdict considered elements not alleged in the complaint. Crosett v. Whelan, 44 Cal. 200; Cody v. Market St. R. Co., 148 Cal. 90, 82 P. 666; Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999.

The judgment is affirmed.

I concur: DORAN, J.

ROTH, Justice pro tem.

I dissent. In my opinion, the amended complaint shows on its face, and the evidence demonstrates as a matter of law, that the plaintiffs' claim is barred by the statute of limitations. Code Civ.Proc. § 338, subd. 4; Haley v. Santa Fé Improvement Co., 5 Cal.App.(2d) 415, 42 P.(2d) 1078, (hearing denied by Supreme Court); Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268; Redpath v. Aagaard, 217 Cal. 63, 66, 16 P.(2d) 998; Wheaton v. Nolan, 3 Cal. App.(2d) 401, 39 P.(2d) 457; Lopez Canyon Oil Co. v. Lofquist, 136 Cal.App. 115, 28 P.(2d) 76; Security Commercial, etc., Bank v. Seitz, 43 Cal.App. 353, 185 P. 188.

In the leading case of Lady Washington C. Co. v. Wood, supra, the court says (113 Cal. 482, at pages 486, 487, 45 P. 809, 810): "Whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, *is a question of law to be determined by the court from the facts pleaded* * * * *and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances* which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. Martin v. Smith, Fed. Cas.No.9,164, 1 Dill. 85; Wood v. Carpenter, 101 U.S. 135 [25 L.Ed. 807]; Hecht v. Slaney, 72 Cal. 363, 14 P. 88; Moore v. Boyd, 74 Cal. 167, 15 P. 670; Lataillade v. Orena, 91 Cal. 565, 27 P. 924 [25 Am.St.Rep. 219]." (Italics ours.)

In short, before a party will be allowed to say that he discovered fraud on a date which occurred more than three years after a transaction, "it must appear that it could not have been made by the exercise of reasonable diligence; and all that reasonable diligence would have disclosed plaintiff is presumed to have known, means of knowledge in such a case being the equivalent of the knowledge which it would have produced." Montgomery v. Peterson, 27 Cal.App. 671, 151 P. 23, 25.

From the allegations of the amended complaint excerpted in the majority opinion, it affirmatively appears: (1) That the company ceased paying dividends within one year after the stock was purchased; (2) that plaintiffs loaned $7,000 to the company early in the year of 1930; (3) that assessments were levied upon stock including plaintiffs' stock before July of 1930, which plaintiffs paid in July of 1930 by allowing a credit to the corporation on account of the $7,000 loaned; (4) that assessments were levied on stock periodically after July, 1930; (5) that after July, 1930, and until January, 1931, plaintiffs

"paid several assessments on this stock"; (6) that some time between July, 1930, and January, 1931 (the exact date not appearing from the pleadings), plaintiffs purchased from the corporation 16,844 shares of stock which were forfeited for nonpayment of assessments.

In addition, the evidence, which made clear the evasive allegations of the complaint, showed (a) that the corporation furnished no security for the $7,000 loan, but that the security which was furnished therefor belonged to H. C. Pressey; (b) that the cessation of dividends occurred some time before October, 1929 (the approximate date of the stock market crash); (c) that the shares of stock purchased by plaintiffs on defaulted assessments were purchased at 2 cents on the dollar.

Comparing these pleaded and demonstrated facts with the representations made, it is difficult to understand what obligation does devolve upon a reasonably prudent person in matters of this kind, if one were to say that such facts were not sufficient to prod a reasonably prudent person into some sort of inquiry. It would seem to me that, even to the unwary, these facts furnished an actual demonstration as to the falsity of representations 2, 3, and 5. It is an established principle in fraud cases that, where a plurality of representations has been made, and the falsity of one or more is discovered, the party defrauded is put on notice as to the probable falsity of others. Gratz v. Schuler, 25 Cal. App. 117, 142 P. 899; Nicolaisen v. Toffelmier, 97 Cal.App. 342, 275 P. 823; Ruhl v. Mott, 120 Cal. 668, 53 P. 304.

Further, it is my opinion that the italicized portion of the excerpted allegations from the amended complaint set forth in the majority opinion cannot be considered as statements or continuing promises which lulled the defendants into a sense of security, but that, to the contrary, said statements were of a nature which admitted that the original representations as to the nature of the stock were false, or were of such a character as would have placed a reasonably prudent man on inquiry, and that the effect of such statements was not to lull defendants into a sense of security, but rather to tell them that, in spite of the fact that the stock was not all that it was represented to be, if said plaintiffs would continue to co-operate with Pressey, he, because he was taking over the management of the company, would see that they came out whole.

I, therefore, believe that the judgment should be reversed, and that the trial court should be instructed to enter a judgment for the defendants.



14 Cal.App.2d 6

RAY v. CITIZEN-NEWS CO.

Civ. 9666.

District Court of Appeal, Second District, Division 1, California.

May 12, 1936.

1. Pleading ⇐214(3)

In ruling on demurrer to libel complaint, court was required to regard article as false in its entirety where complaint made no admission of truth of any statement contained therein.

2. Libel and slander ⇐97

In ruling on demurrer to libel complaint, court was required to place itself in position of reading public and consider meaning and effect of publication in its tendency to libel plaintiff.

3. Libel and slander ⇐16

Article exposing another to hatred and contempt and causing him to be shunned and avoided is libelous per se (Civ.Code, § 45).

4. Libel and slander ⇐7(1)

False publication charging one with commission of criminal act is libelous per se.

5. Libel and slander ⇐7(10)

False publication that plaintiff was released on bond pending investigation of charges that plaintiff, a foreigner, overstayed his leave within the country, failed to report alleged arrest on charges of contributing to delinquency of minor and failed to report unauthorized departure from the United States *held* libelous per se (Civ.Code, § 45; Gen.Laws 1931, Act 3966).

6. Libel and slander ⇐56(3)

A defamatory article which would be libelous per se, if matter was directly stated, does not lose its quality in this regard be-

cause it seeks to avoid otherwise obvious character of a libel per se by statement that it is reported or asserted or believed to be true.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Sonny Ray against the Citizen-News Company. From an adverse judgment, plaintiff appeals.

Reversed.

Lorrin Andrews, of Los Angeles, for appellant.

Harlan G. Palmer and C. D. Thompson, both of Hollywood, and Sparling & Teel, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by plaintiff from a judgment in favor of defendant in an action for damages for alleged libel.

When the action came on for trial, the court sustained an objection of the defendant to the introduction of evidence, upon the ground that the complaint did not state a cause of action, and granted defendant's motion for judgment on the pleadings, which judgment was duly entered.

The complaint alleged that defendant, publisher of a newspaper of wide circulation, maliciously published in a regular issue thereof the following allegedly false and unprivileged article, to wit: "Sonny Ray" (meaning thereby the plaintiff) "27, Australian actor, has been released on $2,000 bond, pending fuller investigation of charges that he overstayed his leave and failed to report his alleged arrest in San Francisco in 1923 on charges of contributing to the delinquency of a minor and also to report an unauthorized departure from the United States." It was alleged that by reason of said publication plaintiff had been brought into public scandal and disgrace and injured in his good name and reputation. No special damages were alleged.

The principal question is whether the article was libelous per se. The definition of libel which furnishes the test is found in section 45 of the Civil Code, which declares a false and unprivileged publication to be libelous which exposes a person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

[1, 2] We are required, as the trial court was, to regard the article as false in its entirety, as the complaint makes no admission of the truth of any statement contained therein. We are required also to place ourselves in the position of the reading public and from this viewpoint to consider the meaning and effect of the publication in its tendency to libel plaintiff. The article charges, in effect, that it was alleged that plaintiff had been arrested in San Francisco in 1923 on charges of contributing to the delinquency of a minor; that charges had been made against him to the effect that he had failed to report his alleged arrest; that he had overstayed his leave and had also failed to report an unauthorized departure from the United States.

[3-5] We are of the opinion—in fact, we cannot conceive that it is doubtful—that a statement that one has been arrested on charges of contributing to the delinquency of a minor would at least tend to expose him to hatred and contempt and would cause him to be shunned and avoided. If it had either or any of these effects, it was libelous per se. Schomberg v. Walker, 132 Cal. 224, 64 P. 290; Stevens v. Snow, 191 Cal. 58, 214 P. 968; Bates v. Campbell, 213 Cal. 438, 2 P.(2d) 383; Maher v. Devlin, 203 Cal. 270, 263 P. 812. The phrase "contributing to the delinquency of a minor" has a well-understood meaning, the undoubted implication being that the person charged has been guilty of a violation of the criminal laws. By the Juvenile Court Act (St. 1915, p. 1225, as amended, Deering's Gen.Laws, Act 3966) it is declared to be an offense, punishable by fine or imprisonment or both, for any person by act or omission to bring or to keep any minor within the provisions of the act or to commit any act contributing thereto. Therefore, a false publication charging one with contributing to the delinquency of a minor would be a charge of the commission of a criminal act. Such a charge is libelous per se. Mellen v. Times-Mirror Co., 167 Cal. 587, 140 P. 277, Ann.Cas.1915C, 766.

[6] In judging of the character of the article, no distinction is to be drawn between a statement that it was alleged that the defendant had been arrested and a statement that he had been arrested upon the charge. A false statement is not less

libelous because it is the repetition of rumor or gossip or of statements or allegations that others have made concerning the matter. As said in Waite v. San Fernando Pub. Co., 178 Cal. 303, 173 P. 591, 592, "A defamatory article which would be libelous per se, if its matter was directly stated, does not lose its quality in this regard because it is couched in the form of an interview with another person, or because it seeks to avoid its otherwise obvious character as a libel per se by the statement that it is reported or asserted or believed to be true. Gilman v. McClatchy, 111 Cal. 606, 44 P. 241; Edwards v. San Jose, etc., Soc., 99 Cal. 431, 34 P. 128, 37 Am.St.Rep. 70; Wilson v. Fitch, 41 Cal. 363." A few of the many authorities from other jurisdictions declaring this well-settled rule are: Arizona Pub. Co. v. Harris, 20 Ariz. 446, 181 P. 373; Lundin v. Post Pub. Co., 217 Mass. 213, 104 N.E. 480, 52 L.R.A.(N.S.) 207; Houston Chronicle Pub. Co. v. Wegner (Tex.Civ.App.) 182 S.W. 45; McClintock v. McClure, 171 Ky. 714, 188 S.W. 867, Ann.Cas.1918E, 96. See, also, Newell on Libel & Slander (4th Ed.) p. 36.

The complaint alleged that the article was intended to and did convey the meaning to the readers thereof that plaintiff had been guilty of unlawful sexual relations with young girls, and the question is discussed in the briefs whether the article admits of this construction. The point is not important upon this appeal. The article is libelous per se, and in holding that the complaint states a cause of action, we may disregard the allegations attempting to attribute the suggested meaning to the article. Wilson v. Fitch, supra. It is unnecessary to decide whether the article was libelous in any respect other than the one we have discussed.

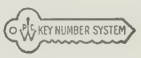
Other points relied upon by respondent rest upon the assumption that the major portion of the statements in the article were true. It may be that they were true, but the record does not show it nor does appellant admit it. The complaint alleged that the article was false, and there was a specific allegation that plaintiff had not been arrested in San Francisco or elsewhere upon a charge of contributing to the delinquency of a minor. We are bound by these allegations as to the article in its entirety, as well as by the presumption that in all respects in which the article was defamatory it was false. Dixon v. Allen, 69 Cal. 527, 11 P. 179.

In reaching the conclusion that the allegations of the complaint which we have discussed were sufficient to state a cause of action, we have considered only the points raised and argued in the briefs of counsel. No question was raised by the demurrer or on the motion, or in the briefs, as to the sufficiency of the allegations of the complaint to allege malice in fact.

The court erred in sustaining an objection to the introduction of evidence and in granting the motion for judgment on the pleadings.

The judgment is reversed.

We concur: HOUSER, P. J.; DORAN, J.



13 Cal.App.2d 651

CLEMMENS v. CLEMMENS et al.

Civ. 10936.

District Court of Appeal, Second District, Division 2, California.

May 4, 1936.

1. Appeal and error ⇐985

Trial court's order, granting motion to terminate proceedings for preparation of reporter's transcript on appeal from judgment, will not be disturbed on appeal from such order, unless clear abuse of such court's discretion appears.

2. Appeal and error ⇐607(1)

Trial court's order, granting motion to terminate proceedings for preparation of reporter's transcript, not prepared on date of notice of motion over nine months after notice of appeal was filed, *held* not unreasonable.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Mattie P. Clemmens against Herbert Clemmens and Lillian May Lowery, co-respondent. From an order grant-

ing plaintiff's motion to terminate proceedings for preparation of the reporter's transcript on appeal from a judgment for plaintiff, co-respondent appeals.

Affirmed.

Jerome D. Rosenfield, of Los Angeles, for appellant.

Hooper & Miller, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

The sole question presented on this appeal is this: Did the trial court abuse its discretion in granting plaintiff's motion to terminate proceedings for preparation of the reporter's transcript? The appeal is from such an order. The notice of appeal from the judgment was filed on April 14, 1934. On the same day the defendant filed her notice to the clerk of the court to prepare the transcript, but did not arrange for the costs thereof. On January 22, 1935, no transcript having been prepared, plaintiff gave notice to defendant of the plaintiff's intention to move to terminate proceedings for the preparation of the transcript on appeal because of the want of diligence of the defendant, and on January 29, 1935, the motion was duly made and granted.

[1] Such an order will not be disturbed on appeal except for an abuse of discretion (Fisher v. Oliver, 174 Cal. 781, 164 P. 800), and this court will not substitute its opinion for that of the trial court unless it is able to say that a clear abuse of discretion appears. It is not sufficient for an appellant, complaining of such an order, merely to cite to an appellate court cases in which orders denying motions similar to the one invoked herein have been sustained upon appeal. Lynn v. Knob Hill Improvement Co., 177 Cal. 56, 169 P. 1009.

[2] Here was a long delay in the proceedings for preparation of the reporter's transcript. The spirit of the law is in favor of early appeals and against delay. We cannot say that in making the order the trial court exceeded the bounds of reason; all the circumstances before it being considered. Sharon v. Sharon, 75 Cal. 1, 16 P. 345.

Order affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.

HALL et al. v. DESSER.*

Civ. 10183.

District Court of Appeal, Second District, Division 1, California.

May 6, 1936.

Hearing Granted by Supreme Court July 2, 1936.

1. Appeal and error ⇐977(3)

Reviewing court cannot interfere with action of trial court in granting motion for new trial unless trial court's action was abuse of its discretion.

2. Appeal and error ⇐1015(3)

Substantial evidence supporting order granting new trial on ground of insufficiency of evidence to support verdict cannot be weighed by reviewing court in determining whether or not order granting new trial was properly made, but weight of evidence is exclusively within province of trial court.

WHITE, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Ann Hall and another against A. Lincoln Desser. From an order granting plaintiff's motion for a new trial after a verdict for the defendant, the defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

Samuel L. Rummel, of Los Angeles, for respondents.

YORK, Justice.

This is an appeal by defendant from an order granting plaintiffs' motion for a new trial.

The action is one for damages for alleged unnecessary removal of certain organs of the plaintiff, Ann Hall. Hearing was had before the court sitting with a jury. The jury brought in its verdict for the defendant, whereupon the court granted plaintiffs' motion for new trial upon all the grounds stated therein, including the ground that the evidence was insufficient to sustain the verdict, and that it was against law. Appellant thereupon excepted to the ruling, and upon this appeal urges that the trial court erred in granting plaintiffs' motion for new trial, specifying particularly that there is no evidence proving

or tending to prove that the defendant was guilty of negligence alleged in the complaint, and specifying that, on the contrary, "the evidence, by an overwhelming preponderance thereof, showed that the defendant in diagnosing and treating the plaintiff did so with the skill and care ordinarily possessed by practicing physicians and surgeons in the same locality."

Appellant also urges that there is no evidence proving or tending to prove that the defendant was guilty of negligence in his treatment of the plaintiff subsequent to the operation, but that, on the contrary, "the evidence by a great preponderance thereof shows that at the time of the operation and at all times subsequent thereto the defendant exercised the skill and care which would have been exercised by a reputable physician practicing in the same or a similar locality."

The motion for new trial was predicated upon notice of motion that plaintiffs would move the court for a new trial and to set aside and vacate the verdict of the jury upon grounds, which they alleged materially affected their substantial rights, to wit:

1. Insufficiency of the evidence to justify the verdict;

2. That the verdict is against the law;

3. Errors in law occurring at the trial and excepted to by the plaintiffs;

4. Error of the court in giving instructions to the jury requested by the defendant.

[1, 2] Unless the action of the trial court in granting the motion for new trial in the instant case was an abuse of its discretion, this court cannot interfere. Although the writer of this opinion—looking at the cold record before this court—might not have been inclined to grant the motion, the trial court had before it the witnesses, heard their testimony, saw the exhibits filed therein, and, when the motion was presented, granted it upon all the grounds stated. Our examination of the record does not disclose an abuse of discretion by the trial court in any of the particulars specified by appellant. If there is any substantial evidence which supports the order appealed from, it cannot be weighed by this court in determining whether or not the order of the trial court was properly made. This is exclusively within the province of the trial court. As already stated, the trial court had an opportunity to observe the witnesses as they were testifying; had an opportunity to observe the conduct of the jury, and the attention or inattention paid by the jury to its instructions, and therefore, was informed as to whether or not any of the grounds stated in the notice of motion was sufficient to require a retrial of the cause.

The order of the trial court granting motion for new trial is therefore affirmed.

I concur: HOUSER, P. J.

WHITE, Justice pro tem.

I dissent. I find myself in disagreement with the conclusions reached by my associates in the majority opinion. The main question at the trial of this cause was whether or not the defendant physician, in removing the ovaries, tubes, and uterus from the body of plaintiff, Ann Hall, used the ordinary care and skill exercised by physicians and surgeons in the community. It is conceded by both appellant and respondent that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony. Houghton v. Dickson, 29 Cal.App. 321, 324, 155 P. 128; Patterson v. Marcus, 203 Cal. 550, 552, 265 P. 222; Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642.

The evidence in this case, it is true, shows a conflict in the opinions of the experts as to the necessity, according to accepted standards in this community, for removal of the organs in question; but such conflicting opinions are based only on the preoperative clinical and the post-operative pathological diagnoses of the removed organs; and in my opinion, nowhere does the evidence disclose any conflict of opinion as to the skill of the defendant physician in operating as he did in the face of what he found when he opened up the body of Mrs. Hall at the time of the actual operation. The defendant testified that at the time of the actual operation, after he had opened up Mrs. Hall, he found conditions existing which in his opinion necessitated the removal of the uterus, tubes, and ovaries, and the defendant physician's opinion, formed at the time of the actual operation, was concurred in by another physician who assisted in the operation. I fail to find in the evidence any testimony challenging the correctness of the defendant physician's judgment, based on the conditions which he found to exist when he opened up the patient at

the time of the operation; and I am of the opinion that unless there was some testimony in opposition to the testimony given by defendant and other physicians testifying in his behalf as to the correctness of his operative methods in the face of what he found at the time of the actual operation, the verdict of the jury in his favor should stand, because of the lack of any conflict in testimony attesting to his skill, when taking into consideration conditions actually apparent to him at the time he operated.

In fact, one of the plaintiff's expert witnesses testified:

"It is absolutely true that each individual case is to be judged by the conditions of that particular case rather than by any set rule and it is absolutely a matter of the judgment of the operator after he has made an examination after the patient has been opened up to proceed with reference to the conditions which are confronting him. That is the final decision. They frequently find unexpected conditions.

"Without knowing what the condition was in any particular operation I could not, nor could any surgeon, say that the doctor did not use ordinary skill and care. It would be impossible for me or any other doctor to express an opinion without those facts."

Another of plaintiff's expert witnesses testified: "Assuming that an operation is performed for the removal of the uterus and that at the time of the operation complications, such as adhesions from a prior operation are found, it is entirely a matter dependent upon the judgment of the surgeon as to whether the tissues should be removed. In other words, in the last analysis it is entirely a matter of judgment."

My understanding of the law is that in a malpractice case the physician should not be penalized for an error in judgment.

A search of the record fails to reveal to me any hypothetical question propounded to plaintiff's witnesses embodying all of the conditions existing and which presented themselves to the defendant physician at the time of the actual operation. In none of the hypothetical questions propounded to plaintiff's witnesses was anything said about the condition of the plaintiff at the time she was placed on the operating table, nor in answering hypothetical questions did they assume or have in mind any knowledge of actual conditions existing at the time of the operation, except such as as were disclosed by the pathological examination made under a microscope. The hypothetical questions propounded to plaintiff's witnesses did not contain, nor make any reference to, the conditions found to exist in the patient at the time of the operation. It is true, these questions assumed conditions disclosed by the preoperative clinical diagnosis and by the laboratorial report of the pathologist as to what the tissues revealed after removal; and it is further true that the removed tissues were introduced in evidence; but one of plaintiff's expert witnesses testified: "It is quite true that it is often the case in a major abdominal operation that the condition there apparent to the operator is such that justifies his reaching a diagnosis that differs entirely from the pathological diagnosis under a microscope following the operation."

The defendant physician testified, and he was corroborated by his co-operator, that at the time of the operation, when he opened up the plaintiff's abdomen, he found the uterus, ovaries, and tubes so affected, that by reason thereof he concluded that these organs should be removed. Hypothetical questions including the conditions existing at the time of the operation were propounded to expert witnesses who testified for the defendant, and they gave as their opinions that under all the facts and circumstances, including the conditions existing at the time of the operation, the defendant physician exercised the skill and care which ordinarily would be exercised by surgeons in this locality. I am of the opinion that since none of the questions propounded to plaintiff's expert witnesses assumed the existence of conditions found at the time of the actual operation, there is no conflict, and surely no substantial conflict, in the claim of defendant physician and his expert witnesses that in the fact of what he found at the time he opened up Mrs. Hall's body he was justified, according to the ordinary standards of care and skill in this community, in removing the tissues in question.

Negligence on the part of a physician or surgeon is not presumed, but must be affirmatively proved. The same is true ordinarily with respect to the possession by the physician or surgeon of the requisite skill and learning. The only expert testimony given concerning the skill of the defendant physician which was based upon

hypothetical questions which assumed the existence of conditions existing at the time of the actual operation was that by reason of such conditions, among others, the defendant physician was justified, in the light of existing medical standards in this locality, in removing the affected organs.

In this state of the evidence it seems to me that there was no substantial conflict on the question of the skill and care of the defendant physician. I have been unable to find anywhere in the record any evidence by any expert witness that, assuming the existence of conditions which the defendant physician and his co-operator testified they came face to face with on the operating table, defendant physician's conduct did not measure up to the medical standards of this locality.

I am not unmindful of the reluctance of reviewing courts to disturb the action of the trial court in granting a motion for a new trial, particularly on the ground of insufficiency of the evidence to justify the verdict; and while the trial court is not bound by a conflict in the evidence, still to justify the granting of a new trial after a jury's verdict, the conflict, if any, in the evidence must be a substantial one. A review of the evidence in this case convinces me that there is no substantial conflict in the evidence given that the defendant physician, in the face of conditions he found at the time of the operation, was justified as a careful and skillful doctor, in removing the organs from the patient's body. In the state of the record herein, I feel that from the expert testimony the jury could draw but a single inference and conclusion, which apparently they did in finding a verdict in favor of the defendant, and that is that the latter exercised the skill and care which would be exercised by the average physician or surgeon in this or a similar locality; because there was no denial thereof by any expert who answered a hypothetical question which embodied and assumed as facts the conditions which the defendant physician found to exist when he opened up the body of the patient.

Concerning defendant's second alleged act of negligence, which had to do with post-operative care of the patient by the defendant physician, a reading of the testimony with reference thereto will, to my mind, disclose no substantial conflict therein militating against the claim of defendant that he prescribed for plaintiff and recommended that she use medicine that is usually and ordinarily ordered by a skillful physician following an operation such as the one here in question.

I realize that where, as in this case, other grounds were urged, the action of the trial court in granting the motion for a new trial will be sustained unless there was an abuse of discretion. Other than the alleged insufficiency of the evidence to justify the verdict, there is only one other ground urged on this appeal in justification of the trial court's action, and that is that the court erred in giving a certain instruction. The order granting the motion for a new trial was as follows: "Plaintiffs' motion for a new trial, heretofore submitted, is now granted on all grounds, including the ground that the evidence is insufficient to sustain the verdict and that it is against the law."

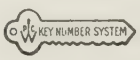
Respondents insist that the court committed reversible error in instructing the jury as follows: "* * * If the plaintiffs do not prove by a preponderance of all the evidence that the defendant negligently removed the ovaries, tubes and uterus of the said plaintiff, Ann Hall, or if they fail to prove by a preponderance of the evidence that said defendant negligently failed to give proper treatment to the plaintiff following the operation and that such negligence, if any, upon defendant's part proximately caused the injury complained of, then there can be no recovery herein against the defendant and your verdict must be against the plaintiffs and in favor of the defendant, Dr. Desser."

Respondents earnestly contend that having alleged two distinct and separate acts of negligence, it would be sufficient, in order for plaintiffs to recover a judgment, that they prove by a preponderance of the evidence either of the acts alleged as a basis of plaintiffs' claim of negligence; and that by the above-mentioned instruction a greater burden was cast upon the plaintiffs than is required under the authorities of this state; it being respondents' claim that the instruction is conjunctive, whereas, under the law, plaintiffs were entitled to recover if their proof was sufficient to establish by a preponderance of the evidence either act of negligence alleged in their complaint. With this claim of respondents I do not agree, because, in my opinion, the instruction plainly advised the jury that the burden was upon the plaintiffs to prove either that the defendant negligently removed the organs, or, that after

the removal of the organs he negligently failed to properly treat her; and it seems to me that the jury could not have understood the instruction to mean anything else. The instruction was a proper one, and no error was committed in giving it.

I am of the opinion that in the instant case there was no cause for granting a new trial on the ground that the evidence was insufficient to sustain the verdict, nor upon the other ground urged, that the court committed error in giving the above-mentioned instruction to the jury.

The order granting the motion for a new trial should be reversed.



COATS v. GENERAL MOTORS CORPORATION et al.*

Civ. 10023.

District Court of Appeal, First District, Division 2, California.

May 4, 1936.

Rehearing Granted June 3, 1936.

1. Corporations ⇐308(11)

Evidence *held* insufficient to show that corporation's executive committee acted fraudulently or in bad faith in canceling bonuses on ground that officer was dismissed because of unsatisfactory service, which, under contract, precluded recovery of bonus stock.

2. Corporations ⇐308(11)

Officer suing on bonus contract *held* bound by unambiguous terms thereof to prove that he was not dismissed because of unsatisfactory service and that his record was entirely satisfactory.

3. Fraud ⇐50

Fraud will not be presumed; this rule being equal to the presumption against crime.

4. Evidence ⇐595

"Deduction" is conclusion based on reason and sound judgment, and is not mere unfounded suspicion or conjecture (Code Civ. Proc. § 1958).

5. Evidence ⇐595

"Inference" is deduction which reason of jury may make, and is not mere guess or arbitrary dixit without reason and without factual support (Code Civ.Proc. § 1958).

[Ed. Note.—For other definitions of "Inference," see Words & Phrases.]

6. Appeal and error ⇐1097(3)

Doctrine of "law of case" is inapplicable, where weight or sufficiency of evidence is involved and where there is substantial difference in evidence.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

7. Corporations ⇐308(11)

Officer suing on contract precluding recovery of bonus in case of dismissal because of unsatisfactory service, of which corporation's executive committee was sole judge, had burden of proving that committee acted fraudulently and in bad faith in finding officer's services unsatisfactory.

8. Master and servant ⇐43

Where contract makes employer sole judge of his satisfaction with employee's services, as regards discharged employee's right to compensation, such as bonus, reasonableness of employer's decision is not jury question; question being whether employer acted fraudulently and in bad faith.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Fred N. Coats against the General Motors Corporation and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellants.

Pillsbury, Madison & Sutro, of San Francisco, and Donahue, Hynes & Hamlin, of Oakland (Alfred Sutro, Eugene M. Prince, and Eugene D. Bennett, all of San Francisco, and O. D. Hamlin, Jr., of Oakland, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the value of bonus stock claimed under a contract of employment as Pacific Coast sales manager with the defendant corporation. The cause was tried with a jury, and plaintiff had a verdict for approximately $150,000. The defendant's appeal presents four separate

*For subsequent opinion see 64 P.2d 1168.

grounds for a reversal of the judgment, but we will confine our discussion to the first mentioned—the absence of competent evidence to prove that plaintiff was not dismissed because of unsatisfactory service and the absence of competent evidence to prove affirmatively that plaintiff was dismissed "with an entirely satisfactory record."

[1, 2] There is very little conflict as to the facts involved. All the competent evidence demanded a verdict and judgment for the defendant. The only conflict is assumed rather than real—a conflict between direct competent evidence and conjectures and suspicions. The verdict rests entirely upon the latter. The plaintiff was employed in April 1922, to take charge of Chevrolet sales on the Pacific Coast under the direction of R. H. Grant, the general sales manager for Chevrolet located in the city of Detroit, who in turn was under the direction of W. S. Knudsen, the president and general manager, also located, in the city of Detroit. In January, 1927, the plaintiff was discharged from his employment by Mr. Grant acting under the direction and order of Mr. Knudsen. In February of that year the executive committee of the defendant corporation sitting in New York, eight of the nine members being present, adopted a resolution expressly approving the action of Mr. Knudsen and Mr. Grant in removing the plaintiff and reciting that this action had been taken because of his unsatisfactory service. The plaintiff made no protest to this action of the executive committee, but about four years and nine months thereafter commenced this proceeding. On a former trial before a jury, the court directed a verdict for the plaintiff in respect to a portion of the bonus stock said to have been earned prior to the dismissal and directed a verdict in favor of the defendant as to the remainder of the stock. Both parties appealed, and both orders were reversed. Coats v. General Motors Corporation, 3 Cal.App.(2d) 340, 39 P.(2d) 838. Upon the second trial, the burden was put on the defendant to prove that the plaintiff had been removed because of his unsatisfactory service and that the act of removal had been taken in good faith. To this purpose a mass of evidence was produced which was not before the court on the previous trial. The plaintiff rested upon the doctrine of the law of the case and left the issue with the jury upon the suspicions which were referred to in the former opinion.

The terms of the bonus plan are plain and unambiguous. Paragraph 5 reads in part: "If a beneficiary leaves the service of the Corporation of his own volition, or is dismissed because of unsatisfactory service (of which the Executive Committee shall be the sole judge), that portion of his bonus represented at the time by the debit balance of his account shall revert to the Bonus Fund." Paragraph 6 reads: "Should a beneficiary be dismissed from the service of the Corporation for no fault of his own with an entirely satisfactory record (of which the Executive Committee shall be the sole judge) he may continue a beneficiary under the Bonus Plan to such an extent as the Executive Committee may determine." This is the contract of the parties. There can be no quarrel with the language, and no call for "interpretation." Plaintiff is suing to enforce this contract, and to recover he must either prove that he was not dismissed because of unsatisfactory service or he must prove that he was dismissed for no fault of his own "with an entirely satisfactory record."

The respondent was dismissed by Mr. Grant acting under instructions from his superior on or about January 1, 1927. On February 11th of that year the executive committee, eight of the nine members being present, after a full discussion and after having been fully informed that the respondent had been dismissed because of unsatisfactory service, unanimously adopted the following resolution: "Resolved that in view of the fact that the services of Mr. F. N. Coats were terminated January 1st, 1927, because his work had not been satisfactory to the Corporation all bonuses due him be canceled as of that date." After the minutes of this meeting, including the quoted resolution, had been written up, all nine members of the committee signed and approved them. At the next meeting of the executive committee, all nine members being present, these minutes were read and unanimously approved by the committee. The authenticity of the resolution and the fact of the termination of respondent's unsatisfactory service therein was established by undisputed proof coming from the secretary, from the testimony of five of the nine members of the committee, and by the formal approval evidenced by the signatures of all nine members. There is not a word of evi-

dence casting any doubt on the authenticity of the resolution or the fact of its adoption. In this respect respondent relies entirely upon a suspicion of some kind which he seeks to raise because of the fact that no member of the executive committee phrased the resolution in the exact words in which it appears in the minutes; the secretary having testified that after the discussion and vote of the committee he phrased the resolution in the light of the determination reached by the committee.

As evidence tending to prove that the action of the committee was taken in good faith and that the respondent was dismissed because of unsatisfactory service, the appellant offered evidence in addition to what was heard at the former trial showing that, before the dismissal was made, Mr. Knudsen had consulted Mr. Grant and told him that respondent's services were unsatisfactory and that he should arrange for respondent's dismissal. On November 26, 1926, John J. Raskob, a member of the executive committee, wrote Mr. Sloan in part as follows, "Why is it that Grant insists on keeping F. N. Coats in his employ when it is the judgment of some of our best executives that this man is thoroughly incompetent for such an important General Motors position?" In 1926 an investigation of respondent's service on the Pacific Coast was made at the instance of Alfred P. Sloan, president and chairman of the executive committee. As a result of this investigation, Mr. Sloan agreed with Mr. Grant that the respondent should be dismissed. Mr. Grant's testimony is that he dismissed respondent because his services were not satisfactory to him and that he reached this determination after his own investigation and after the investigation made at the instance of Mr. Sloan. Mr. Knudsen testified that for two years immediately prior to respondent's dismissal the sales in the Pacific Coast region were below standard, and that he made a personal investigation of the conditions in that region, from which he reached the conclusion that it was necessary to discharge respondent. He made this recommendation to Mr. Grant and to Mr. Sloan. Both of these witnesses testified that they had never been approached by Mr. Fisher or by any other member of the executive committee urging the dismissal of respondent because of any personal animosity on the part of Mr. Fisher or of any other member of the executive committee or because of any interest exhibited by Mr. Fisher or by any other member of the executive committee in the control of Chevrolet dealers in the Los Angeles territory. Mr. Sloan testified that before the meeting of February 27, 1927, he had investigated the work of respondent and learned that his services were generally unsatisfactory; that he voted for the resolution finding that such services were unsatisfactory because of the information that he had thus obtained; that he had not at that meeting or at any other time been approached by Mr. Fisher in reference to the Los Angeles territory; and that at no time had he any information that Mr. Fisher desired the dismissal of respondent because of that situation. Mr. Fisher testified that he had not at any time suggested to any superior of the respondent that the respondent be dismissed from service, that such dismissal had not been suggested by him because of the Los Angeles situation, and that the resolution of the executive committee was not dictated or suggested by any consideration of the Los Angeles situation. L. P. Fisher, P. S. Du Pont, and Donaldson Brown, other members of the executive committee, testified that they had had no information of this purported feeling against the respondent because of the Los Angeles situation, but that they voted for a cancellation of the bonus contract because of their information that respondent had been dismissed because of unsatisfactory service.

[3-5] The foregoing testimony was made necessary because of the suspicion cast upon the action of the appellant by respondent's charge that several months before his dismissal he had had a conversation with a Mr. Baldwin, who was a Chevrolet dealer in the Los Angeles territory; that Mr. Baldwin had asked for more exclusive territorial sales privileges and had intimated to the respondent that Mr. Fisher, a member of the executive committee, was a friend of his. From this fact the respondent suspected that Mr. Baldwin might have said something to Mr. Fisher, and that Mr. Fisher might have said something to Mr. Knudsen, who in turn might have said something to Mr. Grant which had caused the latter to dismiss the respondent from his service. The whole situation is filled with such absurdity that no further comment would be necessary if it had not been given some recognition in the opinion on the former appeal. It seems incredible that any court or judge

could give any weight to testimony of this character which is offered for the purpose of proving the one essential and vital fact, to wit, that, when the executive committee effected the dismissal of the respondent, it did so fraudulently and in bad faith. From time immemorial the rule has been that fraud will not be presumed; this is equal to the presumption against crime itself. Truett v. Onderdonk, 120 Cal. 581, 53 P. 26. But it is argued that a fraud here may be "inferred" from the evidence that respondent's discharge was a result of the Los Angeles situation. We have always understood that an inference is just what the statute declares it to be—"a deduction which the reason of the jury makes from the facts proved." Code Civ.Proc. § 1958. There can be no quarrel with this language. A deduction is a conclusion based upon reason and sound judgment, and is not a mere suspicion or conjecture without any foundation. An inference is a deduction which the reason of the jury may make; it is not a mere guess or an arbitrary dixit without reason and without factual support. Here there is not in any portion of the record any evidence, direct or indirect, of any fact or circumstance which would support an honest and reasonable inference that the action of Mr. Grant in giving respondent notice of dismissal and the action of the executive committee in approving and affirming that act was predicated on any knowledge of or interest in the Los Angeles situation. There is no competent evidence that any member of the executive committee knew that any difficulty existed in relation to the Los Angeles territory and no competent evidence that Mr. Fisher had any knowledge of any purported controversy between respondent and the Los Angeles dealers, but, on the other hand, the only competent evidence touching this situation from any aspect completely disproves and dissipates all the suspicions which respondent has raised in respect to the entire situation. Hence, since there are no facts proved upon which the inference could be based, there is no reason supporting the inference, and what is therefore called an inference becomes nothing more than a suspicion.

To all the foregoing the respondent replies that the decision must be controlled by the principle of the "law of the case." The application of that doctrine is urged by respondent upon the basis of the statement in the former opinion that "The record contains no direct evidence that in making their finding that plaintiff's discharge was due to dissatisfaction with his services the committee was not acting in good faith. However, plaintiff contends that this might reasonably be inferred, from Sloan's statements and the previously expressed satisfaction with his services by Knudsen and Grant, that there was no dissatisfaction with his work, and that his discharge was the result of his refusal to grant the privileges mentioned to Baldwin." 3 Cal.App.(2d) 340, 349, 39 P.(2d) 838, 842. The respondent then relies on the conclusion of the former opinion that because of this "conflict" the question of the good faith of appellant, "other things being equal," would be for the jury.

[6] It is the settled rule that the doctrine of the law of the case does not apply in a case where the weight or sufficiency of the evidence is involved if there is a substantial difference in the evidence. Allen v. Bryant, 155 Cal. 256, 100 P. 704; In re Estate of Baird, 193 Cal. 225, 223 P. 974; Hoffman v. Southern Pac. Co., 215 Cal. 454, 457, 11 P.(2d) 387; Smellie v. Southern Pac. Co., 128 Cal.App. 567, 572, 18 P.(2d) 97, 19 P.(2d) 982. The last case is closely in point. A nonsuit had been granted mainly on the ground of the contributory negligence of the deceased. At the second trial, additional evidence had been received on this issue, and it was held on the second appeal that this additional evidence required the court to hold that the issue was not settled as the law of the case. The issue arises here in about the same way. On the former trial, respondent had no direct evidence of lack of good faith and offered no direct evidence on the second trial. On the former trial evidence was offered tending to show satisfaction prior to the meeting of the executive committee and evidence tending to show some ill feeling on the part of one of the directors arising out of the Los Angeles situation. From this it was held on the former appeal that an inference of bad faith might arise, and hence the question was one for the jury. On the second trial new evidence was offered by appellant showing that what respondent relied on as an expression of satisfaction was merely a form letter written to all employees under the bonus plan, that prior to the dismissal dissatisfaction had been voiced by two of the directors and by Grant's superior, Mr. Knudsen, and that the "pressure" brought upon Grant to make the dismissal was the

result of general dissatisfaction with the respondent's conduct of the business on the coast. It was further shown by undisputed evidence that the Los Angeles situation was not known to any of the directors when the dismissal was made or until some four years thereafter, when respondent "discovered" it and commenced this action.

[7, 8] With the burden of proof on respondent to show that the executive committee acted fraudulently and in bad faith, he rests his case on the showing that no one had told him that his work was unsatisfactory, on the form letters which were sent to all recipients of the bonus, on the claim that his immediate superior was satisfied and that he dismissed respondent because of "pressure" from above, and on the suspicions growing out of the Los Angeles situation. From the testimony covering these matters, respondent has drawn the inference that there must have been fraud and that because Mr. Fisher was a friend of Mr. Baldwin, and, because Mr. Baldwin did not like respondent, Mr. Baldwin must have complained to Mr. Fisher, and Mr. Fisher must have brought pressure upon Mr. Grant to dismiss respondent. In all this the respondent has overlooked the important fact that the question of good faith does not depend on the attitude of Mr. Fisher or Mr. Grant. The bonus contract expressly provides that the executive committee shall be the sole judge of the service of the employee. There is not a word of testimony which tends to show, or which gives any possible foundation for an inference, that the executive committee acted fraudulently when it unanimously determined that respondent's services had been unsatisfactory. All the testimony offered by the respondent is without any evidentiary value upon the issue of the good faith of the executive committee. If Mr. Fisher had done all that respondent suspects he might have done, it would have had no bearing on the question of the good faith of the committee. He may have been dissatisfied with respondent's services and may have honestly believed that his dismissal was for the best interest of the corporation, but, if he had persuaded all the other members to vote his way (the undisputed evidence is to the contrary), there is still nothing left even for an inference of bad faith of the committee. Throughout the briefs the parties have fallen into the same error that prevailed in the former trial. Where the employer is made the sole judge of his satisfaction with the services of the employee, the reasonableness of his decision is not a question for the jury. In such a case the question is whether the employer acted fraudulently and in bad faith. The burden of proof on this issue rests on the employee, and this burden is not met by proof that at some prior time some superior officer was satisfied with respondent's services, that at some prior time his services were in fact satisfactory, or that some executive became dissatisfied because of personal reasons. All the respondent's testimony on these matters proves nothing more than that the action of the executive committee might have been unreasonable; it does not prove either fraud or bad faith. The respondent has failed, therefore, to meet the burden of proof on this issue, and has likewise failed to prove the equally essential element for a recovery on the contract—an element not decided on the former appeal—that his dismissal was "for no fault of his own with an entirely satisfactory record."

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



13 Cal.App.2d 741

Ex parte MOFFETT.

Cr. 190.

District Court of Appeal, Fourth District, California.

May 11, 1936.

1. Habeas corpus ⇐58

Under statute providing that no application for writ of habeas corpus can be heard without proof of due service on district attorney, proof of due service on district attorney *held* necessary prerequisite to consideration of petition on merits, and in absence thereof court is without power to proceed (Pen.Code, § 1475).

2. Habeas corpus ⇐112

Judgment discharging petitioner in habeas corpus proceeding *held* required to be va-

cated, where record failed to show service of copy of application for writ on district attorney in county where petitioner was held in custody at least 24 hours before writ was made returnable as required by statute, and district attorney did not appear in proceeding (Pen.Code, § 1475).

On motion to vacate order and judgment [55 P.(2d) 584] made in this case.

Motion granted, and judgment and order vacated and set aside, together with order of submission.

George A. Work, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Walter C. Haight, Dist. Atty., and W. G. Machetanz, Deputy Dist. Atty., both of Visalia, for respondent.

MARKS, Justice.

This is a motion to vacate and set aside the judgment and order of this court made in this case on March 9, 1936 [Ex parte Moffett, 55 P.(2d) 584], on the ground that the court had acquired no jurisdiction to proceed because a copy of the application for the writ of habeas corpus was not served upon the district attorney of Tulare county, where petitioner was held in custody, at least twenty-four hours before the writ was made returnable. Section 1475, Pen.Code.

An examination of the record discloses no proof of any service on the district attorney of Tulare county. It is not contended that any service was ever made upon him. This defect escaped my notice when examining the proceedings prior to the filing of the opinion on March 9th.

[1, 2] Section 1475 of the Penal Code provides that no application for a writ of habeas corpus can be heard without proof of due service on the district attorney. It is my construction of this section that proof of due service is a necessary prerequisite to a consideration of the petition on its merits, and in the absence of such proof the court is without power to proceed. It follows that the motion must be granted.

Of course, the question of waiver of service, or voluntary appearance by the district attorney without service, is not involved here as no appearance was made by him.

It is ordered that the judgment and order of this court made in this proceeding on March 9, 1936, directing that the petitioner, Ed Moffett, be discharged and his bail exonerated, be, and the same is, hereby vacated and set aside, together with the order of submission.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 637

SHARP v. KEATING.

Civ. 10524.

District Court of Appeal, Second District, Division 1, California.

May 1, 1936.

Rehearing Denied May 25, 1936.

Hearing Denied by Supreme Court June 29, 1936.

1. Appeal and error ⇐1011(1)

Reviewing courts will not disturb judgment where there is conflict of evidence on material point and where there is reasonable and substantial evidence to support trial court's decision.

2. Brokers ⇐38(4)

Evidence *held* to support judgment denying recovery against stockbroker for failure to surrender stock purchased by customer within reasonable time after modification of purchase agreement and for conversion of such stock on ground that under agreement stock was not to be delivered until after designated date, whereafter stock was tendered to customer.

3. Appeal and error ⇐1011(1)

District Court of Appeal will not weigh evidence, but only considers its legal sufficiency as distinguished from its probative force, and must accept substantial conflict as conclusive.

4. Customs and usages ⇐10

Parties contracting as to subject-matter concerning which known usages prevail, incorporate usages by implication into contract if nothing is said to contrary.

5. Appeal and error ⇐1015(3)

Order denying motion for new trial will be affirmed on appeal where motion is based

on affidavit opposed by counter affidavits fully denying all material allegations contained therein.

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by Omer L. Sharp against A. G. Keating. Judgment for defendant, and plaintiff appeals.

Affirmed.

James M. Gammon, of Los Angeles, for appellant.

Emmett A. Tompkins, of Los Angeles, for respondent.

WHITE, Justice pro tem.

Plaintiff and appellant, Omer L. Sharp, is a physician, and the defendant and respondent, A. G. Keating, is a stockbroker, and also president of Big Jim Mines, Inc. It appears that appellant had bought and sold stocks through respondent's office over a period of several years. On December 29, 1933, appellant agreed to purchase from respondent 50,000 shares of Big Jim Mines, Inc., stock, at 6 cents per share, and paid $1,100 on account of the purchase price, receiving the ordinary confirmation from respondent's agent. There is nothing in writing to indicate when the balance of the purchase price was to be paid, appellant claiming that he was to have 90 days within which to pay the full purchase price, and that nothing whatever was said about day of delivery of the stock, while respondent insists that the agreement was that the whole order was to be readjusted at the end of 30 days, and that the oral agreement between the parties with reference to delivery was that the same was to be accomplished at the option of respondent. No further payment was made by appellant on the purchase price of the 50,000 shares of stock, and on March 10, 1934, respondent wrote appellant, canceling the latter's order for the 50,000 shares, and advising appellant that his account had been credited with 18,333 shares of Big Jim Mines, Inc., stock, which represented approximately the number of shares paid for by the $1,100 delivered on account by appellant to respondent at the time the original agreement to purchase the 50,000 shares was executed. Appellant subsequently acquiesced in this arrangement, and about May 29, at appellant's request, respondent wrote him what was denominated a "resume of his (appellant's) account," showing that respondent was holding for appellant 26,477 shares of Big Jim Mines, Inc., stock, being made up of the 18,333 shares paid for by the aforesaid $1,100, and an additional 8144 shares due appellant from a stock pool. In the same communication respondent offered to sell appellant an additional 523 shares for $31.38, to make an even 27,000 shares. On June 6, 1934, appellant paid respondent the $31.38, thus making appellant's stock holdings 27,000 shares. About May 29, 1934, there was delivered to appellant the 8,144 shares of pooled stock, leaving a balance of 18,856 shares belonging to appellant in the possession of respondent, after the June 6th payment.

The amended complaint herein presents two causes of action; the first of which sets up the purchase agreement of December 29, 1933, for 50,000 shares of stock, the subsequent modification of said agreement on May 29, 1934, whereby the appellant, having paid in full the purchase price for 18,856 shares, became entitled to the delivery thereof within a reasonable time thereafter. Plaintiff further averred that notwithstanding numerous demands by him for delivery of the stock, defendant refused to surrender the same to plaintiff, to the latter's damage in the sum of $3,016.96. The second cause of action adopted portions of the first, and in addition thereto charged defendant with conversion of the stock to plaintiff's damage in the aforesaid sum.

Upon trial by the court, sitting without a jury, judgment was rendered in favor of defendant, and plaintiff appeals therefrom.

At the trial appellant contended and testified that respondent agreed to deliver the shares of stock finally agreed upon within a few days and as soon as the same could be transferred, while respondent's testimony was that he specifically stated to appellant that the stock was not to be delivered until after a stockholders' meeting, to be held on or about July 21, 1934, and that the reason for such delay in delivery was that respondent, who was president of the corporation, did not want the stock to be available to appellant for the latter to place the same on the market, thereby reducing the market price at which the company's stock was selling. Respondent also testified that he tendered the stock to appellant on July 23, 1934, two days after the stockholders' meeting, and at all times thereafter was willing to deliver the stock. At the time of trial

defendant also made another tender of the stock in question to plaintiff.

[1-3] The trial court resolved this conflict in favor of defendant by finding that the agreement between the parties was that the stock was not to be delivered until after the stockholders' meeting on July 21, 1934, and by further finding that defendant tendered the stock in question to plaintiff on July 23, 1934. No citation of authority is required for the assertion that reviewing courts will not disturb a judgment while there is a conflict of evidence on material points, and where there is real and substantial evidence to support the trial court's decision. Being of the opinion that reasonable minds, dispassionately viewing the evidence in this case, might fairly entertain a difference of opinion upon it, we must uphold the conclusion of the trial court thereon, because in passing upon the question before us, we are not to weigh the evidence, but only to consider its legal sufficiency, as distinguished from its probative force, and accept a substantial conflict as conclusive upon us. Hughes v. Atchison, etc., Ry. Co., 121 Cal.App. 271, 8 P.(2d) 853; Thoreau v. Industrial Accident Comm., 120 Cal. App. 67, 73, 7 P.(2d) 767; Smith v. Royer, 181 Cal. 165, 172, 183 P. 660; City of San Diego v. Hall, 180 Cal. 165, 179 P. 889.

[4] Appellant further contends that since the written instrument evidencing the transaction between the parties was silent on the question of delivery, under the law delivery must be made according to the usage and custom among brokers. However, we think the law is that parties, as to a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary. 25 Cal.Jur. 420; 6 Cal.Jur. 315; Robinson v. United States, 13 Wall. (80 U.S.) 363, 20 L.Ed. 653. In the instant case, the court found, and there was substantial evidence to support such finding, that there was a special contract between the parties as to the time for delivery of the stock, in which case the doctrine of usage and custom was not applicable; and the understanding, contract, and agreement thereon between the parties furnished the measure of respondent's duty. Luckehe v. First Nat. Bank of Marysville, 193 Cal. 184, 187, 223 P. 547.

[5] Plaintiff assails the action of the trial court in denying the motion for a new trial, but we are of the opinion that such order should not be disturbed on appeal, because the weight of authority seems to be that where, as in this case, such motion is based on affidavits in support thereof, opposed by counter affidavits fully denying all the material allegations contained therein, the order denying the motion for a new trial will be affirmed on appeal. Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann.Cas.1913D, 908; Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann.Cas. 1914D, 232.

No other points raised by appellant require discussion. The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 659

FAVALORA et ux. v. ODEN et al.

Civ. 9898.

District Court of Appeal, First District, Division 2, California.

May 6, 1936.

1. Automobiles ⇐162(1)

Court sitting without jury *held* justified in negativing negligence of driver of delivery truck stopped at curb on left side of street intersection, who could not see child who proceeded along right side of truck to point immediately in front thereof, and was hit when truck started.

2. Death ⇐24

Parents suing for death of child less than five years of age, who went in front of stationary delivery truck at moment that truck started, *held* contributorily negligent in permitting child to play in street notwithstanding previous perils and warnings of danger.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Domiano Favalora and wife against Lila Oden and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

John H. Thomsen and J. W. Lenahan, both of Los Angeles, for appellants.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued for damages for the death of their child aged four years and eight months. The cause was tried before the court sitting without a jury. Findings were made that defendants were not negligent and that plaintiffs were guilty of contributory negligence. The appeal is confined to an attack on these findings.

[1, 2] The defendant was operating a truck in the delivery of milk. While the truck was stopped at the curb of the left or "wrong" side of the intersection of two streets, the little child entered the street and ran or "toddled" across the intersection and then along the right-hand side of the truck to a point immediately in front of it. At that moment the truck was started, and the child was struck down and killed. The evidence was that the child could not have been seen by the defendant and that the latter had exercised all the care and caution that could be demanded of any one operating the truck. The evidence furthermore demonstrated the contributory negligence of the parents in permitting the child to play in the street in spite of previous perils and of warnings of the danger.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



ANDERSON v. WESTERN PACIFIC R. CO. et al. *

Civ. 9592.

District Court of Appeal, First District, Division 1, California.

April 30, 1936.

Rehearing Granted May 29, 1936.

1. Appeal and error ⇐1002
Negligence ⇐136(26)

Ordinarily, question of contributory negligence is for jury, and, where evidence is conflicting thereon, verdict and judgment cannot be disturbed.

2. Appeal and error ⇐996

Judgment of trial court with respect to person's negligence must be affirmed if reasonable minds would disagree under all facts and circumstances as to whether such person had been negligent.

3. Negligence ⇐136(27)

In action for injuries received when person walking across unfenced land was precipitated into pit of smouldering fire which was consuming inflammable material dumped on lot by defendant, evidence of plaintiff's contributory negligence *held* for jury.

4. Negligence ⇐54

Company dumping refuse on private property which was being filled under private contract excluding public dumping, and upon which signs forbidding dumping were displayed, *held* trespasser upon such property so as to be liable for negligence causing injury to person on property as trespasser or licensee.

5. Negligence ⇐134(1)

Evidence *held* to support judgment granting damages to person injured while walking across unfenced lot when he was precipitated into pit of smouldering fire which was consuming inflammable material dumped on lot by defendant, on ground that accident happened on private property upon which public dumping was prohibited.

6. Trial ⇐252(1), 260(1), 261

Instructions in personal injury action *held* properly refused, where based upon theory not supported by evidence or incorrectly declaring law or where substantially covered by other instructions which were given.

7. Damages ⇐96

Authority to fix amount of damages in personal injury action is committed almost entirely to sound discretion of jury.

8. New trial ⇐77(2)

In ruling on motion for new trial, judge of trial court may consider evidence and set aside verdict of jury if excessive damages have been awarded under influence of passion or prejudice.

9. Appeal and error ⇐1004(1)

Reviewing court may not exercise power of revision of damages on appeal unless as matter of law award of damages made by jury and sustained by trial court was so grossly disproportionate to any compensation reasonably warranted by facts as to shock sense of

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 61 P.2d 1209.

justice and raise at once presumption verdict was result of passion, prejudice, or corruption, rather than honest, sober judgment.

10. Damages ⇐132(6)

$25,000 *held* not excessive for severe burns on both legs from hips down, requiring skin grafting and hospitalization for seven months, and causing disability from performance of any work for period of two years and permanent disability from engaging in occupation followed prior to injury at which injured person earned $7 per day.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Otto Anderson against the Western Pacific Railroad Company, the Pacific Gas & Electric Company, and others. Judgment for plaintiff, and the Pacific Gas & Electric Company appeals.

Affirmed.

Thomas J. Straub, W. H. Spaulding, Clinton F. Stanley, and W. R. Dunn, all of San Francisco, for appellant.

Joseph A. Brown, of San Francisco, for respondent.

PER CURIAM.

Plaintiff was awarded a verdict for damages against the defendants Pacific Gas & Electric Company, Meyer Rosenberg, and L. Rosenberg on account of personal injuries received by him through their alleged negligence; and the Pacific Gas & Electric Company has appealed from the judgment entered on said verdict.

There were other parties defendant to the action, and mainly on account of the question of liability involved, the trial consumed several weeks. Necessarily the evidence on certain points is conflicting, and, resolving those conflicts in support of the jury's verdict, the essential facts of the case may be summarized as follows: A block of land lying between Indiana, Twenty-Sixth, Minnesota, and Army streets in San Francisco was being gradually filled in and brought to grade. The block was divided into separate parcels, which, although separately owned, were unfenced, and people were constantly traveling over them. On some of the parcels public dumps were maintained, while the others were being filled in under private contracts entered into between the respective owners and the defendant Meyer Rosenberg. One of these owners was Adelheid Schultze, and under the terms of her contract the defendant Rosenberg was required to fill in and raise her land to official grade with good solid soil or rock. No soft or mushy fill was to be used, and signs were displayed on her lot forbidding dumping. For some time preceding and up to the time of the accident herein, appellant had been dumping on the lands within said block many truckloads of refuse and by-products from its gas plant. It consisted of a black, highly inflammable and combustible substance, which when dumped was hot and smouldering, but as it cooled a crust formed on the surface, over which more or less dirt was deposited. Testimony was introduced showing that without permission on the part of the owner or occupant of the Schultze property, and surreptitiously, so the Rosenbergs claimed, appellant dumped much of this inflammable material on the Schultze property. As stated, it was the common practice of people in that neighborhood to cross over the unfenced Schultze property, and on the day of the accident, which occurred shortly after the noon hour, while respondent was walking across the Schultze property, the ground beneath him caved in and he went down to his waist in a pit of smouldering fire, which was consuming the inflammable material dumped there by appellant. Respondent's brother, who at the time of the accident was a short distance away, heard respondent's screams; and he hastened to respondent's aid and pulled him out of the burning hole, but he had already sustained very severe burns which medical testimony shows resulted in permanent injuries.

[1-3] The first of the five major grounds urged by appellant for reversal is that respondent was guilty of contributory negligence. In support of such contention, it is argued that respondent actually knew of the smouldering character of the material that was being dumped in the block by appellant, and that he had only to anticipate that it might cave and precipitate him into a fire, and that accordingly he should have guarded himself against that contingency. In this regard it may be conceded that a number of circumstances are pointed out by appellant which tend to support its argument. However, on the other hand, respondent testified that there was nothing to indicate that there was a fire concealed below the ground where the accident oc-

curred or that he was entering upon or crossing ground that was dangerous. And in this connection he introduced evidence to show that prior to the accident his physical condition was normal and good in all respects, except a small impairment of his hearing, and that his vision was not defective in the slightest degree. Therefore, in view of the positive testimony given by him that the dangerous condition of the ground was not apparent, it cannot be held as a matter of law that there was no substantial evidence to support the implied finding of the jury that respondent was not guilty of contributory negligence. As repeatedly held, ordinarily the question of contributory negligence is for the jury, Wise v. Stott, 114 Cal.App. 702, 300 P. 883; Wynne v. Wright, 105 Cal.App. 17, 286 P. 1057, and, where the evidence is conflicting, the verdict and judgment cannot be disturbed, Bannister v. Los Angeles Ry. Corporation, 203 Cal. 427, 264 P. 756; Cummins v. Yellow & Checker Cab Co., 127 Cal.App. 170, 15 P.(2d) 536; Nevin v. Mallon, 136 Cal. App. 571, 29 P.(2d) 303. Moreover, it is well established that, if reasonable minds would disagree under all the facts and circumstances as to whether a person was negligent, the judgment of the trial court must be affirmed. Gerdes v. Pacific Gas & Electric Co., 219 Cal. 459, 469, 27 P.(2d) 365, 90 A.L.R. 1071. We are of the opinion that the facts and circumstances of the instant case are such that at best reasonable minds would disagree on the issue of contributory negligence. Therefore, under the rule above stated, the conclusions of the jury and the trial court on this issue cannot be disturbed on this appeal.

[4] The second ground urged for reversal is based upon the legal proposition that one who dumps and abandons refuse to become part of the realty at a public dump no longer has control of it and is not responsible for injuries to one who goes voluntarily upon such public dump. Numerous authorities are cited and discussed by appellant in support of this contention. The principle of law thus sought to be invoked, however, is not applicable here, for the reason that the evidence clearly shows that the Schultze property was not a public dump, but, on the contrary, was being filled under private contract, which by its terms excluded public dumping; and that signs forbidding dumping were displayed on the property. It follows, therefore, that by dumping its refuse thereon without legal authority from the owner or occupant appellant became a trespasser upon the Schultze property, and as such became and was liable for its negligence. Nor does the admitted fact that respondent also was a trespasser or at most a licensee on the Schultze property exempt appellant from liability for its negligence, for the reason that, both being trespassers or mere licensees, each was liable to the other for damages arising from his or its negligence. Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353.

[5] As third ground for reversal, appellant contends that respondent failed to prove facts showing that appellant owed him any duty to exercise care for his safety, in that respondent failed to prove that the accident happened on property on which appellant did not have the right by invitation to dump its refuse. This contention involves two points, the first of which is whether respondent established that appellant had no legal right to dump its refuse on the Schultze property, because, if it did have such right, then its liability was governed by the well-settled rule that one who is rightfully on real property under authority of the owner is rightfully in possession thereof, and to that extent is clothed with the same rights as an owner, and therefore is not obligated to conduct himself or the operations of his property so as to make it safe for a trespasser; that under such circumstances he will be liable only for willful or wanton acts done with knowledge of the presence and apparent danger of the trespasser. As already pointed out, however, the evidence establishes that appellant did not have any lawful right to dump its refuse on the Schultze property, nor upon any portion thereof, but, on the contrary, that it was a trespasser thereon. Therefore, under the trespasser rule above stated, it was liable to respondent for its negligence. The second point is whether the accident happened within the boundaries of the Schultze property, or, as appellant contends, just outside of the boundaries thereof. Upon this question of fact much testimony was introduced and extended arguments were presented in the briefs, for the reason that, if it happened beyond the boundaries of the Schultze property, appellant was liable only for a willful and wanton injury, and no such injury is claimed or proved. The jury found in effect by its verdict, however, that it happened within the boundaries of the Schultze property; and, by denying appellant's motion for new trial, the trial court evident-

ly reached the same conclusion; and in our opinion such finding and conclusion are supported by substantial evidence.

[6] Fourth, appellant contends that the trial court erred in its instructions to the jury, in that it incorrectly stated the law as to dumps, denied appellant the right to have certain material issues submitted to and passed upon by the jury, and gave formula instructions omitting essential elements of liability. We have inquired into each of the numerous assignments made in this behalf, but find no substantial merit in any of them. With respect to the instructions proposed by appellant and by the court refused, it may be stated that several were either based upon theories not supported by the evidence or did not correctly declare the law upon the subjects to which they related, and, as to the rest of them, that the substance thereof was covered by other instructions which the court gave. With respect to the trial court's charge to the jury, it may be said that it contained a large number of instructions, many of which were proposed by appellant, all of which were divided into four groups. The first related to rules of evidence and burden of proof; the second to the law of negligence; the third had application to the particular type of case on trial; and the fourth dealt with the question of damages. And, taking them as a whole, it is our opinion that they fully, fairly, and clearly presented to the jury the law governing the case, and that there is nothing therein which would warrant a reversal.

[7-10] The verdict was for $25,000, and as fifth ground for reversal appellant contends that the amount allowed was grossly excessive. As has been frequently said, the authority to fix the amount of damages that shall be allowed in a case of this kind is committed almost entirely to the sound discretion of the jury; and, in order to safeguard against the danger of excessive verdicts, the judge of the trial court in ruling on motion for new trial may consider the evidence anew and set aside the verdict of the jury if in his opinion excessive damages have been awarded under the influence of passion or prejudice. On appeal, however, the reviewing court may not exercise the power of revision unless it is able to hold, as matter of law, that the award of damages made by the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest, sober judgment. Kirschbaum v. McCarthy (Cal.Sup.) 54 P.(2d) 8; Britting v. Dewes (Cal.App.) 54 P.(2d) 736; Reneau v. Hirsch, 88 Cal.App. 1, 262 P. 1100; Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L.R.A.(N.S.) 687, Ann.Cas.1912C, 50; Horn v. Yellow Cab Co., 88 Cal.App. 678, 263 P. 1025; Gregoriev v. Northwestern Pac. R. Co., 95 Cal.App. 428, 273 P. 76; Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Holmes v. California Crushed Fruit Co., 69 Cal.App. 779, 232 P. 178; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Miller v. Southern California Tel. Co., 216 Cal. 391, 14 P.(2d) 519. In the present case it appears from the evidence adduced on the part of respondent that he was so severely burned that he was confined in the hospital for a period of seven months; that he was burned on both legs from his hips down, the more severe injuries being on his left leg; that skin grafting was necessary; that for a period of two years he has been unable to perform any kind of work, and will not be able to do the work he was doing prior to the injury; and that this disability will continue in the future and that this condition is a permanent one. At the time of the accident he was employed in a lumber yard and was earning $7 per day; and, according to the medical testimony, he will never be able to resume that employment, or any other that requires muscular action. It is true that at the time of the trial he was working as a janitor at $60 per month, but the evidence shows that he is still suffering much pain, and that he will continue to do so for a long time in the future. It is our opinion, therefore, that, in view of the facts disclosed by the evidence as to the nature and extent of respondent's injuries, this court, under the rule declared by the decisions above cited, is precluded from interfering with the verdict of the jury fixing the amount of respondent's damage. Kirschbaum v. McCarthy, supra. Then again, on motion for new trial, this claim of excessive damages was presented to the trial judge, who had listened to the evidence for several weeks, and in ruling adversely upon said motion he refused to modify the amount of the verdict.

The judgment is affirmed.

13 Cal.App.2d 715

PARKER v. HOME FIRE & MARINE INS. CO.

Civ. 9672.

District Court of Appeal, First District, Division 1, California.

May 11, 1936.

Insurance ⊂=164(1)

Under contract for sale of prunes which were stored with buyer and subject to lien of third person, providing that title should pass on payment or on delivery which should be deemed to occur when buyer retained prunes in execution of sale and on release thereof by seller so as to entitle buyer to take delivery free of lien, and that buyer should be entitled to 48 hours within which to accept prunes after delivery, title *held* not in buyer at time of destruction of prunes by fire within 48 hours after discharge of lien, but before payment, release by seller, or acceptance by buyer, so that assignee of buyer was not entitled to recover for loss of prunes on buyer's fire policy.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by D. A. Parker against the Home Fire & Marine Insurance Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Thornton & Watt and Thornton & Taylor, all of San Francisco, for appellant.

Orrick, Palmer & Dahlquist, of San Francisco, for respondent.

PER CURIAM.

The action was brought by plaintiff as the assignee for collection of Herbert, Inc., to recover for the loss by fire of a lot of prunes claimed to have been owned by the latter and to have been covered by a policy of fire insurance issued to it by the defendant.

The case was tried before the court, which rendered judgment in defendant's favor. The plaintiff appeals.

There is no dispute as to the facts, and the only question of law involved is as to whether Herbert, Inc., had acquired title to the goods at the time they were destroyed and were consequently covered by the policy.

The sale and purchase of the prunes was one of a number governed by the terms of a general contract dated June 20, 1932, and entered into by United Prune Growers, a co-operative marketing association (designated therein as "United") on the one part, and a number of packers of dried fruit, of which Herbert, Inc., was one, on the other. The particular lot of prunes here involved, although the property of United, were stored at the packing plant of Herbert, Inc., to which they had been delivered by the growers for the account of said marketing association, and they had been pledged by the latter to the Bank of America and the Federal Farm Board, which had jointly granted a loan to United, and Herbert, Inc., had delivered to the Federal Reserve Bank as the representative of the lenders a writing, certifying that it held the prunes as their pledge holder.

The sale had been effected by the acceptance on October 31, 1932, by Herbert, Inc., of an offer by United of a certain gross tonnage, including a quantity of 154,279 pounds which is the subject of the present dispute. Invoices were prepared and rendered in due course, but, at the time of the destruction of the prunes, payment therefor had not yet been made.

On January 9, 1933, United delivered to said Federal Reserve Bank a certified check sufficient in amount to repay its loan, and at this time the bank surrendered to it certain pledge holders' certificates, including that of Herbert, Inc. It was too late in the day to pass the check through the clearing house, but this was done on the following day, January 10th, and the amount thereof credited to the accounts of the Federal Farm Board and Bank of America in the respective sums due them as participants in the loan. The fire occurred at about 6 o'clock in the morning of said January 10th, i. e., after the surrender of the pledge holders' certificates to the United, but before the accounts of the lenders had been credited with the proceeds of the check.

The provisions of said general contract the application of which to the sale here involved determines the question of the passage of title are the following:

Paragraph 28 (in part): "All prunes bought from any party by any other party pursuant hereto shall be free of all liens and charges when delivered to the buyer or when the buyer becomes entitled to retain the same."

Paragraph 29 (in part): "(a) When prunes tendered as a delivery by United are

shipped from another location to a Packer's plant, they shall be delivered by United at such plant. When prunes to be delivered to a packer at a particular plant are stored at such plant before they are tendered for delivery, delivery thereof shall be deemed made to such packer when (1) such prunes shall be released to such Packer so that it shall be entitled to take delivery thereof free of all liens and charges."

Paragraph 30 (in part): "If a packer shall wish to make any claim in respect of or reject any prunes tendered for delivery by United, it shall notify United of such claim or rejection within forty-eight hours after such prunes are delivered or tendered for delivery by United, or such claim or claimed right of rejection shall be deemed waived. In any case where payment is made before the expiration of forty-eight hours after delivery or tendered delivery of prunes to a buyer, such payment shall be subject to the buyer's right to examine such prunes within forty-eight hours after delivery or tender and to reject them or make any proper claim in respect thereof. * * * Payment of prunes bought from United and retained by or delivered to a packer shall be made on presentation of invoice by United at any time after such prunes are delivered (or deemed delivered) to and accepted by such Packer. When requested by a packer, United shall promptly present such invoice. Title to prunes bought from United shall pass upon payment therefor, but unless United shall notify a Packer in writing before particular prunes are accepted by such Packer that they are not to be used before payment is made therefor, the Packer shall be entitled to use the same, and title thereto shall pass to such packer upon their acceptance by such packer, such packer being responsible to United for the price thereof upon presentation of an invoice therefor. * * *"

It is seen from the quoted provisions of paragraph 30 that title passes upon payment; and also that upon certain conditions it passes without payment; but in the latter case it is quite obvious that, with regard to prunes already in the possession of the buyer (packer) who is holding them for the account of United, no title passes until they are "deemed delivered" to the buyer, nor until they are accepted. This "deemed delivery" necessarily takes place when the merchandise is, as it is expressed in another part of the same paragraph, "retained" by the buyer in execution of a sale to him.

If the prunes which are the subject of the sale here involved had not at the time of the sale been under pledge to third parties, we should have no difficulty in holding that the "deemed delivery" to Herbert, Inc., took place upon its acceptance of the offer of the United of these prunes; that, having made no objection to them, either as to quality or in any other respect, within forty-eight hours of such "deemed delivery," it thereby accepted them (which is the acceptance referred to in paragraph 30); and that the United, having failed to notify Herbert, Inc., in writing before such acceptance that the latter could not use the prunes before payment, title then passed.

It appears, however, that at the time of the sale of these prunes they were under pledge to the Federal Farm Board and Bank of America. It is true, as already mentioned, that on the afternoon of January 9, 1933, a few hours before the destruction of the prunes by fire, the custodian of the pledge certificates, upon receipt by it of a certified check for the amount due to the pledgees, had surrendered these certificates to the United, and it may be assumed that the prunes were thereby freed from the lien of the pledge notwithstanding that the money represented by the check was not actually credited to the respective accounts of the pledgees until the next morning; but the United did not then nor at any time "release" the prunes to Herbert, Inc. Under the express provision of paragraph 29 that, in the case of prunes stored at the packer's plant, "delivery thereof shall be deemed made to such packer when (1) prunes shall be released to such packer so that it shall be entitled to take delivery thereof free of liens and charges," until this specific release by United to Herbert, Inc., took place, there was no "deemed delivery" to the latter, and, until "deemed delivery" occurred, there could be no acceptance and, in consequence, no passage of title. This was the condition existing at the time of the fire and the resulting destruction of the prunes.

Furthermore, even if it could be held that title to prunes stored at the buyer's plant passes to the buyer without the specific release mentioned in paragraph 29, still, under the provisions of paragraph 30, without payment it could not pass until there was a deemed delivery to, and acceptance by, the buyer. While it is of course perfectly competent for parties to contract to sell and buy goods subject to a lien, the contract here specifically provided that the deemed

delivery of prunes held by a packer for the account of United should not take place upon a sale thereunder until the prunes were free of all liens and charges. This condition, as already pointed out, did not arise until the afternoon of January 9, 1933, at the earliest. The buyer then had forty-eight hours in which to accept or reject the prunes; and until acceptance the United had the right to notify the buyer that it could not use the prunes until payment was made therefor; and only in the absence of such notification would title pass without payment. (Here no payment had been made.) The buyer by a specific acceptance within forty-eight hours could have terminated the time reserved to the United to give such notification, but it did not do so; and, although its inaction in this respect would at the end of that period have resulted in its automatic acceptance of the prunes, the fire occurred within that time, thus effectually preventing acceptance, with the result that no title passed.

It follows from what we have said that the trial court correctly held that the prunes never became the property of Herbert, Inc., and accordingly that they were not covered by the policy issued to that corporation by the defendant.

The judgment is affirmed.



13 Cal.App.2d 748

SESSIONS v. MEADOWS et al.

Civ. 1756.

District Court of Appeal, Fourth District, California.

May 11, 1936.

Hearing Denied by Supreme Court July 10, 1936.

1. Schools and school districts ⇐141(6)

Evidence that contract employing rural school supervisor had been mutually abandoned and rescinded by supervisor and new county superintendent *held* sufficient to justify judgment denying supervisor reinstatement to such position or salary for period subsequent to rescission (Civ.Code, § 1688).

2. Appeal and error ⇐1010(1)

Finding supported by substantial evidence cannot be disturbed on appeal.

Appeal from Superior Court, Kings County; Arthur Allyn, Judge.

Petition for a writ of mandate by H. A. Sessions against J. E. Meadows, superintendent of schools of the county of Kings, and others. Judgment for defendants and petitioner appeals.

Affirmed.

Clarence H. Wilson, of Hanford, for appellant.

Roger R. Walch, Dist. Atty., and William F. Hall, Deputy Dist. Atty., both of Hanford, for respondents.

MARKS, Justice.

Petitioner sought a writ of mandate to compel respondents to pay to him salary as supervisor of rural schools of Kings county and to reinstate him in such position. Judgments went for respondents, and petitioner has appealed.

Petitioner was employed by Elsie I. Bozeman, the then superintendent of schools of Kings county, as supervisor of rural schools of that county for the school year ending June 30, 1935, at a stipulated salary and expense account. The contract bears date of July 1, 1934, but it is admitted it was not executed until the early part of September of that year. Petitioner performed the duties of his employment and received his full compensation up to noon on January 7, 1935. Mrs. Bozeman had been defeated for re-election by respondent J. E. Meadows, who qualified and took over the office on that day.

Counsel admit that the contract made by Mrs. Bozeman and petitioner was valid and binding on her successor in office. The sole necessary question for our decision is: Was the finding of the trial court that the contract had been mutually abandoned and rescinded by petitioner and Meadows supported by the evidence or reasonable inferences to be drawn from it?

Under date of December 28, 1934, Mr. Sessions addressed the following letter to Meadows:

"Friend Meadows: I believe that the last time I talked with you was just before the close of your school at Empire and which I remember as a pleasant occasion. Since then considerable water has passed under the bridge. I had presum-

ed that you would change supervisors, and thought nothing about continuing, and further, I didn't wish in any way to embarrass you, nor to influence your choice. However, since the announcement that Mrs. Bradford will remain on the job, so many teachers and other friends have asked me to be a candidate that I am writing you this letter. By inquiry I find that very few newly elected superintendents are making changes in the staff of supervisors. In a few counties where changes have been made, it seems that preelection arrangements were made. This leaves me few opportunities to secure a new position. Next spring, as the school year closes I believe there will be excellent opportunities. I need a few more months of service to complete my thirty years of teaching necessary to gain the retirement salary, and $200 to put into that fund. I began teaching at seventeen—takes lots of teaching to make thirty years. I need a few more months to get my financial affairs in condition for my retirement should it be necessary. Putting seven children through high school and college has seemed quite a job, and one not through high school yet. I am sending you a few of the commendatory letters I have, and which I should like you to return at your convenience. These are copies—the originals I have. I can refer to Dr. F. W. Thomas and J. W. Canfield of the Fresno State College and others there. To Dr. H. L. Eby, U. C. L. A. to Dr. W. L. Nida, San Diego State College. To Dr. J. C. DeVoss, and Dr. Geo. E. Freeland, San Jose State College, the entire supervisory staff of Fresno county, and many others, as to my qualifications. I shall be pleased to remain on the job until you find some one you can use more advantageously, and should be willing to retire gracefully and graciously when that time comes. Very truly, H. A. Sessions."

On January 2, 1935, the following reply was made:

"Mr. H. A. Sessions, Hanford, Calif. Dear Mr. Sessions: In reply to your letter of December 28th will say that I had already settled on whom my Rural Supervisors are to be. I want you to know, Mr. Sessions, that I have no personal ill will toward you and hope that you may be able to secure a satisfactory position somewhere. Will hand you your recommendations that you sent me some day when I am in Hanford. Wishing you a Happy and Prosperous New Year, I am, Very truly yours."

According to the testimony of petitioner, he had the following conversation with Meadows before leaving the office of the superintendent of schools on January 7, 1935: "I went up to Mr. Meadows and I says, 'Well, how about it?' He said, 'Well, I hope you get something else.' Mr. Wilson: Q. And that was all that was said that morning? A. Yes."

Petitioner removed all of his personal belongings from the office of the school superintendent prior to and on January 7, 1935, and performed no services in connection with his employment after that date. On April 9, 1935, he filed a demand for salary and filed a written demand on Meadows to be permitted to complete his contract. He had one conversation with Meadows prior to that time which he summarized as follows:

"Q. You never mentioned that contract to Mr. Meadows at any time until you served a written notice on him about April 9th, 1935. Is that correct? A. No, I went to see him some few days previous to that and had a talk with him.

"Q. Previous to April? A. Yes.

"Q. And did you discuss the contract with him at that time? A. Well, substantially, yes. I don't remember—

"Q. Did you have the contract with you, do you recall? A. No, I don't.

"Q. But you did tell him that you felt you had a contract? A. Yes.

"Q. Now, on the morning of January 7th, 1935, up to 12 o'clock you said nothing to him about the fact that you considered that you were entitled to remain as Superintendent of Rural Schools? * * * A. No, I didn't make any absolute demand on him at that time.

"Mr. Sharp: Q. In any form? A. No.

"Q. This conversation that you spoke of, Mr. Sessions, of having with Mr. Meadows just before you served the written notice on him, on April 9, 1935, do you recall how many days that was before April? It was just two or three days before you served the written notice? A. Well, just a few days."

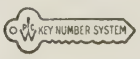
In 6 California Jurisprudence 382 it is said: "The rescission of a contract means the annulling or abrogation of it and the placing of the parties to it in statu quo. As the Civil Code, § 1688, provides, 'A

contract is extinguished by its rescission'. A contract may be rescinded either wholly or in part by the mutual consent of the respective parties, at any stage of their performance, and each of the parties released from any further obligation on account thereof; and such abandonment may be by parol. This is true notwithstanding one of the parties may previously have waived his right to rescind. * * * A rescission by consent may be implied from the acts of the parties. The giving of notice and the conduct of the parties thereafter may amount to rescission by their mutual consent. Moreover, where a rescission on the part of one party is implied by his refusal to comply with the contract, and the other party acquiesces therein, a rescission by consent is effected."

[1, 2] The question of mutual rescission or abandonment of the contract by petitioner and Meadows was one of fact which was addressed to the trial court. It having been found that the contract was rescinded and abandoned and there being substantial evidence to support such a finding, it cannot be disturbed on appeal. Having reached this conclusion, it is unnecessary to consider the other questions argued by counsel for petitioner.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 660

GORZEMAN et al. v. ARTZ.

Civ. 10355.

District Court of Appeal, Second District, Division 1, California.

May 6, 1936.

Rehearing Denied May 26, 1936.

Hearing Denied by Supreme Court July 2, 1936.

1. Evidence ⇐265(18)

Admissions authorized finding that bakery truck driver was negligent in backing truck into three year old child playing in driveway which circled child's home, although there was no other evidence indicating how accident happened.

2. Automobiles ⇐162(1)

Bakery truck driver *held* charged with knowledge that customer's child was apt to be found at any place about customer's yard and was required to exercise precaution before starting truck.

3. Judgment ⇐696

Master who defends action against servant, or has opportunity to assume defense, and is under obligation to do so, because acts complained of were done under his orders, is generally bound by judgment.

4. Evidence ⇐222(10)

Defendant bakery truck driver's statement that he backed over child *held* admissible against him to show his negligence, although not binding on his codefendant employer.

5. Automobiles ⇐193(1)

Employer of bakery truck driver *held* liable on theory of respondeat superior for driver's negligence in backing into child while acting on employer's business.

6. Judgment ⇐696

Where both employee and employer are made parties to action, and employer has opportunity to and actually does defend, and case of negligence while on employer's business is made out against employee by evidence competent against employee, employer is bound by judgment against employee, regardless whether evidence which proved employee's negligence was admissible against employer, unless judgment against employee is reversed or modified for prejudicial error.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Joseph Gorzeman, an infant, by John Gorzeman, his guardian ad litem, and another against H. D. Artz and another. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Swaffield & Swaffield, of Long Beach, for respondents.

ROTH, Justice pro tem.

Joseph Gorzeman, an infant three years old, while playing, on May 22, 1933, in the driveway which circled his home, was backed into and hit, or run over, by the right rear wheel of a bakery wagon operated by defendant Poling, who was at the time an employee of defendant Artz. The

bakery wagon in question was an automobile which was made up of a box mounted upon an automobile chassis. The box was of such size that the operator of the bakery wagon, when sitting in the driver's position, could not see to the immediate or direct rear thereof. The evidence shows without contradiction that Poling had been calling at the infant's home some two months prior to the accident, on an average of six times a week; that there was another child in addition to Joseph; and that frequently Poling would give cookies to the children. When donating such cookies or selling other supplies, Poling had to go to the rear of the wagon and open the doors of the box-like structure. There is no evidence indicating how the accident happened except the admissions of Poling, made first to the infant's mother immediately after the accident (who, in response to the screaming of the child, rushed outside to pick him up), and within five minutes thereafter to the infant's father, upon both of which occasions Poling said, according to their testimony, "I backed over the boy," and made other admissions from which it is not difficult to infer negligence on his part. Poling did not testify in person or by deposition. As a consequence of the accident, this action was instituted by the infant through his father, John Gorzeman, as guardian ad litem, and by the father as a plaintiff in his own right. Both plaintiffs recovered against both defendants. Defendant Artz alone appeals.

[1, 2] Artz contends that there is no evidence of negligence upon which the judgment against either defendant could be sustained, and, further, that the judgment cannot be sustained against him because if there is evidence of negligence it consists wholly of the admissions of Poling, which are only admissible as against Poling.

On the question of Poling's negligence, we are satisfied that the case of Cambou v. Marty, 98 Cal.App. 598, 277 P. 365, 367, is decisive. In that case the court, speaking with reference to similar facts, said in part: "Any reasonable man can be charged with knowledge that a child is apt to be found at any place about the family yard. Charged with that knowledge it becomes his duty to use vigilance and care before setting in motion a dangerous instrumentality in that locality. Failing in the duty he is negligent. We cannot concede that it is a harsh burden to place upon a visitor at a family home. Where a life may be jeopardized by a failure to make certain a clear path it surely is not unreasonable, as a matter of law, to insist that ordinary care demands some precaution before starting an automobile." See, also, Lampton v. Davis Standard Bread Co., 48 Cal.App. 116, 118, 191 P. 710.

[3-6] It is a well-settled general rule that when "a master defends an action against his servant, or has an opportunity to assume the defense, and is under an obligation to do so, because the acts complained of were done under his orders, he is bound by the judgment." 34 Corpus Juris 1024; Shamlian v. Wells, 197 Cal. 716, 242 P. 483; Fedden v. Brooklyn Eastern District Terminal, 204 App.Div. 741, 199 N.Y.S. 9. In this case the statements of Poling were admissible against him to show his negligence, although such statements were not binding upon the employer. It is uncontradicted, however, that Poling was employed by and on the employer's business at the time of the accident. If Poling, under such circumstances, is found negligent, then upon the doctrine of respondeat superior his employer, Artz, is responsible for such negligence. This does not mean that the employer has no right to question the judgment merely because the employee does not, or that in the absence of an appeal by the employee an employer has no right to take an appeal [Roy Tong v. Sun Realty Co., 120 Cal.App. 477, 7 P.(2d) 1101]; or that in an action brought against the employer alone, admissions made by the employee can be used as against the employer [Elcox v. Hill, 98 U.S. 218, 25 L.Ed. 103]; or that the employee can default in an action in which he is made a party, thus binding his employer to a judgment which the employer has had no opportunity to defend, but in our opinion it does mean that when both employee and employer are made parties to the action, and the employer does have an opportunity and actually does defend, and a case of negligence is made out against the employee, by evidence competent against such employee, that the employer is bound by the judgment irrespective of whether the evidence which proved the negligence of the employee was admissible against him, or not, unless for some prejudicial error the judgment against employee is reversed or modified.

Judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

13 Cal.App.2d 663

WHOLESALERS BOARD OF ADJUSTERS v. NORTON et al.

Civ. 10559.

District Court of Appeal, Second District, Division 1, California.

May 6, 1936.

Rehearing Denied May 28, 1936.

1. Appeal and error ⇐1011(1)

Sufficiency of evidence to sustain findings is primarily question for trial court, and findings based on substantially conflicting evidence cannot be disturbed on appeal.

2. Appeal and error ⇐1012(1)

Findings cannot be assailed on appeal unless contrary to undisputed evidence read in light of all legitimate inferences to be drawn therefrom.

3. Appeal and error ⇐1010(1)

Reviewing court could not disturb trial court's findings, in suit by seller's assignee for balance of purchase price of cleaning equipment, that there had been breach of warranty by seller and no waiver on part of buyers where assignee's brief excerpted little evidence in support of its contentions and buyers' brief contained evidence showing ample support for such findings.

4. Evidence ⇐413

Where representations of material facts are made inducing another to enter into written contract, they may be shown by oral evidence although written contract is subsequently entered into.

5. Fraud ⇐9

Representations of material facts which induce another to enter into written contract are sufficient in themselves, on which to predicate cause of action for damages.

6. Sales ⇐347(4)

Buyer's defense of fraud to demand of seller, or in abatement of damages in seller's action for balance of purchase price is always available to buyer.

7. Sales ⇐428

Where there has been breach of warranty, buyer may accept goods and still sue for damages, or wait and set up breach of warranty by way of counterclaim to seller's suit.

8. Sales ⇐288(2)

Buyers *held* not to have waived right to set up defects of cleaning equipment in suit for balance of purchase price by retaining equipment, although failing to continue complaints as to such defects until time of suit for purchase price, since they had right to remain silent.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by the Wholesalers Board of Adjusters against James R. Norton and others, doing business as Ceco Cleaners. Judgment for plaintiff, and it appeals.

Affirmed.

Macfarland, Scheinman & Krasne, of Los Angeles (Max Sisenwein and John B. Taylor, Jr., both of Los Angeles, of counsel), for appellant.

Houser, Houser & Houser and J. Everett Houser, all of Long Beach, for respondents.

ROTH, Justice pro tem.

Appellant corporation is the assignee of the Cleaners Equipment Corporation, which latter corporation, on September 14, 1931, entered into written contract with respondents herein, whereby it agreed to sell, on conditional sale, cleaning equipment described in the contract, which contract guaranteed that the equipment would "supply 700 gallons of clean solvent per hour," and contained other guaranties of parts of the equipment against defects therein by reason of faulty material or workmanship. The contract also provided, "This instrument covers all conditions of this contract * * * no other agreement or representation is binding to us."

Defendants made a down payment of $800 on the purchase price, and provided for the payment of the balance by a series of promissory notes made and executed by them. The first four notes were paid in the aggregate sum of $419.08. Thereafter defendants refused to pay and did not make any further payments, and, action having been instituted for the balance, defended on the ground of fraud and breach of warranty.

Pursuant to the terms of the contract, plaintiff's assignor installed the equipment. There were, however, repeated complaints that the same did not operate in accordance with the expressed terms of the contract and oral representations which had been made prior to the execution thereof.

In response to repeated complaints, appellant's assignor made repeated efforts to correct the system, which were unavailing, and on November 16, 1931, the parties entered into a supplemental agreement whereby the corporation agreed to install equipment capable of furnishing solvent at the rate of 1800 gallons per hour, in lieu of the equipment theretofore installed, which equipment had been warranted to furnish solvent at the rate of 700 gallons per hour. The trial court found the supplemental agreement to be as follows: "It has been agreed between the Ceco Cleaners and the Cleaners Equipment Corporation, to replace the present 12 A Ceco 'Sweetner' System, which is guaranteed to deliver 700 gallons of clean solvent per hour, with a 9C type system which is guaranteed to deliver 1800 gallons of solvent per hour. This change will be made at once without any additional expense to the Ceco Cleaners; the present contract to remain unchanged. Payments to be deferred for 60 days or to start Jan. 20, 1932."

Operations were again commenced after replacements and additions were made pursuant to the supplemental agreement, with no satisfactory result.

The trial court decided in favor of the contentions of defendants, finding specifically that said defendants suffered damages, by reason of the fact that said equipment was not as represented, in the sum of $3,486.42, giving judgment to plaintiff for the balance between said amount and the amount due on the contract, which amount, together with interest theretofore accruing, totaled $564.64. Plaintiff appeals from that judgment and contends that the evidence is not sufficient to support the findings of the trial court that there was a breach of warranty; that there were breaches of representations made prior to the execution of the contract; that there was no waiver on the part of defendants; and also as to what the actual capacity of the cleaning equipment was, and what the actual value of the equipment involved in the litigation amounted to.

[1-3] It is trite to say that the sufficiency of evidence to sustain findings is primarily a question for the trial court [Jones v. Dickerman, 114 Cal.App. 357, 300 P. 135], and that findings based upon substantially conflicting evidence cannot be disturbed by an appellate court [Stewart v. Crowley, 213 Cal. 694, 3 P.(2d) 562]. It is also settled that findings cannot be assailed on appeal unless they are contrary to undisputed evidence read in the light of all legitimate inferences to be drawn therefrom. Bowden v. Wooden, 125 Cal.App. 115, 13 P.(2d) 811. Appellant in its brief makes some references to the reporter's transcript, but excerpts little or no evidence in support of its contentions. Respondents' brief, however, is replete with excerpts from the evidence, showing ample support for each of the findings made by the trial court, which have been heretofore referred to. Under such circumstances, this court cannot disturb them.

[4-8] The finding that there was a breach of warranty is in itself sufficient to sustain the judgment. In addition, when representations of fact are made, inducing another to enter into a written contract, and such representations are of material facts, they may be shown by oral evidence even though a written contract is subsequently entered into [Wedge v. Security-First Nat. Bank, 219 Cal. 113, 25 P.(2d) 411; Stewart v. Crowley, supra], and such representations of fact are sufficient in themselves, upon which to predicate a cause of action for damages [Von Schrader v. Milton, 96 Cal.App. 192, 273 P. 1074; California Credit, etc., Corp. v. Goodin, 76 Cal.App. 785, 246 P. 121]. There is nothing in appellant's contention that respondents waived any defect in the equipment because they retained it and remained silent. The contention of appellant as to the silence of respondents is only partially true. The evidence shows that respondents did not remain silent but complained continuously, and as a result of said complaints a supplemental contract was entered into. The fact that respondents did not complain repeatedly after the supplemental contract does not mean that they waived any of their rights. The defense of fraud to the demand of plaintiff, or in abatement of damages in an action brought by plaintiff for the balance of the purchase price, was always available to defendants. Retention of goods, in itself, is but a slight element in proof of an estoppel. When there has been a breach of warranty, the buyer may accept the goods and still sue for damages, or, he may wait until the seller sues and then set up a breach of warranty by way of counterclaim. Leonard v. Home Builders, 174 Cal. 65, 161 P. 1151, L.R.A.1917C, 322; Browning v. McNear, 145 Cal. 272, 78 P. 722; Tracy Brick, etc., Co. v. Wurster, 44 Cal.App. 652, 187 P. 125. Respondents

had a right to remain silent, until such time as they were sued. Nevada Land & Investment Corp. v. Sistrunk, 220 Cal. 174, 30 P.(2d) 389; First Nat. Bank v. Stansbury, 118 Cal.App. 80, 5 P.(2d) 13.

We find no reason to disturb the judgment of the trial court, and it is therefore affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



PERUMEAN et al. v. WILLS et al.*

Civ. 10123.

District Court of Appeal, Second District, Division 1, California.

May 8, 1936.

Hearing Granted by Supreme Court July 6, 1936.

1. Trial ⇐139(1)

Directed verdict is proper whenever, upon the whole evidence, judge would be compelled to set contrary verdict aside as unsupported by evidence.

2. Schools and school districts ⇐89

In action against high school instructor and high school district for injuries student sustained in class in automobile mechanics when automobile, started while in reverse gear, pinned student against work bench, defendants' evidence that schools in other cities and garages customarily did not block wheels when starting motors *held* improperly admitted, in view of dissimilarity of conditions in garages and failure to show that conditions in other schools were the same.

3. Negligence ⇐4

The term "ordinary care" is a relative one, measurable by standard varying with circumstances attending each particular case, since care must be in proportion to danger to be avoided and consequences that may reasonably be anticipated.

[Ed. Note.—For other definitions of "Ordinary Care," see Words & Phrases.]

4. Schools and school districts ⇐89

In action against high school instructor and high school district for injuries student sustained in class in automobile mechanics when automobile, started while in reverse gear, pinned student against work bench, whether ordinary care required blocking of wheels of automobile and whether instructor was negligent in failing to ascertain whether wheels were blocked *held* for jury.

5. Appeal and error ⇐110

Order denying motions for new trial *held* not appealable.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Barouk Perumean, a minor, by his guardian ad litem, Edward Perumean, and another against George M. Wills and others. From judgments in favor of defendant Los Angeles City High School District and defendant Samuel Leonard Fick, plaintiffs appeal.

Reversed and remanded for a new trial.

Gerald Willis Myers and L. V. Meloy, both of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondents.

DESMOND, Justice pro tem.

Plaintiffs have appealed from judgments entered upon verdicts rendered by a jury in favor of Los Angeles City High School District and Samuel Leonard Fick, an instructor in George Washington High School, in an action wherein plaintiffs, Barouk Perumean, a minor, and his father, Edward Perumean, sought damages for injuries suffered by the minor while attending a class in automobile mechanics. They have also appealed from an order of the trial court denying a motion for new trial as to the above-named respondents.

"The injury happened," according to respondents' brief, "as the direct result of the act of a fellow pupil, George M. Wills. George Wills had been working in the auto shop under the instruction of the defendant, Samuel Fick, for approximately two years before this accident. He had been a good student in the shop, he had his own driver's license and drove his own car. Mr. Fick had taught auto shop for some nine years without any accidents, and had worked as a mechanic and operated his own garage an additional twelve years. On the particular occasion George Wills had been directed by Mr. Fick to adjust

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 67 P.2d 96.

the valve tappets on the Buick automobile which had been brought in that morning for repairs. The automobile was first placed near the door at the end of the shop and was examined there by Mr. Fick. George Wills started the motor with Mr. Fick's permission and listened to the tappets to see how much work would be required to adjust them. In order to use the space where the car was standing for another purpose Mr. Fick directed George Wills to put the car on a jack and move it over near the work benches. After the car was moved to that position the motor was again started by George Wills and he ran it for about five minutes to warm up the engine, then turned off the motor and went into the adjacent tool room for certain wrenches. On his return to the automobile he turned on the switch and, standing on the floor of the garage, opened the door and leaned into the front compartment and pressed his hand upon the starter button. In some manner the gearshift lever had been shoved into reverse position so that the gears of the car were engaged and when the engine started the car moved rapidly backward against the plaintiff Perumean and pinned him against the work bench at which he had been working. Realizing what had happened, George Wills sprang into the driver's seat and drew the car forward, releasing the plaintiff. In the meantime, Mr. Fick, who had been engaged in giving instructions to another pupil in a different part of the shop room, had heard the commotion and ran to the assistance of the plaintiff."

The Buick car upon which work was being done belonged to Samuel Brown, father of a student, who brought it to the auto shop of the school for repairs. As owner of the car, he was made a defendant in this action, but a nonsuit was granted as to him by the trial court, the same action being taken as to Mr. and Mrs. George N. Wills, parents of George M. Wills, also original defendants. After remaining defendants had put on their testimony and the evidence was closed, the court, upon motion, directed the jury to return verdicts in favor of the High School District and the instructor, Mr. Fick, which directions were followed; the jury at the same time rendering its verdict in favor of the minor, George M. Wills.

Later, the trial court denied a motion for a new trial as to the school district and the instructor, but granted such a motion as to the minor and his parents.

The appellants contend that the court erred in ordering the directed verdicts, also in admitting testimony as to the practice prevailing in various other schools and in industry in regard to placing blocks under cars before starting a motor. Error is also predicated upon the court's order denying motion for a new trial as to the School District and the instructor.

In considering the objection to the directed verdicts, we turn to the In re Estate of Baldwin, 162 Cal. 471, at page 473, 123 P. 267, and find the rule set out as follows:

[1] "A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one." (Citing cases.) As stated many years ago in Marion County Com'rs v. Clark, 94 U.S. 278, 284, 24 L.Ed. 59, 61, 62, "Before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." That the trial judge was cognizant of these principles appears from his comment at the time he directed the verdicts: "I am convinced that there was no negligence on the part of Mr. Fick, therefore not on the part of the School District." If there were any evidence of negligence on the part of Mr. Fick, which the jury might have concluded was the proximate cause of the student's injury, then error was committed by the trial court.

Shortly before the accident, the minor plaintiff had been instructed by Mr. Fick to repair a radiator, and to perform that work was directed to go to a soldering bench running from east to west along the north wall of the shop room where the class was conducted. A safety line was marked on the floor parallel with this bench

and 5 feet away from it. The Buick was backed up to this line, but there was no barrier between it and the boy, as he stood at the bench. Mr. Fick testified that the boys had been instructed, before starting any automobile, to examine it to see whether it was in gear, that motors must be checked by the instructor when first started, and that the car should be blocked. Blocks 6 inches by 6 inches and approximately 10 inches long were provided for the purpose. One of the students attending the class with the minor plaintiff and minor defendant testified that in addition to the precautions mentioned above, the boys had been instructed to see if the hand brake was set. The minor Wills testified that he had received all these instructions, but "I do not know on this occasion whether or not the hand brake was set on the automobile as I did not test it and I did not block the wheels nor do I know whether or not the wheels were blocked." Under cross-examinations, Mr. Fick testified as follows concerning blocks:

"Q. And you never made any inspection of that car to see whether it was blocked, or whether any safety precautions were taken, did you? A. I saw the car sitting there, and I gave him permission to start it; I saw him start it, it was all right, I went over across the shop to instruct these other students; came back again, the car had been started, and that is what happened.

"Q. The blocks were not on the car, were they? A. The blocks were not on the car at the time?

"Q. Yes. A. I couldn't say whether they were or not. I don't believe they were.

"Q. You didn't make an examination of the car at all to see whether the blocks were there at all at the time it was first started, did you? A. I was there, I don't remember whether I checked that or not, I don't believe they were on either."

[2-4] To offset the theory that negligence arose from failure of the instructor to observe whether or not the wheels of the Buick were blocked when the motor was first started, counsel for the defendant school district produced several witnesses, who, over the objection of plaintiff's counsel, testified respectively that blocking of wheels when starting motors in the auto shops of various schools in Los Angeles, Glendale, Long Beach, Minneapolis, and New York, and also in various garages was not required as a measure of safety and customarily was not done. On this showing, respondents argue that, "No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed," quoting from Brands v. St. Louis Car Co., 213 Mo. 698, 112 S.W. 511, 514, 18 L.R.A.(N.S.) 701. In our view, an inexperienced boy of fifteen or sixteen years of age working around a school machine-shop, and acquiring for the first time practical knowledge, not only of the trade in which he may be interested, but also of possible hazards incident thereto, is not "in the same business" as experienced auto mechanics working at their trade in industry and private garages. While the custom obtaining under the same or like conditions as in a given case may be shown as bearing on the question of negligence (19 Cal.Jur. 581; Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 P. 666), we are by no means satisfied that the practice followed in automobile machine-shops may be accepted as the standard of operations adaptable to students. Youth is notoriously indiscreet, careless, and indifferent in the face of dangers, as to which adults are held to a high degree of care. Therefore, those in charge of boys and girls at school and elsewhere are called upon to adopt such means and measures as may be available for their protection. Failure to follow such a course constitutes negligence.

Nor does it appear that the conditions in the school shops where blocks were not used were the same as in the instant case. We hold, therefore, that the evidence of custom and usage elsewhere was improperly admitted. "The term 'ordinary care' is a relative one, and the standard by which it is to be measured varies * * * with the circumstances attending each particular case. * * * Care must be in proportion to the danger to be avoided and the consequences that may reasonably be anticipated as the result of conduct * * *." 19 Cal.Jur. 579. Applying this language to the situation presented by the facts in this case, we think it may be said fairly that when Mr. Fick instructed his students to block the wheels, he undoubtedly considered it a precautionary measure. Whether, regardless of custom elsewhere, it was a necessary precautionary measure, in view of the position of this Buick automobile in relation to the un-

guarded position of this boy working at the soldering bench, is a question which we believe the jury should have had an opportunity to determine. Shea v. Pacific Power Co., 145 Cal. 680, 79 P. 373. Upon the jury's decision of that question would then rest its further decision as to whether negligence arose when Mr. Fick failed to ascertain whether or not the wheels were blocked, when he saw George Wills start the motor. In closing, we may say that there was evidence before the jury from which it might have found that no blocks were used on the Buick car on the morning in question.

[5] The appeal from order denying motions for new trial as to respondents Los Angeles High School District and Samuel Leonard Fick being unauthorized (Gray v. Cotton, 174 Cal. 256, 162 P. 1019; Williams Co. v. Leong Sue Ah Quin, 44 Cal. App. 296, 186 P. 401; United Casting Co. v. Duncan, 44 Cal.App. 384, 186 P. 403), is ordered dismissed; judgments in favor of said respondents are ordered reversed; cause remanded for a new trial.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 667

PEOPLE v. ROMERO.

Cr. 2812.

District Court of Appeal, Second District, Division 1, California.

May 6, 1936.

1. Criminal law ⇐178

Dismissal of information in prosecution for violating California Narcotic and Drug Act *held* not bar to further prosecution, notwithstanding that minute order of dismissal failed to state reasons for dismissal as required by statute (St.1929, p. 380, as amended; Pen.Code, §§ 1385–1387).

2. Criminal law ⇐1167(1)

Defendant accused of felony cannot complain of failure to set forth reasons for dismissal of prosecution as required by statute, since statutory requirement had nothing whatever to do with rights of defendant, but was enacted in interest of public welfare (Pen. Code, §§ 1385–1387).

3. Constitutional law ⇐52

Legislature has not absolute power to limit courts in determination of constitutional questions.

4. Criminal law ⇐573

Whether defendant has had speedy trial within meaning of Constitution may depend upon surrounding circumstances of individual case (Const. art. 1, § 13).

5. Criminal law ⇐573

Test for determining whether defendant has had "speedy trial" as guaranteed by Constitution is time, together with surrounding circumstances (Pen.Code, § 1382; Const. art. 1, § 13).

6. Criminal law ⇐573

Defendant who was tried for violating California Narcotic and Drug Act thirty-one days after information upon which he was tried was filed *held* to have had "speedy trial" as guaranteed by Constitution, notwithstanding that trial was not held until sixty-four days after filing of information for identical offense which was dismissed (St.1929, p. 380, as amended; Pen.Code, § 1382; Const. art. 1, § 13).

[Ed. Note.—For other definitions of "Speedy Trial," see Words & Phrases.]

7. Criminal law ⇐574

Statute providing for dismissal of prosecution which had not been brought to trial within sixty days after finding of indictment or filing of information *held* not unconstitutional as interfering with court's effective application of constitutional guaranty of speedy trial (Pen.Code, § 1382; Const. art. 1, § 13).

8. Criminal law ⇐576(5)

Failure of defendant to object to trial being set beyond sixty days after finding of indictment or filing of information constitutes waiver of defendant's statutory right to dismissal for failure to hold trial within 60 days (Pen.Code, § 1382).

9. Criminal law ⇐576(6)

Statutory requirement that defendant should be brought to trial within sixty days after finding of indictment or filing of information was complied with by bringing prosecution under California Narcotic and Drug Act to trial within thirty-one days after filing of information, notwithstanding that trial

was not held until sixty-four days after filing of previous information for identical offense was dismissed (Pen.Code, § 1382; St.1929, p. 380, as amended).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Manuel Romero was convicted for violating the California Narcotic and Drug Act, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DORAN, Justice.

The defendant herein, who was charged by information with violating the state Narcotic and Drug Act (St.1929, p. 380, as amended), was tried by the court, sitting without a jury, and found guilty. The court also found against the defendant on a plea of "Once in Jeopardy." Appeal is from the judgment and from an order denying a motion for a new trial.

Two informations were filed, charging identical offenses. The first one, which was filed on August 8th, was dismissed on motion of the district attorney on August 22d. The minute record of the order is as follows: "Deputy District Attorney C. H. Matthews and the defendant with his counsel, J. H. Hearn, present. On motion of the District Attorney and in the interest of justice, this case is dismissed. Defendant is released."

On September 10th the second information was filed. To this second information defendant entered his pleas of "Not Guilty" and "Once in Jeopardy."

Appellant earnestly contends that the dismissal of the first information was a bar to further prosecution for the reason that the minute order failed to state the reasons for the dismissal, as required by section 1385 of the Penal Code. People v. Disperati, 11 Cal.App. 469, 105 P. 617, 620, is relied upon for authority in support of this contention. In the Disperati Case, supra, no reason for the order was specified in the minutes, and the court held as follows: "The statute provides that the order 'as provided in this chapter' is not a bar, and the mandate in reference to said order is that it must contain the 'reasons of the dismissal.' We have no authority to disregard this requirement, or to hold that it is merely directory. The proceeding is somewhat harsh, and imposes an additional burden upon the defendant, and no substantial departure from the plain provision of the statute should be tolerated."

The respondent points to the case of People v. Head, 105 Cal.App. 331, 288 P. 106, 108, in which case the minute order of a dismissal did not state the reasons therefor, but the court nevertheless held that, "The failure to state in the order of dismissal the fact that another proceeding was pending charging the identical offense constituted a mere omission to state a fact which the records of the court already disclosed, and here constituted, at most, a mere irregularity in procedure without prejudice to appellant. It does not appear that the Legislature intended by the sections above mentioned [sections 1385 and 1387 of the Penal Code] to create a bar to further prosecution under the circumstances in the present case."

Neither one of the foregoing cases construes section 1385 according to its apparent, if not its obvious, purpose. Section 1386 of the Penal Code provides as follows: "The entry of a nolle prosequi is abolished, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section." Formerly the prosecutor alone had authority to dismiss a criminal action, but with the adoption of sections 1385 and 1386 of the Penal Code, this authority was transferred to the court.

The Supreme Court of California has declared the following with respect to section 1385: "The power under which the order was made is substantially the same as that held by the attorney general in England, and by the prosecuting officer in many of the American states, to enter a nolle prosequi. The court, for the purposes of the order of dismissal, takes charge of the prosecution, and acts for the people. It holds the power to dismiss, as the attorney general in England holds the power to enter a nolle prosequi, by virtue of the office and the law; and it is exercised upon official responsibility. The court, having acted for the people, and under express power granted by them to so act in their criminal prosecutions, there is no appeal on their part from such action." People v. More, 71 Cal. 546, 12 P. 631.

[1, 2] The Legislature, in imposing this duty and responsibility upon the court, has gone one step further, however, and has required the court to spread upon the minutes for public reference the reason for its action in dismissing a felony prosecution. From the standpoint of the public welfare, potent arguments suggest themselves as to the wisdom of such a requirement. Indeed, the Legislature has gone so far as to guard against the likelihood of the court doing violence to the interest of justice by providing that such order can be made only "in the furtherance of justice." The obvious function of section 1385 of the Penal Code is to impose a duty on the court, but with certain limitations and conditions: The "limitation" that such dismissal must be in furtherance of justice, and the "condition" that the reasons for the dismissal must be entered upon the minutes. The section has nothing whatsoever to do with the rights of the defendant. For the court to fail to perform its duty, therefore, is not a matter about which a defendant can be heard to complain. The order of the court, under section 1385 of the Penal Code, in dismissing a felony action may be a matter of public concern, but in no way, either by motion or by plea, can it be seized upon by a defendant as the technical means to a coveted end. Section 1387 of the Penal Code definitely and unequivocally provides that such a dismissal is not a bar if the offense is a felony. The plea of "Once in Jeopardy," therefore, was without legal sanction, and the finding by the court against the defendant on the plea of "Once in Jeopardy," was valid, assuming that such a finding was required.

Section 1382 of the Penal Code provides in part as follows: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." Although the trial of the appellant was held thirty-one days after the information herein was filed, sixty-four days had elapsed from the filing date of the information which was dismissed, and appellant therefore urges, quoting from appellant's brief: "We contend that this order of the court granting the dismissal together with the filing of a new complaint and the proceedings based thereon, whereby the defendant was subsequently, and more than sixty days after the filing of the first information, compelled to defend himself against the same charge, constituted a violation of defendant's constitutional right to a 'speedy trial.'" Thus it will be seen that appellant seeks to apply the sixty-day limit fixed by the Legislature in section 1382 as the test for what constitutes a speedy trial within the meaning of the Constitution (article 1, § 13). In other words, if the Legislature had fixed ten days or one year, it nevertheless would be conclusive on the question of what the Constitution means by the phrase "speedy trial."

[3-6] Even though its acts may afford a useful guide, it could hardly be contended, at least successfully, that the Legislature has the absolute power to limit the courts in the determination of constitutional questions. The question as to whether a defendant in a criminal action has had a speedy trial within the meaning of the Constitution may depend upon the surrounding circumstances of the individual case. People v. Brock, 87 Cal.App. 601, 262 P. 369, 263 P. 544. Time, only, will not always suffice as the sole basis for the determination of this question, but time, together with the surrounding circumstances, avoids an arbitrary standard and yet effectively preserves the safeguards created by the Constitution. Under the circumstances presented in the case at bar, it cannot be said that appellant did not receive a speedy trial within the meaning of the Constitution.

[7] The foregoing is not to be understood as holding that section 1382 of the Penal Code is not constitutional. The effective application by the court of the constitutional guaranty of a speedy trial, in any given case, is wholly aside and apart from the laws adopted by the Legislature with respect to procedural matters on the same subject. Therefore, the court's determination of what constitutes a speedy trial does not disturb the full force and effect of section 1382 of the Penal Code.

[8, 9] It is well settled, however, that if the sixty days have elapsed, a defendant will be held to have waived the benefits of the section unless some affirmative action is taken before trial by way of a motion to dismiss. A failure to object to the case being set beyond the sixty-day period is the equivalent of consent. People v. Rongo, 169 Cal. 71, 145 P. 1017. However, in setting the case for trial within thirty-one days after the filing of the information,

the trial court followed the provisions of section 1382, and therefore such action of the court is not open to objection on a procedural question.

No other questions are raised by the appeal.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: HOUSER, P. J.; YORK, J.



13 Cal.App.2d 338

ANDERSON v. CALAVERAS CENT. MINING CORPORATION.

Civ. 5421.

District Court of Appeal, Third District, California.
April 21, 1936.

Rehearing Denied May 21, 1936.

Hearing Denied by Supreme Court June 19, 1936.

1. Corporations ⇐590(3)

Contract under which transferee of assets of company agreed to pay all outstanding indebtedness of company created liability against transferee enforceable by assignee of creditor of company (Civ.Code, § 1559).

2. Corporations ⇐591

Where transferee of company's assets agreed to pay all company's outstanding indebtedness, creditor's assignee's commencement of action on such contract *held* sufficient acceptance of benefits thereof to entitle him to maintain action.

3. Corporations ⇐591

Provision in contract, under which transferee of company's assets agreed to pay all outstanding indebtedness of company within period of twelve months, that transferee might within such time secure release of company from such indebtedness *held* not to defeat liability of transferee to assignee of creditor of company where release was not obtained.

4. Limitation of actions ⇐46(12)

Where contract provided that transferee of assets of certain company would pay such company's indebtedness within period of twelve months, suit by assignee of creditor of such company against transferee within five years from date of contract *held* not barred by limitations, since obligation under contract did not mature for one year (Code Civ.Proc. § 337).

5. Limitation of actions ⇐46(12)

Where one assumes to pay another's past-due debt not at time barred by statute of limitations, statute as between promisor and creditor runs only from date of new undertaking and not from original date of maturity of debt (Code Civ.Proc. § 337).

6. Corporations ⇐308(3)

In absence of fraud or coercion on part of officer, where charter or by-laws of corporation provide for fixing of salaries by majority of directors, resolution fixing officer's salary adopted by majority of directors whose salaries are not affected thereby, is valid, although that officer also participated therein, provided salary does not appear to be excessive.

7. Corporations ⇐308(11)

In suit on labor claims based in part on unpaid salary of corporation's secretary, defendant had burden of proving its contention that resolution of directors of corporation fixing such salary was invalid.

8. Corporations ⇐308(3)

Where corporate by-laws authorized directors to fix officers' salaries, fact that secretary of corporation, who was member of board, attended meeting which determined his salary *held* not to invalidate salary so as to preclude recovery therefor where it did not appear that he voted on such determination, majority present were disinterested, and salary fixed was not exorbitant.

9. Corporations ⇐308(3)

Action of directors of corporation at meeting attended by mere quorum of three members, including secretary in voting to pay secretary $200 in cash each month *held* not to affect validity of previous resolution at meeting attended by all directors fixing salary at $300 a month, one-half to be paid in cash so as to constitute defense to suit based on unpaid salary.

10. Corporations ⇐308(3)

Action of directors of corporation at meeting attended by mere quorum, including secretary who waived part of his unpaid salary, in determining amount due secretary *held* not to affect validity of previous resolution fixing secretary's salary, so as to constitute defense to suit based on such unpaid salary.

11. Limitation of actions ⇐53(3)

Claim for accrued salary of corporate officer, which had been fixed on April 28, 1920, *held* not barred by limitations at time of promise to pay salary on March 10, 1927, where last entry of salary items, which were entered in corporation's open book account, was made November 30, 1926, since statute began to run from date of last entry (Code Civ.Proc. § 337).

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Suit by B. M. Anderson against the Calaveras Central Mining Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Abbott, Cannon, Appel & Dains and Philip C. Boardman, all of San Francisco, for appellant.

Cornish & Cornish, of Berkeley, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered against it in a suit based on assigned claims for labor performed for the Victor Land & Mineral Company, the predecessor of the defendant corporation, which claims the appellant promised to pay. Subsequent to the performance of the labor, in part consideration of the defendant's agreement to pay these labor claims, all of the assets of the Victor Land & Mineral Company were sold and transferred to the defendant.

This is a companion case with the action entitled Montreeville v. Victor Land & Mineral Co., 57 P.(2d) 565, in which this court has today filed an opinion. These two cases involve the same labor claims. The complaint in the Anderson case was filed February 26, 1932, and is based on a written contract by the terms of which the Calaveras Central Mining Corporation assumed and agreed to pay the labor claims. The amended complaint in the Montreeville Case was filed August 5, 1927, against the original debtor, upon one of the same claims. The cases were tried together. The appeal is presented on the same transcript of evidence. Separate findings and judgments were adopted in each case. These judgments were both favorable to the plaintiffs. Each judgment provides that its payment, or any part thereof, shall be credited on both judgments. Separate appeals from these judgments were perfected by the respective defendants.

The complaint in the Anderson case contains three counts. The first count demands payment for labor performed by C. R. Montreeville in behalf of the Victor Land & Mineral Company prior to March 10, 1927, of the reasonable and agreed value of $1,024. The second count demands payment for labor performed by J. A. Montreeville for the same company, prior to March 10, 1927, of the reasonable and agreed value of $7,360. The third count demands payment of money advanced by J. A. Montreeville to the same company prior to March 10, 1927. It is alleged these claims were all assigned to the plaintiff, and that by the terms of a written contract which was executed on the last-mentioned date, all of the assets of the Victor Land & Mineral Company were sold and transferred to the Calaveras Central Mining Corporation, in part consideration for which the last-mentioned corporation agreed to assume and pay these claims. To this written agreement there was attached as an exhibit and made a part thereof an itemized list of all claims which the grantee assumed and promised to pay, including those which are involved in this suit. The material language of that agreement reads as follows:

"The party of the first part (Calaveras Central Mining Corporation) does hereby assume and agree to pay, within the period of twelve (12) months from the date hereof, or within said time secure the release and discharge of the party of the first part and its stockholders of and from, the outstanding obligations and indebtedness owing by said Victor Land and Mineral Company on March 6th, 1926, which said obligations and indebtedness are set forth and described in Exhibit 'A' hereto attached, and made a part hereof. * * *

"Exhibit 'A'

"Labor Claims.

"C. R. Montreeville from 7/1/25 to 2/28/26.....	$1,024.00
"Cash advanced by J. A. Montreeville	35.47
"Back salary of J. A. Montreeville to Feb. 28, 1926.....	7,360.00."

To this complaint the defendant demurred on the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer was overruled. An answer was then filed denying the indebtedness and the material allegations of the complaint. It is affirmatively alleged in the answer that the obligations were merely conditionally assumed by the terms of the contract by specifying therein that the defendant "does hereby assume and agree to pay, within the period of twelve (12) months from the date hereof, or within said time secure the release and discharge of the party of the first part and its stockholders of and from, the outstanding obligations and indebtedness. * * *" No such release of claims is alleged or proved. The answer also asserts that C. R. Montreeville repudiated the agreement by the terms of which the defendant assumed and promised to pay his claim; that the claim for salary is illegal and void for the reason that it was not legally authorized by the mining company; and that the claims are barred by the statute of limitations.

At the trial of this case the court adopted findings favorable to the plaintiff and rendered judgment against the defendant in the sum of $7,719.47. From this judgment, the defendant has appealed.

The appellant contends that the findings and judgment are not supported by the evidence; that the agreement upon which this action is based is not an unqualified acceptance and promise to pay the claims owed by the grantor of the assets of the mining company, and that it is therefore not binding on the defendant; that the contract was not accepted, but, on the contrary, was repudiated by the claimant by commencing an action therefor against the Victor Land & Mineral Company prior to the time the

claims became due and payable under the terms of the agreement; that the defendant is entitled to set up any valid defense which might have existed against the original debtor; and that one of the claims is illegal and void for the reason that the salary of J. A. Montreeville was not authorized or allowed by a valid resolution of the board of directors of the corporation, and that each of the claims is barred by the statute of limitations.

[1] The written contract which was executed for a valuable consideration March 10, 1927, between the Victor Land & Mineral Company and the Calaveras Central Mining Corporation covenanted to transfer all of the assets of the first-mentioned company to the last-named corporation, with an express agreement on the part of the grantee to assume and pay all outstanding indebtedness of the grantor, including the plaintiff's claims which were therein specifically designated and mentioned. This contract created a liability on the part of the Calaveras Central Mining Corporation to pay those claims on the terms expressed in the contract. Since the contract was made in part for the benefit of creditors named therein, it creates a liability against the promisor for the satisfaction of which the creditor or his assignee may maintain an action against it. Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045; 6 Cal.Jur. 469, § 279; 2 Elliott on Contracts, 666, § 1411; 6 R.C.L. 882, § 271; 1 Restatement of the Law of Contracts, p. 151, § 133, and Cal.Supp. of 1933, to subd. 1 of § 133 of the last-mentioned citation. In the text of the supplement last mentioned a large number of California cases are cited in support of that doctrine. In section 133 of the Restatement of the Law of Contracts, supra, the third party in whose favor an agreement to assume and pay obligations is made is appropriately termed "a creditor beneficiary." Section 1559 of the Civil Code recognizes such a third party claim as valid and enforceable against the promisor. Regarding the basis of the rule which recognizes the right of a third party claimant to maintain an action against the promisor who, for a valuable consideration, assumes and promises to pay obligations due from the promisee, it is said in 6 Ruling Case Law § 271, at page 885:

"The rule has been variously stated as resting upon a trust relationship, the equitable right of subrogation, agency; privity of contract by substitution, or the broad equity of the transaction."

Since our statute and a multitude of California cases recognize the rule, it is immaterial which of the previously suggested grounds the rule rests upon.

[2, 3] The commencement of this action by the assignee of the creditor beneficiary was a sufficient acceptance of the benefits of the contract in his behalf. A prior formal acceptance of the benefits of the contract by the creditor beneficiary was unnecessary. The assent of the beneficiary will be presumed from the instituting of the action. More v. Hutchinson, 187 Cal. 623, 203 P. 97; Bryan v. Banks, 98 Cal.App. 748, 758, 277 P. 1075; 6 R.C.L. 889, Sec. 276; 2 Elliott on Contracts, 672, Sec. 1414; 13 C.J. 711, § 817.

The contract was not repudiated by the creditor beneficiary, C. R. Montreeville, nor were the benefits thereof rejected by him, by his prior commencement of a suit for the recovery of the same claim against the Victor Land and Mineral Company. He had a right to look to either or both parties to that contract for the recovery of his claim. His prior suit against the promisee named in the contract was commenced in August, 1927, before the statute of limitations had expired against the original obligation and before the claim matured against the Calaveras Central Mining Corporation, by the express terms of the agreement, which provides that the promisor "does hereby assume and agree to pay, *within the period of twelve (12) months* from the date hereof, * * * (March 10, 1927) the outstanding obligations and indebtedness". Regarding the liability of both parties to the contract under circumstances similar to those which are presented by this case, it is said in Volume 1, Restatement of the Law of Contracts, page 167, Section 141: "A creditor beneficiary *who has an enforceable claim* against the promisee can get judgment against either the promisee or the promisor or against each of them on their respective duties to him. Satisfaction in whole or in part of either of these duties, or of judgments thereon, satisfies to that extent the other duty or judgment."

In the present case the separate suits in behalf of C. R. Montreeville and the other claimants, against the promisee and the promisor were tried together, and judgments were rendered in both cases in plaintiffs' favor with the express provision therein that payment in whole or in part of either judgment should be deemed to be satisfaction to that extent of the other concurrent judgment. This procedure is in exact accord with the preceding statement of law.

The language of the contract heretofore quoted constitutes an absolute acceptance and promise to pay the indebtedness "within the period of twelve months" from the date of that instrument, unless the promisor within that time otherwise procures the release and discharge of the obligations listed therein. This release it failed to obtain. The release and discharge of those debts was neither pleaded nor proved. That option is not a condition which defeats the liability of

the Calaveras Central Mining Corporation under the terms of the contract.

[4] Neither suit was barred by the provisions of the statute of limitations. The first suit was not barred at the time it was instituted for the reasons we shall hereafter assign. The statute of limitations did not commence to run in the present Anderson suit under the terms of the contract until twelve months from the date of the contract, which date of maturity was March 10, 1928. The statute of limitations did not expire in this suit until four years thereafter. This suit was commenced February 26, 1932. It is true that the obligation to pay the indebtedness created by the new promise according to the terms of the contract is subject to the provisions of section 337 of the Code of Civil Procedure and accrues "after the assumption thereof by the promisor * * * when, upon the maturity of the original indebtedness, the promisor failed to pay the same." Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 961, 31 A.L.R. 1045. In the present case, since the Calaveras Central Mining Corporation did not agree to pay the claim until twelve months from the date of the contract which was executed March 10, 1927, the obligation on its part matured March 10, 1928, and the statute of limitations did not expire until four years thereafter.

[5] The rule is well settled that if one assumes and agrees to pay another's debt, which is past due but not barred at the time of the promise, the statute of limitations, as between the promisor and the creditor, runs only from the date of the new undertaking, and not from the original date of maturity of the debt. In effect, the new agreement to assume and pay the obligation is a waiver of so much of the statute of limitations as had already run on the original indebtedness prior to the new promise to pay the debt according to the terms of the subsequent contract. Bogart v. George K. Porter Co., supra; Daniels v. Johnson, 129 Cal. 415, 61 P. 1107, 79 Am.St.Rep. 123; Sherwood & Sherwood v. Gill & Lutz, 36 Cal.App. 707, 173 P. 171; Davis v. Davis, 19 Cal.App. 797, 127 P. 1051; 31 A.L.R. 1056, note.

The appellant contends that the findings and judgment are not supported by the evidence for the reason that the portion of the labor claim which is based on the unpaid salary of J. A. Montreeville as secretary of the Victor Land & Mineral Company is illegal and void since his salary was fixed by resolution of the company adopted with his concurrent vote as a member of the board of directors, and that the salary claim was barred by the statute of limitations at the time of the execution of the contract by the terms of which the Calaveras Central Mining Company accepted and agreed to pay the indebtedness of the former company.

We are of the opinion the salary claim of J. A. Montreeville is neither illegal for the reason that it was fixed by his concurrent vote as a member of the board of directors, nor is it unenforceable because it was barred by the statute of limitations. The salary was fixed at a regular meeting of the board, attended by all five directors, of which board J. A. Montreeville was a member. While Montreeville signed the minutes of that meeting as secretary of the board, it does not affirmatively appear that he voted upon the resolution fixing his salary as secretary of the board. Even though he may have done so, there were four other directors who participated in the proceedings of that meeting, three of whom were not officers of the company whose salaries were affected thereby. Assuming that the members of the board voted unanimously for that resolution, the result would have been the same with or without the vote of the secretary. His vote would therefore have been ineffectual. Nor does it appear that the salary of the secretary which was fixed by the resolution was exorbitant.

Assuming, without so deciding, that the rule of law prevails as suggested by the case of Mottashed v. Central & Pacific Imp. Corporation (Cal.App.) 47 P.(2d) 525, and in volume 1, Restatement of the Law of Contracts, p. 165, § 140, that obligations may be enforced by a creditor beneficiary only when they were valid and enforceable against the promisee at the time when the agreement to assume and pay them is made, and that any defense thereto which was available to the promisee is also available to the promisor, we are of the opinion the salary claim of J. A. Montreeville was neither invalid on the ground that his compensation was fixed by the concurrence of his vote as a director of the company, nor unenforceable because it was barred by the statute of limitations. On the contrary, there is substantial evidence to support the findings and judgment that it is valid and enforceable against either the promisor or the promisee.

[6] It is true that the resolution of a corporation fixing the salary of an officer thereof with the necessary concurrence of

his own vote, or when it is procured by fraud or coercion on his part is voidable. But there is ample authority and good reason for holding that in the absence of fraud or coercion on the part of an officer, where the charter or by-laws provide for the fixing of salaries by a majority of the board of directors, a resolution regularly adopted by a majority vote of the board of directors whose salaries are not affected thereby is valid even though that officer also participated therein, provided the salary does not appear to be excessive. 14A C.J. p. 143, § 1908; 3 Thompson on Corporations (3d Ed.) p. 448, §§ 1859–1861; Zellerbach v. Allenberg, 99 Cal. 57, 33 P. 786. With respect to the validity of the resolution of a board of directors of a corporation fixing the salary of an officer, it is said in 3 Thompson on Corporations, p. 450 et seq., supra:

"The resolution must be passed at a meeting attended by a quorum qualified to vote on the resolution. * * * The compensation, where authorized, must not be unreasonably disproportionate to the services rendered. * * *

"A resolution of a board of directors fixing the salary of one of the members as an officer of the corporation, will not be held invalid merely because the director himself voted, where it appears that a majority of the board voted for the resolution without the vote of the interested director."

Regarding the same subject it is also said in 14A C.J. p. 143, § 1908:

"The director who claims compensation for his services, being disqualified from voting on the question, if he is necessary to make up a quorum of the board, or if his vote is necessary to the result, the resolution will be void. But where his vote is not necessary to the adoption of such a resolution it will not necessarily be void, although he may have voted for it, or although he may have been present when the vote was taken."

[7, 8] In this case the by-laws authorize the board of directors to fix the salaries of its officers. The secretary's salary was fixed by resolution of the board of directors of the Victor Land & Mineral Company at a regular meeting attended by all five directors, including J. A. Montreeville, who was also a member of the board. It does not affirmatively appear that he personally voted on the adoption of that resolution, although, as secretary, he did approve and sign the minutes of the meeting. That resolution fixed his salary as secretary and superintendent at $300 a month, one-half of which was to be paid each month in cash. The resolution provides that the remaining half of his salary was to be credited each month to his account on the books of the company and paid "when the mine of the company is unwatered or active development work is actually begun." The burden was on the defendant to show that the resolution was invalid. No such evidence appears in the record. In addition to the secretary and the president of the company, who were then present, three other disinterested directors, whose salaries were not involved therein, participated in the proceeding. In the absence of fraud or coercion, their affirmative vote was sufficient to render the resolution valid even though the secretary concurred therein.

[9] It is true that at subsequent meetings of the board of directors held on July 11, 1922, and on January 1, 1925, there was a mere quorum of the board present consisting of three members, including the secretary, J. A. Montreeville, and that their action would have been voidable if they had attempted to increase his salary at those meetings. But at neither of these meetings was his salary increased. The action of the board at these last-mentioned meetings in no way affects the validity of his salary as it was fixed by the directors at the meeting which was held April 28, 1920. At the meeting of July 11, 1922, the board merely voted to pay the secretary $200 in cash each month in lieu of the $150 per month which had been previously paid in cash. This amounted to a mere change in the arrangement as to when and how the salary was to be paid. There is evidence that the mine became "unwatered" February 1, 1921. Since that was the circumstance or condition upon which the impounded or deferred portion of his previously fixed salary of $300 a month was to be payable, the secretary was then entitled to the entire amount of $300 a month, and the agreement to accept $200 a month cash and leave the remainder impounded to his credit in no way increased his salary. Even though it be conceded the resolution of July 11, 1922, was voidable, it did not affect the validity of the previous resolution fixing the amount of his salary.

[10] Nor did the resolution which was adopted at the meeting of January 5, 1925, affect the salary of the secretary, except that since J. A. Montreeville agreed to the

resolution then adopted and signed the minutes to that effect, it may amount to a waiver on his part of a portion of the accrued and unpaid salary then due to him over and above the sum of $6,050. On the last-mentioned date the board adopted a resolution finding that the total sum of accrued salary which was due, credited to the secretary's account and unpaid between May 1, 1920, and January 1, 1925, as shown by the book account thereof, was the aggregate amount of $8,200, all of which he then waived, except the sum of $6,050. The defendant may not complain that the secretary saw fit to waive a part of the accrued salary which was due to him. The court accepted that waiver as binding on him, and estimated his salary on the basis of $6,050, which he was willing to accept up to January 1, 1925. It may be conceded that this resolution could not bind the defendant as an account stated and acknowledged to be due by the company. The amount of salary found by the court to have been due the secretary prior to January 1, 1925, is not dependent on this invalid resolution. Photographic copies of the pages constituting the corporation's book account of the secretary's salary were received in evidence showing that the company owed him a sum in excess of $6,050 prior to January 1, 1925, which had accumulated and was credited to his account pursuant to the valid resolution of April 28, 1920, fixing his salary. The balance of the judgment which was rendered in his favor accrued since January 1, 1925.

[11] Nor was the accrued salary fund barred by the statute of limitations at the time the Calaveras Central Mining Corporation, by the contract of March 10, 1927, accepted that obligation and promised to pay it, for the reason that each item thereof was entered in the corporation's open book account of his salary and credited to him, as provided by the original resolution of April 28, 1920. Section 337 of the Code of Civil Procedure provides that an action may be brought "upon a book account whether consisting of one or more entries," or upon "a balance due upon a mutual, open and current account," within four years. It has been held that an action on an open book account is not barred until four years have elapsed since the entry of the last item in the account. Bailey v. Hoffman, 99 Cal.App. 347, 278 P. 498; Egan v. Bishop (Cal.App.) 47 P.(2d) 500; Shanklin v. Scribner, 62 Cal.App. 487, 217 P. 130, 132. In the case last cited it is held that a book account which is kept by a corporation in which "the corporation was charged with plaintiff's salary from month to month and credited with payments thereon as made from time to time; * * * is an open book account. * * * 'Payment made and entered upon the open book account tolls the statute.' Furlow P. B. Co. v. Balboa L. & W. Co., supra [186 Cal. 754, 200 P. 625]." In other words, it is here held the statute of limitations begins to run from the date of the last entry of the book account.

In the present case the last entry which appears in the book account affecting the secretary's salary is November 30, 1926. That account was therefore not barred by the statute of limitations March 10, 1927, when the appellant assumed the indebtedness and promised to pay the deferred salary.

The assessments which were subsequently levied against this stockholder's shares appear to have been properly charged and deducted from the balance due to the claimant, J. A. Montreeville.

The judgment is affirmed.

We concur: TUTTLE, Justice pro tem.; PULLEN, P. J.



13 Cal.App.2d 753

MONTREEVILLE v VICTOR LAND & MINERAL CO.

Civ. 5422.

District Court of Appeal, Third District, California.

April 21, 1936.

Rehearing Denied May 21, 1936.

Hearing Denied by Supreme Court June 19, 1936.

Corporations ⇐308(1)

Secretary of corporation *held* entitled to recover from corporation for services performed as corporate officer.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by C. R. Montreeville against the Victor Land & Mineral Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Philip C. Boardman, of San Francisco, for appellant.

Cornish & Cornish, of Berkeley, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a companion case with the action entitled Anderson v. Calaveras Central Mining Corporation, 57 P.(2d) 560, in which cause an opinion of this court was this day filed. Both suits involve the same claims. They were heard and determined on the same evidence. The pleadings, findings, and judgments in these cases were, however, separate and distinct. This action was brought against the original debtor. The Anderson Case is founded on an agreement on the part of the Calaveras Central Mining Corporation by the terms of which it accepted and promised to pay the indebtedness of this defendant corporation.

The amended complaint in this action includes several counts. The first count demands payment of an assigned claim of J. A. Montreeville for services performed as an officer of the defendant corporation in the sum of $7,360. The court found that only $6,660 of that sum was due and owing. The second count demanded judgment for the further sum of $2,400 due to the last-mentioned individual. That claim was dismissed at the trial and is not involved in the judgment or on this appeal. The fourth count is for services alleged to have been performed by the plaintiff, C. R. Montreeville, which the court also found to be due and owing to him. Judgment was accordingly rendered in favor of the plaintiff and against the defendant in the aggregate sum of $7,684. It is provided in this judgment that any sum which may be paid thereon shall also be credited on the Anderson judgment. From this judgment, the defendant has appealed. The issues which are involved on this appeal are all determined by the opinion in the Anderson Case.

On the authority of Anderson v. Calaveras Central Mining Corporation (Cal. App.) 57 P.(2d) 560, the judgment is affirmed.

We concur: TUTTLE, Justice pro tem; PULLEN, P. J.

KEY NUMBER SYSTEM

13 Cal.App.2d 465

JORDAN v. WILLIAMS IRR. DIST. et al.

Civ. 5486.

District Court of Appeal, Third District, California.

April 27, 1936.

As Modified on Denial of Rehearing May 27, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Waters and water courses ⇐228

Irrigation districts are public corporations organized pursuant to law for municipal purposes and are authorized to consolidate (Gen.Laws 1931, Act 3854 and Act 3866).

2. Waters and water courses ⇐230(8)

In suit against irrigation districts on irrigation bonds of a consolidated district, complaint alleging that both districts were organized by virtue of laws of state, consolidation of districts, and that consolidated district was existing by virtue of laws of state *held* to sufficiently allege that consolidated district was organized and existed pursuant to law (Gen.Laws 1931, Act 3854 and Act 3866).

3. Evidence ⇐65

Knowledge of law and requirements of statutes with relation to organization and consolidation of irrigation districts will be imputed to all those who are interested therein (Gen.Laws 1931, Act 3854 and Act 3866).

4. Waters and water courses ⇐228

Upon organization of irrigation district or on consolidation of districts pursuant to law, district takes legal title to property therein in trust for uses and purposes set forth in act (Gen.Laws 1931, Act 3866, § 9).

5. Waters and water courses ⇐228

Where public corporation takes over property of another irrigation district by consolidation or otherwise, there is implied promise to pay obligations of organization

absorbed and equitable trust is created making promisor liable for such obligations (Gen. Laws 1931, Act 3866, § 9).

6. Waters and water courses ⇐230(8)

Complaint in suit on irrigation bonds of consolidated district alleging that two districts were consolidated and that consolidated district was organized and existing by virtue of laws of state *held* sufficient to assume that statute requiring apportionment of any outstanding indebtedness had been complied with (Gen.Laws 1931, Act 3866, § 8).

7. Waters and water courses ⇐228

Failure to apportion former indebtedness to particular lands comprising consolidated irrigation district would not relieve consolidated district of liability for claim against district, since requirement of apportionment was merely to provide means of satisfying debt (Gen.Laws 1931, Act 3866, § 8).

8. Waters and water courses ⇐230(8)

In suit against two irrigation districts on bonds issued by one of districts which was consolidated with second district, complaint which sufficiently alleged consolidation pursuant to law *held* to state cause of action against second district, even though liability of merged district may have been terminated by consolidation (Gen.Laws 1931, Act 3854 and Act 3866).

9. Waters and water courses ⇐230(8)

Where complaint in suit for amount unpaid on coupons for accrued interest on irrigation bonds alleged respective dates when each coupon was presented for payment and dates when each coupon matured, irrigation district *held* liable for legal interest rate on matured obligations from and after date of presentation for payment.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by James H. Jordan against the Williams Irrigation District and another. Judgment for defendants, and plaintiff appeals.

Order sustaining demurrer to second count affirmed and judgment reversed and cause remanded, with directions.

W. Coburn Cook, of Turlock, for appellant.

Hankins & Hankins, of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him for declining to amend his complaint after a demurrer thereto had been sustained.

The second amended complaint contains two counts. The first cause seeks to recover a judgment against the defendants for the aggregate sum of $2,880 alleged to be due and unpaid on 84 coupons for accrued interest on irrigation bonds of a consolidated district. It is alleged the Williams Irrigation District is located in Colusa county and that it was organized under the laws of California, April 13, 1920; that the Glenn-Colusa Irrigation District is situated in Glenn and Colusa counties, and that it was organized under the laws of California, March 2, 1920; that the last-mentioned district "was enlarged to include the Williams Irrigation District, and that such consolidation became effective June 16, 1924"; that ever since its organization the consolidated district "has been and now is an irrigation district organized and existing under and by the virtue of the laws of the State of California"; that the Williams Irrigation District issued interest-bearing bonds in 1921, in the sum of $600,000; that the plaintiff is the owner and holder of 84 interest coupons of these bonds of the face value of $30 each, the terms of which are specifically alleged; that these coupons are numbered 122 and from 149 to 157, inclusive, and are dated February 26, 1932, to March 21, 1934; that these coupons were presented to the treasurer of the irrigation district on certain specified dates; and that no part of them has been paid.

The second cause of action seeks to recover judgment for the same sum of $2,880 alleged to have been advanced to the irrigation district at its special request, no part of which has been paid. In other words, the second count is a suit in assumpsit for money had and received.

The demurrer is general and special in character. It asserts that the complaint fails to state facts sufficient to constitute a cause of action; that the court is without jurisdiction over either defendant; that there is a misjoinder of parties defendant; and that the complaint is uncertain in that it cannot be ascertained therefrom what terms or conditions the coupons contain or from what dates the interest thereon is to be computed; how the Glenn-Colusa Ir-

rigation District became obligated to pay these interest coupons; to what officers or parties the coupons were presented for payment; or whether an assessment has ever been levied by the irrigation districts for the payment of these coupons.

The demurrer was sustained as the judgment states "for the reason that the said complaint does not state facts sufficient to constitute a cause of action." The plaintiff was granted ten days in which to amend, but he declined to amend the pleading and judgment was subsequently rendered against him. From that judgment, this appeal was perfected.

We are of the opinion the first count of the complaint states a good cause of action and that the court erred in sustaining the demurrer thereto. It is true that the language employed in the complaint is not as specific in some instances as it might have been, but it appears to contain allegations sufficient to state a cause of action.

[1-3] The respondents first contend that the complaint fails to allege the consolidation of the two irrigation districts pursuant to law. This objection is not well taken. The demurrer does not specify the failure to allege the consolidation of the districts. It merely asserts there is a misjoinder of parties defendant. An irrigation district is a public corporation organized pursuant to law (St.Cal.1897, p. 254, and amendments thereto, 2 Deering's Gen. Laws of 1931, p. 1948, Act 3854) for municipal purposes. Crawford v. Imperial Irr. District, 200 Cal. 318, 253 P. 726; Irrigation districts are authorized to consolidate pursuant to law. St.1921, p. 1018, 2 Deering's Gen.Laws of 1931, p. 2027, Act 3866. A general allegation that an irrigation district was organized at a specified time and that it exists pursuant to law is sufficient to confer jurisdiction of the public corporation on the court. It will be observed that the complaint specifically alleges that both the Williams Irrigation District and the Glenn-Colusa Irrigation District were organized "by virtue of the laws of the State of California," together with the particular dates when these districts were so organized. Then it is specifically alleged that the Glenn-Colusa Irrigation District "was enlarged to include the Williams Irrigation District, and that such consolidation became effective June 16, 1924." From the last statement it must be clearly understood that the last-mentioned district became a part of and was merged in the Glenn-Colusa Irrigation District. Then it is alleged that Glenn-Colusa Irrigation District, ever since its organization, was, "and now is an irrigation district organized and existing under and by virtue of the laws of the State of California." This is a sufficient allegation that the consolidated district was organized and exists pursuant to the statutes provided therefor. Knowledge of the law and the requirements of the statutes with relation to the organization and consolidation of irrigation districts will be imputed to all who are interested therein. Board of Directors of Modesto Irr. District v. Tregea, 88 Cal. 334, 26 P. 237. It will also be noted that all of the coupons upon which this suit is based matured after the date of the consolidation of the two irrigation companies, and therefore become a charge against the consolidated irrigation district.

[4, 5] Upon the organization of an irrigation district or on consolidation of such districts pursuant to law, the district takes the legal title to land therein and the property in trust for the uses and purposes set forth in the act. Section 9, Consolidation Irrigation Act of Calif., supra; Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937. We are of the opinion that when a public corporation takes over the property of another irrigation district, whether by consolidation or otherwise, there is an implied promise to pay the obligations of the organization thus absorbed and an equitable trust is thereby created pursuant to law, making the promisor liable for the indebtedness of the promisee. Anderson v. Calaveras Central Mining Corporation (Cal.App.) 57 P.(2d) 560.

[6, 7] It is contended that the complaint in the present case fails to state facts sufficient to constitute a cause of action for the reason that it fails to allege pursuant to section 8 of the Consolidation Irrigation District Act of California that the board of directors of the consolidated district did "apportion to the lands of the said consolidated district any outstanding indebtedness," which may have existed. The complaint alleges that the two districts were consolidated, and that the Glenn-Colusa Irrigation District, which "was enlarged to include" the Williams District, is "an irrigation district organized and existing under and by virtue of the laws of the State of California." This is a sufficient allegation to assume

that section 8, supra, was complied with according to law. Moreover, the failure to apportion the former indebtedness to particular tracts of land does not relieve the irrigation district of the obligation of paying the indebtedness which it assumed by consolidating the districts. The apportionment of the former indebtedness merely designates the particular lands within the district against which the indebtedness may become a lien. The omission to apportion the indebtedness may affect the ultimate means of satisfying the debt, but it does not invalidate the primary liability of the district. It is immaterial whether an assessment was ever levied or not. If the plaintiff has a valid claim against the defendants, or either of them, he is entitled to maintain his action and recover judgment therefor, regardless of whether the officers of the irrigation district may have failed to perform their duties, and thus deprived him of a lien on particular property of the district. That is a mere means of satisfying the judgment, and has nothing to do with the merits of the cause. Crocker Co. v. County of Lake, 4 Cal.App.(2d) 29, 40 P.(2d) 931; 33 C.J. 1211, § 149.

[8] The demurrer was sustained on the sole ground that the complaint fails to state a cause of action. It was not sustained on the ground that there was a misjoinder of parties defendant. Assuming, without so deciding, that the Williams District was merged in the Glenn-Colusa District, and thereby became terminated by the consolidation so as to relieve it from liability, the Glenn-Colusa Irrigation District would still be liable and the complaint states a good cause of action against the last-mentioned district at least.

[9] The complaint does allege the specific terms of the interest coupons upon which the cause of action is founded. It also alleges the respective dates when each coupon was presented to the treasurer of the district for payment, together with the dates when each coupon matured. It follows that the district is liable for the legal rate of interest on its matured obligations from and after the date of the presenting and demand for payment thereof.

We are therefore of the opinion the first count of the second amended complaint states a good cause of action, and that the court erred in sustaining the demurrer thereto.

For the reason that the second count of the amended complaint fails to state facts sufficient to constitute a cause of action, the order sustaining the demurrer to the second count is affirmed. The judgment is reversed with relation to the first count of the complaint, and the court is directed to overrule the demurrer thereto and permit the defendants to answer the pleading.

We concur: STEEL, Justice pro tem; PULLEN, P. J.



13 Cal.App.2d 653

KIDD v. STATE CIVIL SERVICE COMMISSION et al.

Civ. 9927.

District Court of Appeal, First District, Division 1, California.

May 6, 1936.

Hearing Denied by Supreme Court July 2, 1936.

Officers ⇐76

Civil service employee whose resignation was obtained under coercion and duress and whose dismissal was not in accordance with civil service rules requiring written charges *held* not entitled to reinstatement where employee was granted hearing before state civil service commission on charge of inefficiency and charge was found to be true (St.1929, p. 252, § 14).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

On rehearing.

Judgment affirmed.

Prior opinion, 55 P.(2d) 245.

M. F. Ryan and James H. McKnight, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Darwin Bryan, Deputy Atty. Gen., for respondents.

TYLER, Presiding Justice.

This is an action brought for the purpose of obtaining a writ of mandamus directing and commanding defendants to reinstate plaintiff as institutional storekeeper at Agnew State Hospital, a position from which he was removed, and to recover damages for loss of wages from the 5th day of October, 1933, to such time as he may be reinstated. Plaintiff's salary was $110 a month with maintenance. At the conclusion of the trial the court found that plaintiff take nothing by his complaint, defendants to be dismissed with their costs.

The facts, which are practically without dispute, show that plaintiff and appellant was on September 18, 1933, a permanent civil service employee of the state of California employed at Agnew State Hospital as institutional storekeeper. Respondent Dr. J. M. Scanland at such time was medical superintendent of said hospital with full power of direction of appellant as said storekeeper. On said last-named day the doctor summoned appellant to his office and there in the presence of a Mr. Titlow, the office manager, demanded appellant's written resignation as storekeeper, to take effect at once. Appellant asked concerning the nature of the charges against him and was informed that he was inefficient in his duties. Appellant expressed his unwillingness to resign, whereupon the doctor informed him that if he resigned he might be reinstated and that he would not stand in his way but would join in his request for reinstatement. Appellant testified that Mr. Titlow, the office manager, gave him the same advice. Appellant then informed the doctor that he would think the matter over, whereupon he was informed that he would have to sign a resignation at once or he would be dismissed and out of civil service for all time. The resignation presented was dated September 18, 1933. Appellant claimed that he was entitled to a vacation, to which suggestion the doctor agreed and requested his secretary to draw up a new resignation effective October 5, 1933. Appellant testified, and his testimony is not disputed, that he inquired of Dr. Scanland whether he would be permitted to withdraw his resignation during the interim if he so desired, and was informed by the doctor that he would have the right to reconsider it and might withdraw it up to the time it became effective. Appellant believing the statement of the doctor, that he could be immediately discharged and thereby lose his civil service standing unless he signed the resignation, complied with the demand. The resignation was immediately accepted by the doctor and forwarded by him to the Department of Institutions at Sacramento and a successor was appointed to appellant's position prior to the time his resignation became effective. Within a few days after signing the resignation, appellant wrote to the civil service commission regarding his status in view of his resignation and was informed by that body that any employee who resigned could not have his name restored to the eligible list, but could be reinstated to the same or similar position on recommendation of the appointing officer. Upon receiving this information appellant, on October 1, 1933, wrote to Dr. Scanland informing him that he could not be reinstated, without his recommendation, to the position from which he had resigned, and asked for such recommendation. The doctor informed appellant in effect that he could not comply with the request as such act on his part would hardly be consistent with his action in removing appellant, and this notwithstanding his admitted promise to appellant that if he applied for reinstatement he would not stand in his way, but would ask for appellant's reinstatement on the civil service list. Appellant thereupon, on the afternoon of October 5, 1933, so the court found, prepared and left in the office of Dr. Scanland a withdrawal of his resignation. This was prior to the time the resignation was effective, the resignation reciting that appellant's services ended on October 5, 1933, at 5:30 p. m.

Under all these circumstances we held in a former opinion that appellant's resignation was obtained from him under coercion and duress and that the same was not his free and voluntary act, and, further, that his dismissal was not in accordance with civil service rules which require written charges of the specific acts complained of. Amended section 14, Stats. 1929, c. 136, pp. 251, 252.

In a petition for a rehearing it was claimed by respondents that appellant had a hearing before the state civil service commission on the charge of inefficiency. Upon this showing a rehearing was granted and there has been filed for record in the case a transcript of the proceedings had before that body from which it appears that a petition was filed by appellant for a hearing of the entire proceedings. The petition was granted and the question of appellant's inefficiency was fully gone into by the commission and the charge found to be true. This hearing was all that appellant was entitled to, and the question of the irregularity in his dismissal therefore becomes unimportant.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

WEAVER et al. v. SHELL CO. OF CALIFORNIA et al.

Civ. 9609.

District Court of Appeal, First District, Division 2, California.

May 4, 1936.

Hearing Denied by Supreme Court July 2, 1936.

1. Appeal and error ⇐1064(1)

In action against oil company for death of deceased burned in fire during transmission of gasoline from delivery truck to receiving tank in room in charge of deceased, instructions applying doctrine of res ipsa loquitur *held* prejudicial error, where there was no direct evidence of cause of fire and evidence did not show that oil company was in exclusive control or that information as to cause of accident was more accessible to it.

2. Appeal and error ⇐1060(1)

Statement of plaintiffs' counsel in argument to jury intimating that nonproduction of certain file and statements by defendants were acts of suppression of evidence, where record did not indicate suppression and trial court did not admonish jury, taken together with instruction that presumption was that evidence willfully suppressed could be, if produced, adverse to party suppressing it, *held* prejudicial to defendants.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

On rehearing.

Former opinion reversed and judgment below reversed.

Prior opinion, 49 P.(2d) 857.

Hearing denied by Supreme Court; CURTIS, J., dissenting. NOURSE, J., being disqualified did not participate.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Vincent W. Hallinan, of San Francisco, James H. Gillard, of Oakland, and William F. Herron, of Redwood City, for respondents.

STURTEVANT, Justice.

Lincoln Weaver was burned in a gasoline fire, and from that injury he died January 22, 1927. His widow and two children commenced this action to recover damages. The jury returned a verdict in the sum of $50,000, and from the judgment entered thereon the defendants have appealed.

In the block located between Second and First streets and Washington and Broadway in Oakland a private plant is maintained by the Pacific Gas & Electric Company to service its motor vehicles. An alley extends between Second and First streets. That alley is the entrance by which trucks serving the plant enter the premises. On the day of the accident the defendant Alfred H. Bodilly, acting as the servant of Shell Company of California, drove one of the gasoline trucks of the defendant corporation into the alleyway from Second street. He passed along the alley to the front of the oil room which faces the south, and there he stopped to make his delivery. He was informed by the decedent, who was in charge of the oil room, that the portable tank, spoken of as the buggy, was to be filled, and he was also informed as to the quantity that was to be put into the sunken tank. The sunken tank extended under the south wall of the oil room. One valve of the tank was inside of the oil room and another valve was at the end of the tank outside of the oil room. They were of the same height. Each valve was covered with a metal cap which screwed on and off. Decedent took off the cap of the inside valve and stuck down a measuring rod, drew it out, and handed it over to Bodilly to read. Whether decedent put back the cover on that valve does not appear. There is a plain inference he did not. Bodilly was using a General Motors truck having three compartments or tanks containing gasoline. The front one contained 643 gallons, the middle one 629 gallons, and the rear one 438 gallons. All compartments were full. The truck was equipped with a 2-inch hose about 15 feet long. It had a metal core incased in rubber with a cloth coating. One end was fitted to screw to the valve on the truck and the other end had an "L" shaped metal nozzle. As the nozzle on the hose did not fit the valve on the Pacific Gas and Electric Company tank, a nipple was used. The nipple was inserted in the valve and the nozzle on the hose was placed in it. Having been informed by the decedent as to what quantity was wanted, the defendant Bodilly proceeded to make his deliveries. The truck he was using had attached to it a 2-inch hose, whereas the one he ordinarily used had a 1½-inch hose. Each hose had

1½-inch attachments, and therefore discharged about the same quantity.

In their first point the defendants claim that the judgment lacks evidentiary support, for the reason that the evidence does not establish that any negligence of the defendants was the proximate cause of the death of Lincoln Weaver. Before proceeding it should be stated that the trial proceeded on two very different theories. It was the contention of the plaintiffs that Bodilly, in making his delivery, caused or allowed the gasoline to overflow the intake valve on the outside of the oil room, to spread out over the floors outside, to generate gasoline vapors, and then, by carelessly using apparatus that was not properly equipped, caused and allowed static sparks to be generated outside of the oil room and directly connected with the apparatus which the defendants were using, and allowed said sparks to ignite said gasoline vapors outside of said room, and thus caused the fire which injured the deceased. Whereas it was the contention of the defendants that Bodilly spilled no gasoline, that the apparatus of the defendants generated no sparks, and that, if it did, such sparks were properly grounded by a pendant chain attached to the delivery truck. Further, they claimed that the electric light wires and the wires connected with the heating stove, all of which were contained in the oil room controlled and operated by the Pacific Gas & Electric Company, were out of repair, and that they emitted the sparks that caused the fire. Furthermore, they claimed the fire started in the oil room, an explosion followed, and gasoline was blown out of the tank and spread inside and outside of that room. There was no direct evidence supporting the theory of the plaintiffs. Bodilly the driver of the truck, testified to facts supporting the theory of the defendants. There were conflicts in his testimony. But no witness contradicted any material portion of his testimony. No witness testified he saw the spark that started the fire. Several witnesses testified they heard an explosion. After the explosion, there was flowing gasoline which was on fire both outside and inside of the oil room. Whether that flowing gasoline was blown out by the explosion or whether the defendant Bodilly spilled it, and later it was ignited, spread, and did the damage, was the real issue in the case. As stated, there was no direct evidence thereon. The proof, if any, rested on the indirect evidence. The question as to what rules regarding indirect evidence should be applied and followed by the jury therefore became of vital importance in the trial. The plaintiffs relied on the benefits of the res ipsa loquitur doctrine. Without the application of that doctrine to the case, we think it is clear from what we have said above that the judgment lacks evidentiary support, and, as will presently appear, we think that doctrine was inapplicable.

[1] Acting upon the request of the plaintiffs, the trial court gave two instructions, and, acting upon its own motion, it gave another, each of which applied the doctrine of res ipsa loquitur to the facts of the case. The defendants assert that said doctrine was inapplicable. They specify several grounds. Among others, they contend that the doctrine was inapplicable because the instrumentality causing the accident was not under the exclusive control of the defendants. There was no direct evidence as to what caused the fire. The defendant corporation had brought on to the premises gasoline in a motortruck. When it arrived on the premises, the Pacific Gas & Electric Company already had on the premises quantities of gasoline and certain appliances and equipment. While Bodilly was making his delivery, other equipment of the Pacific Gas & Electric Company drove up to the gas station, took deliveries, and left. In no manner in which the facts are viewed can it be said that the defendant corporation was in the exclusive control and management of the instrumentality causing the injury complained of. It is therefore clear for that reason the facts in the instant case did not warrant the application of the doctrine of res ipsa loquitur. Again the defendants assert that the doctrine was inapplicable because information as to the cause of the accident was not more accessible to the defendants than to the plaintiffs. They cite and rely on Johnson v. Ostrom, 128 Cal.App. 38, 43, 16 P.(2d) 794, and many other cases. The case last cited is directly in point and sustains their contention. Gritsch v. Pickwick Stages System, 131 Cal. App. 774, 22 P.(2d) 554, is also in point. In that case the plaintiff was injured in a collision between one of the Pickwick stages and a Buick car. The plaintiff sought to rely on the application of the res ipsa loquitur doctrine. On page 783 of 131 Cal.App., page 558 of 22 P.(2d), this court held that the doctrine was inapplicable, saying: "Thus it has been said that the doctrine is applicable only when the nature of the accident itself not only supports the inference of defendant's negligence but excludes all

others. [Citing several cases.]" So in the instant case. The facts adduced showed no more reason for inferring that the accident occurred through the negligence of these defendants than it did through the negligence of the Pacific Gas & Electric Company. In view of the other testimony introduced in the case and which we have quoted above, we think it is entirely clear that the error committed by giving said instructions was highly prejudicial.

Nothing said in Gerdes v. Pacific Gas & Electric Co., 219 Cal. 459, 27 P.(2d) 365, 90 A.L.R. 1071, is opposed to anything which we have said. In that case two of the defendant corporations appealed. The record disclosed that during the trial direct evidence of the negligence of each corporation was introduced. The trial court gave specific instructions on the issue so made. It also gave instructions applying the doctrine of res ipsa loquitur. The jury returned a general verdict. The Supreme Court held that such verdict was in effect a finding against the defendants on the issue made by the direct evidence, and that it could not therefore say as a matter of law that the giving of the instruction on res ipsa loquitur was prejudicial error.

[2] The defendants also claim that the plaintiffs' counsel was guilty of misconduct. In another place they contend that the trial court erred in giving an instruction on the suppression of evidence. As the two attacks involve the same incidents occurring during the trial, they will be considered together. At the time the accident happened, there was in the employ of the Pacific Gas & Electric Company a man by the name of Martin Fahey, whose duty it was to investigate the facts regarding accidents. He investigated the facts regarding the accident in the instant case. He took some pictures. He interviewed the decedent and made some notes on that interview, and in other respects prepared a report for his employer. That report was for some time among the files of the Pacific Gas & Electric Company. Afterwards Fahey died. At the time of the trial in the instant case witnesses testified that the file was no longer in the possession of the Pacific Gas & Electric Company. What had become of it the record failed to disclose. What was contained in the report that was competent and material evidence on the trial of the issues the record wholly fails to disclose. The same remark applies to what was contained in the pictures. We find nothing in the record indicating that the defendants suppressed or destroyed the file.

Another incident involves the following facts: The plaintiffs called as a witness, under section 2055, Code of Civil Procedure, A. H. Bodilly, the driver of the truck and one of the defendants. Speaking of the manner and sequence in which he made the deliveries, the witness said he first filled the tank on the buggy and then started to fill the sunken tank. Being dissatisfied with those answers, plaintiffs' counsel sought to show that Bodilly started the filling of the sunken tank, and while it was being filled he started to fill the buggy tank. The witness stated that such was not the sequence, and could not be, as there was only one faucet on each tank, and he was not at liberty to take gas out of either of the other tanks, because the contents of each of them had been ordered by other purchasers. In that connection he stated that such other purchasers on certain days took certain amounts. To disprove that fact he was asked to produce the delivery sheets. Mr. Alexander, counsel for defendants, said they were kept but two years and then destroyed. He was then asked if defendants had copies of statements that had been filed with the state board of equalization showing deliveries of gasoline during the years 1926 and 1927. He replied he did not know, he would try to find out. During the presentation of evidence, nothing further was said on the subject. No other incident having the color of suppression occurred during the trial. During his argument to the jury counsel for plaintiffs separately intimated that the nonproduction of said file of the Pacific Gas & Electric Company and the nonproduction of the statements rendered to the state board of equalization were each acts of suppression. The defendants objected to the remarks assigned them as misconduct, and asked that the jury be admonished. In each instance a discussion followed in which counsel for the plaintiffs greatly aggravated and augmented the offense complained of. In no instance did the trial court admonish the jury, but merely stated that said subjects were a matter of argument. It is said the trial court was not asked to admonish the jury. We think it was. It was a three-sided discussion. The request was clearly made—perhaps out of place—but the trial court must have heard and appreciated its nature. However, the trial court seemed to be laboring under the impression that a foundation had been laid,

whereas we think none had been. Much was said in the trial court, and much is said in the briefs, about inferences. That subject is not involved. Inferences rest on facts proved and are not mere guesses. After the above matters transpired, in hectic arguments between counsel and between court and counsel, covering nearly thirty folios, the trial court instructed the jury. Among others, the court gave the following instruction: "I instruct you that under the law the presumption is that evidence wilfully suppressed could (sic) be if produced adverse to the party suppressing it, and that higher evidence would be adverse from inferior being produced." When all of these incidents are noted and read together, it clearly appears that the rights of the defendants were greatly prejudiced and that it cannot be said they had a fair trial.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



13 Cal.App.2d 678

BOWER v. DAVIS et al.

Civ. 10586.

District Court of Appeal, Second District, Division 1, California.

May 7, 1936.

Municipal corporations ⇐182

City chief of police *held* not liable on doctrine of respondeat superior, under provisions of city charter that general manager of police department should be known as chief of police and that he should be subject to like responsibilities as a sheriff, to prisoner for assault and conversion based on acts of turnkey in city jail (St.1889, p. 474, § 54; St.1925, p. 1090, §§ 199, 201).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Charles E. Bower against James E. Davis and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Troy Pace and W. P. Smith, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader and Leon Thomas David, Asst. City Attys., and Thatcher J. Kemp, Deputy City Atty., all of Los Angeles, for respondent Davis.

James H. Sims, of Los Angeles, for respondent National Surety Corporation.

DESMOND, Justice pro tem.

Plaintiff in this case was arrested on July 5, 1935, incarcerated in the jail attached to Georgia Street Police Station in Los Angeles, and released the following morning. His complaint alleges that upon being taken to a cell, he was assaulted by the turnkey, one O. N. Conn; that when his personal effects were delivered to him, upon his discharge, there was missing the sum of $35 cash which he claims was taken from him and delivered to the desk officer when he was "booked." He further alleges that on the morning of July 6th, he demanded in vain the return of said sum from this officer. About a week later he filed this action, claiming damages for assault and conversion, not against Conn or the desk officer, but against James E. Davis, chief of police of Los Angeles, and National Surety Corporation, which furnished "a bond in writing conditioned for the faithful performance by the defendant James E. Davis of his official duty required by law as such chief of police."

Each of these defendants filed a general demurrer, both of which were sustained without leave to amend, judgment thereupon being ordered in favor of defendants.

Plaintiff bases his appeal from this judgment upon certain provisions of the Los Angeles city charter reading as follows: "The General Manager of the Police Department shall be known as the Chief of Police" (section 199, Stats.1925, p. 1090), and, "He shall have, in the discharge of his proper duties, like powers and be subject to like responsibilities as a sheriff in similar cases." Section 201, Stats.1925, p. 1090. Since "the law is well settled that a Sheriff is answerable for the wrongful acts of his deputy, committed under color of his office, and in the pretended discharge of his duty" (Van Pelt v. Littler, 14 Cal. 194, 199; see, also, Abbott v. Cooper, 218 Cal. 425, 23 P.(2d)

1027), the contention here is that the recital in the complaint of wrongs committed by police officers, together with the obligation of the bond, states a cause of action against the chief of police and his surety.

In presenting this argument, appellant in his opening brief is under the impression that the above-quoted language of the city charter declaring a similarity in the offices of sheriff and chief of police appeared for the first time in the charter of 1925, but respondents point out that the same section appeared in the charter of 1889. Reading the decision in Michel v. Smith, 188 Cal. 199, at page 203, 205 P. 113, 115, published in 1922, declaring that the doctrine of respondeat superior does not apply in a case of this character, we find that certain language there appearing is directly applicable to the situation before us: "These provisions of the charter plainly determine the status of the chief in the police department. He is a member of the department and a public servant like every other member, but by reason of his position is charged with the supervision and control of the police force of the city. * * * In this capacity he may not be held liable in damages for the unlawful acts and omissions of the subordinates of the department, selected pursuant to the provisions of the charter, unless it can be shown that he has directed such acts or personally co-operated therein." There was no allegation in the instant case that defendant Davis had any knowledge of the arrest of this appellant, or that he directed or participated in his claimed mistreatment. The principle enunciated in the Michel Case is consonant, we believe, with the accepted idea of the responsibility of a general manager, and, as we have noticed, the chief of police of Los Angeles is expressly referred to in the charter as "General Manager of the Police Department." Appellant in his reply brief stresses the fact that the 1925 charter omits a section appearing in the 1889 document reading as follows: "The Chief of Police * * * may, with the approval of the Board of Police Commissioners, select and appoint one or more deputies from the police force, for whose official acts he shall be responsible." Stats. 1889, p. 474, § 54. This section, it appears, was in effect when Michel v. Smith, supra, was decided, and appellant argues that since it does not appear in the 1925 charter, the reasoning of the Michel Case does not apply. "So," he says, "for the first time the full responsibility of a sheriff under the general laws was placed upon the chief of police for the official acts of his subordinates." But we still think the rule of the Michel Case governs, for, as indicated, that case expressly holds that the doctrine of respondeat superior does not apply in cases such as this.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 505

ATCHISON, T. & S. F. RY. CO. et al. v. SOUTHERN PAC. CO. et al.

Civ. 10402.

District Court of Appeal, Second District, Division 1, California.

April 28, 1936.

Rehearing Denied May 26, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Appeal and error ⇐1060(1)

Statements by respondents' attorney in jury's presence that he thought counsel would agree to telling jury that there would be no occasion to lock them up, with result that jury was permitted to separate for night before reaching verdict, *held* not to warrant reversal of judgment on verdict subsequently returned as prejudicing jury in respondents' favor, in absence of showing by record that jury understood such statements to mean that respondents were unduly concerned about jurors' comfort.

2. Trial ⇐303

Generally, jury must be kept together in charge of sworn officer and prevented from communicating with others until they agree on verdict after cause has been submitted and jury charged.

3. Eminent domain ⇐200

Burden of proving value of property sought to be condemned is on defendant in eminent domain proceeding, not plaintiff, who is not required by statute to allege value as damages (Code Civ.Proc. § 1244).

4. Evidence ⇨142(1)

Witness for plaintiff in eminent domain proceeding may not state on direct examination details of sales of other lands than those sought to be condemned in same neighborhood.

5. Eminent domain ⇨262(5)

Admission of testimony on redirect examination of plaintiff's witnesses in eminent domain proceedings as to value and use of properties, concerning sales of which they testified on cross-examination, in vicinity of lands sought to be condemned, *held* not prejudicial to defendant, where much testimony as to such sales was properly admitted.

6. Eminent domain ⇨262(5)

To warrant reversal of judgment for plaintiffs in eminent domain proceeding for error in admitting evidence of sale prices of other lands than those condemned on question of market value of latter, there must be strong showing by appellants that error was prejudicial.

7. Evidence ⇨558(8)

Evidence of prices paid for other lands than those sought to be condemned was proper on cross-examination of plaintiff's witnesses in eminent domain proceeding for purpose of testing accuracy and honesty of their opinions on direct examination as to value of latter lands, but not as affirmative evidence of such value.

8. Eminent domain ⇨262(5)

Admission of testimony on redirect examination of plaintiff's witnesses in eminent domain proceeding as to what weight or effect sales, inquired about on their cross-examination, of other lands in vicinity of those sought to be condemned, had on witnesses' opinions as to market value of latter properties, *held* not to warrant reversal of judgment for plaintiff, where transcript showed that jury did not permit such evidence to influence or prejudice them to defendants' detriment.

9. Eminent domain ⇨202(1)

Evidence of nature of plan for union railroad passenger station, construction of which Railroad Commission ordered, *held* properly excluded in proceedings to condemn lands therefor as irrelevant and immaterial on question of market value of such lands when complaint was filed over six years after date of such order, which defendant contended was cause of slump in demand for real estate in area involved during such period; court not being governed by cause of market value of property in determining it.

10. Eminent domain ⇨202(1)

Market value, derived from consideration of detriment from proposed improvement, is too remote and speculative to serve as basis for award in eminent domain proceeding.

11. Evidence ⇨558(1)

Trial court's refusal to permit counsel to read voucher into evidence before it was shown to witness and offered and received in evidence *held* not error as unduly restricting cross-examination of witness.

12. Eminent domain ⇨262(5)

Trial court's refusal to permit counsel for defendant banks, holding mortgages on railroad companies' properties sought to be condemned, to cross-examine such companies' expert witnesses as to value of such properties, on ground that banks were sharing in compensation awarded, *held* not prejudicial error, in absence of evidence or allegation that banks' interest was adverse to railroad companies' interest (Code Civ.Proc. § 2045).

13. Eminent domain ⇨137

Existence of spur track from railroad company's passenger station to parcel of land sought to be condemned for construction of new union passenger station, as ordered by Railroad Commission, *held* not to render grounds of former station contiguous to such parcel or make two parcels susceptible of common use for one general purpose, as required to authorize recovery of damages by banks holding mortgages on both properties because of contemplated abandonment of old station (Code Civ.Proc. § 1248, subd. 2).

14. Eminent domain ⇨137

To recover damage in eminent domain proceeding for severance of tracts, only one of which is sought to be condemned, they must be contiguous and used for one general purpose; common ownership thereof being insufficient (Code Civ.Proc. § 1248, subd. 2).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the Atchison, Topeka & Santa Fé Railway Company and another against

the Southern Pacific Company and others, in which named defendant filed a cross-complaint against certain codefendants. From the judgment rendered, cross-complainant and cross-defendants appeal.

Affirmed.

Guy V. Shoup and C. W. Durbrow, both of San Francisco, and Frank Karr and R. E. Wedekind, both of Los Angeles, for appellant Southern Pac. Co.

Guy V. Shoup, of San Francisco, and C. W. Cornell, of Los Angeles, for appellant Southern Pac. R. Co.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for appellants Chase Nat. Bank and Central Hanover Bank.

Robert Brennan, M. W. Reed, E. T. Lucey, E. E. Bennett, Malcolm Davis, and Hill, Morgan & Bledsoe, all of Los Angeles (Charles H. Woods, of Chicago, Ill., of counsel), for respondents Atchison, T. & S. F. Ry. Co. and Los Angeles & Salt Lake R. Co.

HAAS, Justice pro tem.

This is an action for the condemnation of certain properties in the city of Los Angeles to be utilized in the construction of a union passenger depot in said city.

[1, 2] Appellant's opening brief charges irregularities and misconduct of respondents' counsel, setting up that by such irregularities and misconduct before the jury, respondents prejudiced the jury in their favor to the detriment of appellants and resulting in a miscarriage of justice. The record reveals the following took place in the presence and hearing of the jury panel:

"Mr. Morgan: I'll say this for us, and I think counsel will agree, I think it will be agreeable on all sides, if we tell the jury that there will be no occasion to ever lock them up as far as the case is concerned. It has been usual in condemnation cases, even when submitted to the jury, to agree that they might, if they have not agreed upon a verdict at the regular time for quitting each day to allow them to go home and return to deliberate again the next day.

"The Court: In any event, there will be no occasion to keep them together until at least the case is submitted to them.

"Mr. Morgan: No, your Honor.

"Mr. Karr: That would be my idea.

"The Court: The other question can be met when we come to it. There will be no occasion to keep you together during the progress of the case at all."

The record further reveals the following: "Thereupon the plaintiffs rested and there being no rebuttal, the jury, pursuant to stipulation of all parties, again viewed the proposed location of the depot site and after doing so returned to the court room; the case was argued to the jury by counsel, after which the following proceedings took place in the presence of the jury:

"The Court: I take it we will not submit the case to the jury this afternoon.

"Mr. Morgan: It would be pretty late, Your Honor, wouldn't it?

"The Court: There are some matters I want to discuss with counsel.

"Mr. Brennan: I think it would be more satisfactory if the jury could be instructed in the morning and sent out.

"Mr. Morgan: I think, Your Honor, in a case like this, even if the jury is unable to arrive at a verdict at quitting time each day, there is no necessity of locking them up, and I think each side would agree that they could go home every afternoon and come back the next day and redeliberate, and if they can arrive at a verdict in those hours—

"The Court: In any event, if the instructions are given at ten o'clock tomorrow morning there will be a whole day ahead. We need not meet that question just now.

"Mr. Karr: I think we would be perfectly willing to agree with Mr. Morgan on that. However, I think we ought to determine that when the time comes.

"The Court: There is no necessity of making any agreement now.

"Mr. Morgan: I made that suggestion only because I had previously talked it over with Mr. Karr, and it was agreeable to him.

"Mr. Karr: The jury might have some preference.

"Mr. Morgan: I do not think any juror likes to be locked up, not in this weather."

"The irregularity of respondents' counsel," appellants contend, "in making the suggestion he did led directly to the separation of the jury after the cause had been submitted to the jury, after it had deliberated for several hours and before a verdict had been reached by it; that the separation was permitted for the night of August 2d; that the separation laid the way open for the jury to receive and consider evidence from outside sources; that some of the jurors did receive such evidence is indi-

cated by some of the affidavits filed on the motion for a new trial."

Did the result (namely, the fact that the jury was permitted to separate on August 2d) jeopardize the interests of appellants and result in a miscarriage of justice?

There is nothing in the record to show that the statements made by the attorney for respondents were in any way taken by the jury to mean that respondents were unduly concerned about their comfort even though he may have been attempting to curry the favor of the jury. It has been held that it is not "ground for the reversal of the judgment on the verdict, where the remarks are not shown to have influenced any juror and the trial court passed upon the effect of the remarks" on a motion for a new trial. Charlton v. Kelly (C.C.A.) 156 F. 433, 13 Ann.Cas. 518. "The general rule is, in civil as well as in criminal cases, that after the cause has been submitted and the jury have been charged, they must be kept together in charge of a sworn officer, and prevented from communicating with other persons, until they have agreed on their verdict." McKinney v. People, 2 Gilman (Ill.) 540, 43 Am.Dec. 65, 77, and cases there cited.

[3-5] A question was raised as to whether the trial court erred in overruling appellants' objections to receiving evidence of sale prices of other parcels than the ones in controversy, as evidence of the market value of the land sought to be condemned. It is contended by appellants that on cross-examination the witnesses, Edward H. Allen, Richard W. Puffer, George L. Schmutz, and J. L. Brady, called by respondents, were asked whether or not in their investigation they had learned of certain specified sales in the neighborhood; that where they gave an affirmative answer each was asked to state the date of the sale, the parties to the transaction, and the sale price; and that on redirect examination "the trial court fell into error, when, over appellants' objections it permitted the following types of questions to be asked of, and answered by, these four witnesses: 1. Questions as to whether or not the sales inquired about on cross-examination were of properties more or less valuable than property on Alameda street and the property sought to be condemned. 2. Questions as to whether or not the sales inquired about on cross-examination were in localities which compared favorably or unfavorably as to development and improvement with property on Alameda street, between Aliso and Macy. 3. Questions as to whether or not property in the general locality of the property sought to be condemned had increased or decreased in value during stated periods up to the time of the trial. This class of questions included all property in the general locality in the case of some of the questions, and in the case of other questions involved only particular pieces of property in the locality. 4. Questions as to what weight or effect the sales inquired about on cross-examination had on the witnesses' opinions of the market value of the property sought to be condemned. 5. Questions as to adaptability for use and actual use of the property in the locality of the sales inquired about on cross-examination."

We know of no better way than to consider seriatim the "principles" appellants set forth in their brief in regard to these questions, here referred to by number: (1) The authorities in relation to the burden of proof as to value in proceedings in eminent domain, are conflicting. Lewis on Eminent Domain, vol. 2, § 426. In California the burden as to value is on the defendant. Section 1244 of the Code of Civil Procedure provides what the complaint shall contain, and it does not mention value or damages. And if the plaintiff was not required to allege value as damages, he is not required to prove it. This was the view taken in California S. R. Co. v. Southern P. R. Co., 67 Cal. 59, 63, 64, 7 P. 123. This was also the case here. The burden of proof was on the defendants. That such witness may not on direct examination state the details of other sales he has investigated is well settled in California. City of Los Angeles v. Fred T. Hughes et al., 202 Cal. 731, 736, 262 P. 737, 739. This case is cited by appellants. It was urged therein that the trial court committed error in admitting on direct examination evidence of the selling prices of land in the neighborhood. The question propounded in the case above cited, on direct examination, was: "Now you have a list of any sales made there, that your figures are based on?" Quoting from the opinion, "Objection was made to this evidence on direct examination of any *specific sales*, but the court stated that Mr. Smith 'could tell what he knows about sales out there.' This the witness proceeded to do. The ruling was erroneous, and the objection should have been sustained. * * * But we are not convinced that the ruling was prejudicial. Much testimony was properly given by witnesses for both sides as to specific sales in that vicinity, and the record

indicates that the trial court increased the award in reliance, in part at least, on such evidence." (Italics ours.) The same may be said of the case at bar. In a case where as much testimony was taken as in the case at bar, we cannot conceive that such an irregularity was emphasized in the minds of the jury to prejudice them.

It will be noted that in the case of Central Pacific Railroad Co. of California v. James Pearson et al., 35 Cal. 247, the court admonished against allowing such evidence on direct examination as leading to "interminable" investigation, but the question whether a ruling of the court overruling objection to its introduction constituted grounds for a reversal did not arise. So the case of City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.(2d) 378, 379, does not make such a ruling reversible error, per se. The question, after stating the general rule, was categorically put by the court in that case, "Was the error prejudicial?" referring to the admission of evidence by the trial court of net income as substantive proof of market value. It is apparent that in the case above cited the judgment of the trial court was reversed because the appellate court held that evidence was permitted to be introduced on direct examination showing "the net profits derived from the use that is being made of the property," and the reviewing court held that the error *was* prejudicial for reasons stated. There is nothing in the evidence in the case before us that would lead us to conclude that reasons of the same potency and weight hold here. The evidence in the above-cited case constituted the very hinges upon which the door of the decision swung. In the case before us evidence of the value was adduced on direct examination and the evidence in question that was admitted, on the objection being overruled, was merely a small part of all the evidence before the jury. The case of De Freitas v. Town of Suisun City, 170 Cal. 263, 266, 149 P. 553, 555, also swings upon the same pivot: "In the present case, however, the questions, both as to value and damage, were framed upon the *erroneous theory* that value may be determined *from gross revenue alone,* and neither of them should have been allowed. * * * We cannot say that the erroneous admission of this evidence did not affect the the minds of the jury in their deliberations. On the contrary, we believe that it probably did influence them." (Italics ours.) We also note this important statement of the court: "One witness for plaintiff testified properly to the value of land." Apparently the reviewing court held the evidence of this one witness was not sufficient and reversed the judgment and order refusing a new trial. So in the case of Spring Valley Water Works v. Mary Drinkhouse, 92 Cal. 528, 28 P. 681, 682, the Supreme Court sustained the judgment of the trial court where an objection was sustained to the questions as irrelevant and incompetent on direct examination of the witness: "Do you know what the value of that land is down there for reservoir purposes? Have you any means of knowing the value of this land for reservoir purposes?" and the objection was rightly sustained in accordance with the well-established rule of evidence that the plaintiff is limited to bringing out the value of the property. The question whether or not any evidence adduced was prejudicial did not arise here. In the Matter of the Estate of Ida Hancock Ross et al., 171 Cal. 64, 151 P. 1138, the well-established rule of evidence above stated is again laid down. Here the court affirmed the order of the trial court fixing the value of the estate of decedent and leaned toward a broad construction of the rule. Nowhere in the court's opinion do we find the question discussed as to whether evidence introduced was prejudicial. In the case of Fishel v. F. M. Ball & Co., Inc., 83 Cal.App. 128, 256 P. 493, 496, tried before the court without a jury, a witness for the plaintiff was permitted to testify, over objection, as to how certain price lists already received in evidence without objection, were regarded by the trade as establishing prices. The court here said, "This was a proper question to ask in an attempt to lay at least a partial foundation for the introduction of these price lists, *even if a proper objection had been interposed.*" (Italics ours.) The appellate court held there was no sufficient showing of error in the record to warrant a reversal.

[6] We note in the later cases a more liberal tendency in applying the rule; also that there must be a strong showing on the part of appellant that the error, if any, is prejudicial.

[7] (2) What we have said in regard to question 1 applies equally to question 2, and hence we will not again review the cases cited as to that point. In the case of Palladine v. Imperial Valley Farm Lands Ass'n, 65 Cal.App. 727, 225 P. 291, 303, the appellate court held that, "testimony as to the prices at which other similar lands could be bought was proper for the purpose of testing the witnesses' knowledge and impeaching their

opinions, but not for the purpose of fixing the value of the land; and the jury should have been so advised particularly in view of defendants' requested instruction." The question whether evidence introduced was prejudicial to either party to the case was not discussed, nor was the rule laid down there that the witness could be cross-examined only for the purpose of testing qualifications. The case of City of Santa Ana v. Harlin, 99 Cal. 538, 34 P. 224, does not go to the point here raised although it sets up the general rule of evidence. The case of City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083, 1084, at most sets forth the well-accepted rule in this state. Evidence of price paid for other lands "was proper in cross-examination of the plaintiff's witnesses, for the purpose of testing the accuracy and honesty of the opinions which they had given of the value of the land in their direct examination; but, as it would not have been admissible as affirmative evidence for the purpose of establishing the value of the land in question, it was not competent for the court to consider it for that purpose, even though properly brought before it in cross-examination. It may be added that, even if it had been competent evidence of the value of the land for which the price was given, it would not sustain the conclusion of the court." Nothing here is said about the ruling being prejudicial error, nor does the opinion show that the judgment would have been reversed for that reason. We see no reason why the judgment should be reversed on this point.

(3) What we have said in answer to question 2 is applicable here. In Reclamation District No. 730 v. Inglin, 31 Cal.App. 495, 160 P. 1098, 1101, the court states: "It follows, of course, that the court not only erred in allowing the question of sales of other lands and the prices paid for such lands to be gone into on the *re-direct* examination of the witness Kendall, but erred in refusing to grant the motion to strike out the testimony of said witness; it having been made clearly to appear from said testimony that the witness had based his opinion upon the question of value wholly upon incompetent matters. * * * But we think the errors thus considered were not prejudicial, for it is obvious from the verdict that the jury did not accept the testimony or opinion of the witness Kendall upon the question of the value of the property proposed to be taken." (Italics ours.) Taking the evidence as a whole, there is nothing in the case before us to disclose that the evidence, erroneously admitted, influenced the verdict.

[8] (4) In McCabe v. City of Chelsea, 265 Mass. 494, 163 N.E. 255, the appellate court held that evidence adduced on redirect examination of the value of a lot not being the subject for which damages were claimed, was error, and should have been excluded, but that "it is the duty of the excepting party to show either expressly or by fair inference *that he was harmed* by the admission of incompetent evidence. * * * If the jury gave any weight to the evidence, it operated against the interest of the defendant. It cannot be assumed that they disregarded it. This exception must be sustained." (Italics ours.) In the case cited no doubt the court had the transcript of evidence before it and when the court states "it cannot be assumed that they disregarded it," it means to say that there can be no such assumption from the evidence before it. In the case at bar the transcript of the case shows ample reasons why the jury did not permit the evidence objected to, to influence or prejudice them to the detriment of appellants.

[9, 10] The further charge is made by appellants that the trial court erred in refusing to let evidence of the nature of "Plan 4–B" go to the jury inasmuch as this refusal by the court precluded appellants from developing the exact location of the station as per plan involved in decision of the Railroad Commission No. 18593 set forth in Plaintiff's Exhibit 1, ordering the construction of the union passenger station, and it is urged that the alleged error was prejudicial to appellants and resulted in a miscarriage of justice.

We are first confronted with the question whether the ruling of the trial court in regard to the admission into evidence or rejection of plan 4-B extended to its entire exclusion—or to the exclusion complained of by appellants. It will be remembered that Defendants' (respondents') Exhibit I was accepted in evidence while the witness Astrue was on the stand and that he identified the exhibit, stating what the various marks and designations on the map in decision No. 18593 represented and that it "shows by very fine dotted lines the so-called plan 4-B. * * * The map enclosed within the dotted lines and where it is not superimposed over with red, shown in yellow, outline lines shown on the commission's exhibit 4-B in the 1927 decision of the railroad commission," and then the

witness proceeded to explain from the map what the various tints represented, and that the areas so colored were sought to be condemned in this proceeding. We must deduct from this that the jury was informed that the Railroad Commission had made a decision which referred to said plan 4-B. By that decision rendered July 8, 1927, the commission ordered the respondents and appellants herein (except Southern Pacific Railroad Company) to proceed "* * * in substantial compliance with the plan outlined in commission's exhibit 4-B herein." However, Exhibit 4-B mentioned in said decision 18593 was not included in Plaintiffs' Exhibit 1 in this case. On Defendants' Exhibit I the Plaza Set Back plan and Exhibit 4-B both are shown. However, when Defendants' Exhibit I was introduced, it was introduced into evidence "for the purpose of showing the area of land which is involved in this condemnation proceeding and the general territory immediately surrounding it, and not for the purpose of showing any of the detail of the railroad construction." It is appellants' contention that the commission's order of July 8, 1927, was an important element to be employed by any one seeking to determine the market value *as of the date of filing the complaint herein,* namely, December 1933, in that the very order itself, becoming known, retarded this area, i. e., "stigmatized" it, and affected its market value. The law does not, however, lend a willing ear to speculation. While appellants may have evidenced change for the worse in the demand for real estate there between July, 1927, and October 4, 1933, when the commission issued its decision 26399, approving the Plaza Set Back plan, yet the trial court would have permitted an indulgence in unfathomable speculation had it opened the road to the examination of witnesses, using the order of July, 1927, and said plan 4-B as a basis in order to determine whether there was a slump in the market in this area, and, if so, what it was due to, during that period. Appellants' statement, "In other words, appellants were entitled to have the market value of this land determined as if the decision of the commission never had existed," to us is paradoxical. The market value is an effect and we are not governed by the cause that brings it about in order to determine it. The *market* value could have been neither greater nor less if the cause had been examined into. Such examination of the exhibit containing plan 4-B was not relevant nor material in determining the market value as of the time of filing the complaint.

The case of Mississippi & R. River Boom Co. v. Patterson, 98 U.S. 403, 25 L. Ed. 206, has no bearing on this case, nor is appellants' contention therein sustained. Here three islands were sought to be condemned for the purpose of a boom, i. e., to catch floating logs. It was not urged therein that the property had been "stigmatized" by any agency, public or private, and the case of San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 75, 20 P. 372, 377, 3 L. R.A. 83, referred to by appellants, expressly holds, "It seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." If the benefits may not be considered, why consider the detriment? A value so derived is too remote and speculative.

[11] Appellants then charge that "the trial court committed error in unduly restricting the cross-examination of one of respondents' expert witnesses," referring to the witness George L. Schmutz. While we cannot see the relevancy to the issue of much of the testimony of this witness of respondent, much of which is apparently based on rumor and hence of little weight, yet no objection was raised to it. The objection was raised by respondents' counsel, Mr. Morgan, when appellants' counsel, Mr. Karr, apparently attempted to read a voucher into evidence without first submitting it to the witness. The objection reads:

"Mr. Morgan: I object as incompetent, irrelevant and immaterial. First, that it is not proper cross-examination, and second, it is not a proper manner in which to call the witness' attention to a particular document by purporting to read it into the record before it is shown to the witness and before it is admitted into evidence.

"The Court: I think that is correct, Mr. Karr."

It is apparent that the statement of the court related to the later statement or objection of Mr. Morgan, and did not go to the question of the competency, relevancy, or materiality of the objection. It goes without saying that the court committed no error in preventing the voucher to be read into evidence before it was shown to the witness and offered and received into evidence. This did not constitute an attempt

to unduly restrict appellant counsels' examination of the witness.

We are of the opinion that the rulings of the trial court in matters above referred to were neither so erroneous nor irregular as to prejudice the jury in arriving at its verdict.

[12] But we have yet to consider whether the appellants Chase National Bank of the City of New York and Central Hanover Bank & Trust Company obtained a fair trial. It is alleged in their opening brief that they were the holders, respectively, of incumbrances on property of the appellant Southern Pacific Railroad Company known herein as parcel 2, and on the property now used as a depot by said company known as the Arcade Station, not being condemned herein. They urge: "I. That the trial court committed prejudicial error in denying the banks the right to cross-examine expert witnesses produced by the Southern Pacific Company and the Southern Pacific Railroad Company; and II. That the trial court committed prejudicial error in striking from the answer of each bank a special defense which, under the contentions of the banks, had proper bearing upon the damages to be awarded for the taking of Parcel 2, covered by the mortgages."

A careful reading of the statements of counsel and rulings of the court, convinces us that the court was considerate and not hasty in its rulings; and that the objection was sustained on the ground that appellant banks were sharing in the compensation to be awarded. It is apparent that, at the best, defendant banks could succeed in nothing to their benefit by such examination unless it be to boost the values already given by the witness, in which case it would not in fact be cross-examination but would be redirect examination, if not direct, and we note these words of the court in sustaining the objection: "That does not foreclose you from, on redirect examination, going further into any of the sales which have been enquired about by Mr. Morgan on cross-examination." The witness had been called as a witness of the defendants. We find no justification for cross-examination of the witness Boylin by counsel for the banks. To have permitted it would be to violate the rule as to cross-examination laid down in section 2045, Code of Civil Procedure, for we find nothing in the evidence or the pleadings indicating that the interest of the banks, who hold the mortgages on the property of the Southern Pacific Railroad Company, being condemned herein, is adverse to the interest of the Southern Pacific Railroad Company or to the Southern Pacific Company. Whatever the banks were to receive must be carved out of what the Southern Pacific Railroad Company would receive as an award. Hence their interests were not antagonistic but identical. We find no prejudicial error in the ruling of the court sustaining an objection to permitting counsel for the banks to cross-examine the witness for the Southern Pacific Company and the Southern Pacific Railroad Company.

[13, 14] As to the second charge of error set up by the banks, having reference to the abandonment of the Arcade Station:

It is contended that inasmuch as the mortgage of the bank covers both parcel 2 of the Southern Pacific Railroad Company, which parcel was being condemned herein, and the land on which the Arcade Station is situated, not being condemned herein but which it is alleged will necessarily be abandoned when the new union depot is in operation, that there is such a connection between the two properties that the Southern Pacific Railroad Company and the Southern Pacific Company should be considered as suffering a damage by severance because of the contemplated loss of the use of this station. There is nothing in the evidence by which the court could infer that the properties are contiguous. It is not disputed, however, that the Southern Pacific Railroad Company has the right to operate trains over tracks on a strip of land lying between the Arcade Station and parcel No. 2, and that the Arcade Station will be abandoned by the two railroad companies. It must be remembered that the abandonment is due to action to that effect by the Railroad Commission, and not due to any order of the trial court. The Arcade Station property is not the property sought to be condemned either in whole or in part here. There must be physical contiguity (section 1248, subd. 2, Code Civ.Proc.), or else no damage can be recovered for severance. The fact that there was a spur track leading from the main line of the Southern Pacific Railroad tracks, running from the Arcade Station to parcel No. 2, sought to be condemned, cannot constitute the Arcade Station grounds contiguous to parcel No. 2,

nor does that fact make the two parcels susceptible of a common use. East Bay Municipal Utility District v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178, and City of Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 153 P. 705. Whatever damage may result to the Arcade Station by this proceeding is a damage to the business and not to the realty. In the case of City of Stockton v. Marengo, 137 Cal. App. 760, at page 765, 31 P.(2d) 467, 469, the court states: "The problem as to what constitutes a single parcel of land in contemplation of the foregoing statute" (see section 1248, subd. 2, Code Civ.Proc.) "is essentially a question of law for the determination of the court." The tracts must be *contiguous* and must be used for *one general purpose.* 20 Cor.Jur. p. 735, § 190. "If the several parcels have no relationship except that which arises out of a common ownership, the necessary unity does not exist." Id. The mere fact that parcel 2 had a spur track running into it from the main line cannot be held to give it such a "common use" or "general purpose" as is contemplated by law. Such a use is not comparable with that outlined in Union Terminal R. Co. v. Peet Bros. Mfg. Co., 58 Kan. 197, 48 P. 860, where there were "two tracks of land owned by a manufacturing company, *separated by a cattle drive* 16 feet wide, over and under which the landowners had a right of way, with full privilege to bridge over or tunnel under, as they might see fit," and where it was held that "damages may be awarded to both tracts, though the right of way appriated is taken wholly from one of them." (Italics ours.) In Cameron v. Pittsburgh & Lake Erie R. Co., 157 Pa. 617, 27 A. 668, 22 L.R.A. 443, it is held no recovery can be had where the injury is indirect and consequential only.

The case at bar is not comparable with the case of Westbrook et al. v. Muscatine N. & S. R. Co., 115 Iowa, 106, 88 N.W. 202, 203, where a farm was divided by an intervening tract, wherein it was held that the "manner in which plaintiffs used their lands * * * was the test of whether they" (the separate tracts) "constituted *one farm.*" (Italics ours.) Inasmuch as the manner in which parcel No. 2 was used is not comparable with the manner in which the lands of the Arcade Station were used, the portions of the answers referred to were properly stricken out by the court.

For the reasons advanced, we are of the opinion that the judgment should be, and it is therefore, affirmed.

I concur: YORK, Acting P. J.

I concur in the judgment: DORAN, J.



13 Cal.App.2d 656

BOWES et al. v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10199.

District Court of Appeal, First District, Division 2, California.

May 6, 1936.

Rehearing Denied June 5, 1936.

Hearing Denied by Supreme Court July 2, 1936.

Injunction ⇐223(1)

Where voting trustees, against whom minority stockholders brought action, not complying with statute, to remove trustees because of their acts as corporation's directors, delivered proxy to cotrustee before entry of judgment removing trustees and enjoining them from exercising any right under voting trust agreement, trustees and cotrustee, who subsequently voted stock pursuant to proxy, *held* not in contempt, since trial court, when ordering trustees' removal, changed their status to such extent that their appeal necessarily stayed judgment in so far as requiring them to take any affirmative action, and excused trustees from affirmatively revoking proxy (Civ.Code, § 310).

Petition by W. K. Bowes and others for a writ of prohibition against the Superior Court in and for the City and County of San Francisco to restrain proceedings in contempt.

Peremptory writ issued.

Hearing denied by Supreme Court; CURTIS and LANGDON, JJ., dissent. NOURSE, J., being disqualified did not participate herein.

Arnold C. Lackenbach, of San Francisco, for petitioners.

Rogers, Clark & O'Brien and Freidenrich & Selig, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

The petitioners seek a writ of prohibition restraining proceedings in contempt. An alternative writ was issued by the Supreme Court and transferred to this court for hearing and determination. On the hearing respondent rested on the assumption that the petitioners were acting in violation of a prohibitory injunction pending an appeal. We do not deem this question determinative of the rights of the parties and will therefore refrain from deciding it. The real issue goes deeper than this—it is the question of the jurisdiction of the trial court to entertain any proceeding for contempt against these petitioners on the pleadings before us.

Acting under a contract designated a voting trust, the petitioners had elected themselves as three of the five directors of the Six-Twenty Jones Corporation which was engaged in the operation of an hotel in San Francisco. A minority of the stockholders, who became dissatisfied with the management of the hotel, sued for the removal of petitioners as voting trustees and for the appointment of other trustees in their stead. On March 7, 1936, judgment was entered removing two of the petitioners as such trustees and adjoining them from designating a successor and from doing any act or exercising any right under the voting trust agreement. Prior to the entry of the judgment, these two petitioners had delivered their power of attorney and proxy for the voting of all stock of the hotel company held in their names as trustees. On March 9th, at a meeting of the stockholders of the hotel company, this stock was voted by the proxy designated. For these acts, the parties executing the proxy and the one to whom the proxy was given were cited for contempt.

The alternative writ should be made peremptory. The main action sought the removal of petitioners as voting trustees because of acts performed by them as directors of the hotel company. It was not brought under section 310 of the Civil Code and did not meet any of the requirements of that section. The complaint did not plead any act as trustee which would give rise for a demand for the removal of petitioners. When the trial court ordered their removal as trustees, it changed their status to such an extent that their appeal necessarily stayed the judgment in so far as it required them to take any affirmative action. Clute v. Superior Court, 155 Cal. 15, 99 P. 362, 132 Am.St.Rep. 54; Foster v. Superior Court, 115 Cal. 279, 47 P. 58.

Though the petitioners were charged with a violation of the injunction, the affidavit does not allege any violation. Before the judgment was entered, two of the petitioners delivered their proxy and power of attorney to the third. This they were authorized to do by the trust agreement. After the judgment, the one to whom the proxy was given voted the stock at a regular stockholders' meeting. The two who gave the power of attorney did nothing after the judgment was entered. The one who voted the stock was not enjoined and did nothing that he was not authorized to do under the trust agreement or under the judgment. The other two were not charged with any overt act as trustees in contempt of the injunction. If their remaining passive in not revoking the proxy is the act sought to be charged as contemptuous, then they were excused by the appeal from affirmatively revoking or recalling the power given before entry of the judgment.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.



13 Cal.App.2d 709

In re PETERSON'S ESTATE.

BOOS et al. v. HARDINGE et al.

Civ. 9964.

District Court of Appeal, First District, Division 2, California.

May 9, 1936.

1. Wills ⇐55(1)

Evidence *held* insufficient to establish unsoundness of mind and general mental incompetency of testatrix, so as to justify revocation of probate of will.

2. Wills ⇐166(12)

Circumstantial evidence raising only a suspicion of undue influence in making of

will has force of proof only when circumstances are proven which are inconsistent with claim that will was spontaneous act of alleged testatrix.

3. Wills ⇐166(1)

Evidence in will contest *held* insufficient to sustain finding that testatrix was under undue influence on part of sole residuary legatee and her husband so as to invalidate will.

4. Wills ⇐166(1)

Statement by testatrix that sole residuary legatee had informed testatrix that one or more relatives of testatrix' husband wanted to put her in an insane asylum did not prove that statement had been made by legatee and therefore could not be relied on to prove fraud in execution of will.

5. Wills ⇐166(11)

Evidence that testatrix made statement that sole residuary legatee had informed her that one or more of relatives of testatrix' husband wanted to put her in an insane asylum *held* insufficient to sustain finding of fraud on part of sole residuary legatee in absence of proof that, even if statement had been made by legatee, legatee's statement was false.

6. Wills ⇐163(1)

In contest of will, burden was on contestants to prove that statement of sole legatee that one or more of relatives of testatrix' husband wanted to put testatrix in an insane asylum, if made, was false in support of their charge of fraud.

7. Wills ⇐166(11)

Statement by testatrix that sole residuary legatee had informed her that one or more of relatives of testatrix' husband wanted to put her in an insane asylum, where making such statement was denied by legatee, *held* insufficient to sustain finding of undue influence by legatee on such testatrix.

8. Wills ⇐52(5)

In contest of will on ground of unsound mind, evidenced by alleged belief of testatrix that one or more of testatrix' husband's relatives wanted to put her in an insane asylum, burden was upon contestants to show that such belief was not only a mistaken belief but also that it was an insane delusion.

9. Wills ⇐55(3)

Evidence *held* insufficient to sustain finding of unsoundness of mind, on theory that testatrix had mistaken belief one or more of her husband's relatives wanted to put her in an insane asylum and that such belief was an insane delusion.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Mattie S. Peterson, deceased. Proceedings by Emma C. Boos and others against H. A. Hardinge and another to contest and revoke probate of will. From judgment revoking probate of will, proponents appeal.

Reversed.

E. M. Rea, of San Jose, and Louis R. Deadrich, of Oakland, for appellant May Spencer.

Owen D. Richardson, of San Jose, for appellant H. A. Hardinge.

M. Mitchell Bourquin, Clinton L. Markley, and Edward P. Murphy, all of San Francisco, and Harvey C. Miller, of San Jose, for respondents.

SPENCE, Justice.

The last will of Mattie S. Peterson was admitted to probate on December 20, 1932, and appellant H. A. Hardinge was appointed executor. Under the terms of said will, appellant May Spencer, a friend of the deceased, was named as residuary legatee. On June 3, 1933, a contest and petition for revocation of probate of the will was filed by respondents. Four of the respondents were sisters of John August Peterson, the deceased husband of Mrs. Peterson. The remaining six of the respondents were the children of Oscar Peterson, a deceased brother of said John August Peterson. There were three alleged grounds of contest: (1) Unsoundness of mind; (2) undue influence on the part of Mr. and Mrs. Spencer; and (3) fraud on the part of Mr. and Mrs. Spencer. Upon a trial by jury all of said issues were determined in favor of respondents. This appeal is taken from the judgment revoking the probate of said will.

The main contention of appellants is that the evidence was insufficient to sustain the verdict of the jury upon any of the issues submitted to them. We are of the opinion that this contention must be sustained, and we shall therefore briefly set forth the salient facts which appear in the record.

Mattie S. Peterson, deceased, and her husband, John August Peterson, deceased,

had lived near Mr. and Mrs. Spencer in Mountain View for about twenty years prior to the death of said John August Peterson on October 17, 1929. After the death of the husband, Mrs. Peterson was taken to the home of one of the respondents in Redwood City where she remained for about three weeks. During that time, and on October 28, 1929, being eleven days after the death of her husband, Mrs. Peterson made what we may term the first will. In that will she left all of her property to the four sisters of her deceased husband. Shortly thereafter and on November 11, 1929, she returned to Mountain View and visited with Mr. and Mrs. Spencer. During her visit, she expressed a desire to have a home of her own stating that she preferred to live alone and to be free to do as she pleased rather than to live with friends or with relatives of her deceased husband. She suggested to Mr. Spencer that she would advance the sum of $1,500 for the construction of a three-room cottage on the land of Mr. Spencer with the understanding that she could occupy the same during her lifetime without the payment of rent. This was agreed to by the parties and a written agreement was executed by them in the office of Mr. Hardinge, an attorney at law. The cottage was constructed, and thereafter Mrs. Peterson occupied the same for over two years and until the time of her death on August 13, 1932. The evidence shows without contradiction and respondents concede that during all of the time that Mrs. Peterson visited with the Spencers and subsequently occupied the cottage, she was given the best of care and attention by them and particularly during her last illness when she was greatly in need of such care. The evidence further shows without contradiction that Mrs. Crounse was the only one of the ten respondents who ever visited or communicated with Mattie S. Peterson after she went to visit the Spencers and that Mrs. Crounse's visits were confined to the first few weeks after Mrs. Peterson returned to Mountain View. At the time of her death Mrs. Peterson had not seen or heard from any of respondents for a period of over two and a half years.

Respondents claim that shortly after Mrs. Peterson went to live with the Spencers in Mountain View, her attitude toward them began to change. The record may sustain this claim but the record also discloses ample reasons for the change in attitude. Upon the visits of Mr. and Mrs. Crounse during those first few weeks, they emphatically expressed to Mrs. Peterson and to the Spencers their disapproval of the building of the cottage as planned. Mr. Crounse testified that it had been suggested that Mrs. Peterson should go to some Old Peoples' Home, "but that did not appeal to her." In respondents' brief, they state that when Mr. Crounse expressed his disapproval of the plan to build the cottage, "things began to change." They state that Mrs. Peterson then complained that some of her husband's relatives wanted to put her in an asylum, and they further state that the Spencers made them feel that they were not wanted. Shortly thereafter Mr. and Mrs. Crounse called again, but no one came to the door although they claimed that they saw "the curtain moving stealthily." They did not subsequently see or communicate with Mrs. Peterson and, as above stated, none of the other respondents ever saw or communicated with Mrs. Peterson at any time after she returned to Mountain View.

A second will was made by Mrs. Peterson on November 26, 1929, shortly after going back to Mountain View. In this will she made a few bequests including one of $500 to Mrs. Spencer and again named the four sisters of her deceased husband as residuary legatees. The third will, being the will in question here, was executed on March 1, 1930. This will contained a few bequests and Mrs. Spencer was made the sole residuary legatee. While this will was made in the home of Mr. and Mrs. Spencer before the completion of the cottage, neither Mr. nor Mrs. Spencer was present at the time. It was drawn by Mr. Hardinge at the request of Mrs. Peterson and was witnessed by Mr. Hardinge and Mr. Ackerman.

[1] The testimony offered by respondents in an effort to establish the general mental incompetency of Mrs. Peterson at the time of the making of the will in question was wholly insufficient. We have reviewed the record and do not find that any witness gave an opinion that Mrs. Peterson was of unsound mind or incompetent at any time. Appellants' witnesses testified that in their opinions Mrs. Peterson was of sound mind and some of respondents' witnesses testified to the same effect. In the briefs respondents call attention to the fact that Mrs. Peterson was an elderly woman and had suffered a stroke a year or two before her husband's death. The evidence as to age was in conflict, respondents claim-

ing that Mrs. Peterson was approximately seventy-eight years old when she made the will in question while there was other evidence to show that she was under seventy. They also offered evidence to show that Mrs. Peterson was somewhat feeble and was not very keen mentally. When respondents' witnesses were asked their opinions regarding her soundness of mind, they made no direct answers. One answered: "I never considered her much more than a child. * * * I don't know just how to describe one whose mental faculties are not keen." Another replied: "Well, I don't know as you would call it exactly in her right mind at all times; she seemed to be—I don't know." The reasons, if they may be called such, which were given for these answers were wholly insufficient to show unsoundness of mind and there was an entire absence of any substantial evidence of general mental incompetency. In re Estate of Finkler, 3 Cal.(2d) 584, 46 P.(2d) 149; In re Estate of McDonough, 200 Cal. 57, 251 P. 916. We believe respondents concede that the evidence was insufficient for this purpose as they rely mainly upon a claimed insane delusion to which reference will be hereinafter made.

[2, 3] Respondents discuss the subjects of "Misrepresentation, Fraud and Undue Influence" under one heading. Aside from the evidence upon which the claim of fraud is based, the remaining evidence was wholly insufficient to sustain the finding of undue influence. It was admittedly circumstantial in nature and, if stretched to its limits, it could at most only raise a suspicion of undue influence. Such circumstantial evidence "has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." In re Estate of Leahy (Cal.Sup.) 54 P.(2d) 704, 706. No such circumstances were shown here and under the rules set forth in the authority last cited, we conclude that this evidence cannot be relied upon to sustain the verdict.

[4-7] We come now to a discussion of the evidence relied upon to sustain the finding of fraud, which evidence is also discussed by respondents in connection with the other issues. Respondents claimed that Mrs. Spencer had told Mrs. Peterson that one or more of her husband's relatives wanted to put her in an insane asylum. The only evidence to prove this was the testimony of alleged declarations of Mrs. Peterson, which declarations were admitted over the objection of appellants. It may be further stated that Mrs. Spencer denied making any such statements to Mrs. Peterson. We believe this evidence was insufficient to sustain the finding of fraud for two reasons: First, such declarations of the deceased, even though admitted in evidence, could not be relied upon to prove that the alleged statements had been made to the deceased by Mrs. Spencer. In re Estate of Calkins, 112 Cal. 296, 44 P. 577; In re Estate of Gregory, 133 Cal. 131, 65 P. 315; In re Estate of Donovan, 140 Cal. 390, 73 P. 1081; In re Estate of Arnold, 147 Cal. 583, 82 P. 252; In re Estate of Snowball, 157 Cal. 301, 107 P. 598; In re Estate of Gleason, 164 Cal. 756, 130 P. 872; In re Estate of Casassa, 98 Cal.App. 97, 276 P. 366. Second, there was no proof of the falsity of the alleged statements. In this connection Mr. Crounse testified that he told Mrs. Peterson that her idea that one of the sisters wanted to put her in an asylum was foolish; but there was no denial by any of the respondents that such was their desire. For aught that appears in the record, all of respondents may have wanted to put Mrs. Peterson in an asylum and they may have so expressed themselves on many occasions. Counsel for respondents take the position that appellants failed to establish the truth of the statement which was attributed to Mrs. Spencer. They overlook the fact that Mrs. Spencer denied making this statement, and even if the making of the statement had been proved, the burden was upon respondents to prove its falsity in support of their charge of fraud. We therefore conclude that the evidence was insufficient to sustain the finding of fraud. We further conclude that said evidence offered in support of the charge of fraud is not helpful to respondents in their attempt to sustain the finding of undue influence.

[8, 9] Returning to the issue of unsoundness of mind, it is respondents' contention that if Mrs. Spencer did not tell Mrs. Peterson that her husband's relatives wanted to put her in an asylum, then the statements of Mrs. Peterson regarding the attitude of her husband's relatives showed that she was suffering from an insane delusion. We are unable to follow the reasoning of respondents. Assuming that Mrs. Peterson had such a belief regarding the attitude of her husband's relatives, the burden was upon respondents as contestants to show that

such belief was not only a mistaken belief but also that it was an insane delusion. In re Estate of Shay, 196 Cal. 355, 237 P. 1079. Respondents failed to show that such belief was either a mistaken belief or an insane delusion and there is no evidence whatever to support the finding of unsoundness of mind upon this theory.

In view of the conclusions which we have reached, it is unnecessary to discuss the other points raised by appellants.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



13 Cal.App.2d 528

PEOPLE v. GLAB et al.

Cr. 2846.

District Court of Appeal, Second District, Division 2, California.

April 28, 1936.

1. Marriage ⇐57

Statutory provision for judicial determination of void marriages *held* not to establish exclusive method of questioning validity of purported marriage, but judgment pursuant thereto merely declares existing fact which may be shown even though not so adjudicated (Civ.Code, § 80).

2. Witnesses ⇐63

Purported ceremonial marriage by husband who had deserted first wife *held* invalid in absence of showing that first wife was generally reputed to be dead or that she was not known to husband to be living or that five-year period had elapsed from date of separation at date of second marriage, so that husband was competent as witness in trial of second wife for forgery and preparing false evidence, notwithstanding that invalidity of marriage had not been judicially determined (Pen. Code, §§ 134, 470, 1322; Civ.Code, §§ 61, 68, 80; Code Civ.Proc. § 1881(1).

3. Criminal law ⇐511(1)

Evidence corroborating testimony of accomplice *held* sufficient to support conviction of forgery and preparing false evidence (Pen. Code, §§ 134, 470, 1111).

4. Witnesses ⇐359

In prosecution for forgery and preparing false evidence, refusal to permit impeachment of witness by showing that witness had admitted at preliminary hearing that she was guilty of possession of narcotics *held* not error where court permitted proof that witness was charged with possession of narcotics (Pen. Code, §§ 134, 470).

5. Criminal law ⇐1170(1)

In prosecution for forgery and preparing false evidence, error, if any, in refusal to permit defendants to introduce fact that jacket of file in felony case pending against witness for prosecution contained notation that case was dismissed as of future date to show that district attorney had agreed to dismiss charges against witness at later date provided she testified for prosecution *held* not prejudicial error (Pen.Code, §§ 134, 470).

6. Criminal law ⇐878(3), 1216(2)

Forgery of will and preparing false evidence *held* separate offenses under statute defining crimes, so that in prosecution for both offenses acquittal of forgery of will would not operate as acquittal of preparing false evidence, and consecutive sentences for both offenses were properly imposed on conviction of both (Pen.Code, §§ 134, 470).

7. Criminal law ⇐29

Whether single act or series of acts constitutes two separate offenses is determined by whether each offense requires proof of facts additional to those involved in the other.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Hazel Belford Glab and Fred Steeger were convicted of forgery and preparing false evidence, Clara Steeger was convicted of preparing false evidence, and Hazel Belford Glab and Clara Steeger appeal.

Affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellants.

U. S. Webb, Atty.-Gen., and Warner I. Praul, Dep. Atty.-Gen., for the People.

GOULD, Justice pro tem.

Defendants were jointly charged by grand jury indictment with the crimes of forgery (Pen.Code, § 470) and preparing false evidence (Pen.Code, § 134). Defend-

ant Fred Steeger pleaded guilty. Upon a jury trial his codefendant Glab was found guilty on both counts, and Clara Steeger, acquitted of the forgery charge, was found guilty of preparing false evidence. This appeal is prosecuted by both defendants Glab and Clara Steeger from the judgment of conviction and from the order denying their motion for new trial.

According to the evidence produced at the trial, defendant Glab, through defendant Fred Steeger, contacted Albert L. Cheney, a reputed millionaire, resulting in Mrs. Glab and Cheney living together in apartments in the city of Los Angeles from some time in September of 1934 until March 12, 1935, when they went to Las Vegas, Nev., where Cheney died the next day. During the entire period of the association between Mrs. Glab and Cheney, the latter was usually intoxicated. The day after Cheney's funeral Fred Steeger drove Mrs. Glab to a stationer's store where she bought some ink and an ink eradicator, advising Steeger that she wanted to do something with a paper in her possession with Cheney's signature upon it. In fact, in December, 1934, she had told Steeger that she had Cheney's signature upon a piece of paper, blank except for some numerals on the left-hand side. After the incident of the ink eradicator, it was testified by Steeger, Mrs. Glab wrote a will on the sheet of paper above Cheney's signature and the two Steegers then signed it as witnesses. This purported will was offered for probate in the Los Angeles county superior court and all three defendants there testified as to its validity—that it was written by Mrs. Glab at Cheney's request and witnessed by the Steegers, also at his request. Testimony of a handwriting expert was to the effect that the purported will was written on the paper after Cheney signed it and after certain numerals had been eradicated.

Taken as a whole, the testimony as to the guilt of defendants was clear and convincing and was ample to support the judgment. Indeed, appellants do not question the sufficiency of the evidence but center their attack upon the admission of certain evidence, claiming that had such improperly admitted proof been excluded there would then have been insufficient to uphold the jury's verdict.

Especially do appellants stress the point that it was prejudicial and reversible error to permit Fred Steeger to testify. The case of the prosecution was built largely around the testimony of this witness, who told in detail of the introduction of Mrs. Glab to Cheney, their daily association together, the procuring of Cheney's signature on the blank piece of paper, the alteration of the paper by erasing the numerals, the forgery of the will, and the false witnessing of it by himself and Clara Steeger. If this testimony was erroneously admitted, as claimed by appellants, it was highly prejudicial. In fact, without it, it would be difficult to sustain the conviction.

The objection to Steeger's testimony arises from the fact that on March 14, 1933, he was married at Los Angeles to appellant Clara Steeger, by a ceremony of marriage duly licensed and solemnized as provided by section 68 of the Civil Code. Upon the trial appellants at once raised the point that as the husband of his codefendant Clara Steeger he could not be called as a witness against her, and that to allow him to testify would be violative of the confidential communications provision of section 1881 (1) of the Code of Civil Procedure and of section 1322 of the Penal Code, expressly providing that neither a husband nor wife is a competent witness for or against the other in a criminal action to which one or both are parties, except with the consent of both. The prosecution then developed the fact that Steeger had been married before; that on November 19, 1913, he had married one Bessie Creamer; that the Creamer marriage had not, so far as Steeger knew, ever been annulled; and that no divorce had been granted with relation to his first marriage prior to his marriage to Clara Steeger in 1933. In fact, it was shown that Steeger was served with papers in a divorce suit brought by his first wife in about August, 1934, and the records of the divorce action of Bessie Creamer Steeger, as introduced in evidence, showed the entry of a final decree March 12, 1935.

With the testimony in this situation, the trial court permitted Steeger to testify against the second wife, upon the theory that his ceremonial marriage to her was in fact no marriage at all, that therefore he was not her husband, and that sections 1881 of the Code of Civil Procedure and 1322 of the Penal Code raised no bar to his testimony.

Decision as to the correctness of this ruling rests upon the interpretation of section 61 of the Civil Code, which provides

that "a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless: 1. The former marriage has been annulled or dissolved. * * * 2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." The trial court was without authority, appellants urge, to summarily declare the second marriage of the witness Steeger and appellant Clara Steeger void, and, contend appellants, the objection to his testifying was good until that marriage had been declared void by a competent tribunal upon proper proceedings. It will be noted that section 61 of the Civil Code specifically provides that a subsequent marriage is illegal and void from the beginning unless the former marriage has been annulled or unless the former spouse "is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage," in which cases the subsequent marriage is valid until nullified by judgment of court.

It is true that Fred Steeger testified that he had not heard from his first wife and had not seen her since he "left" her in 1928 until immediately preceding his marriage to appellant Clara Steeger on March 14, 1933; but nowhere in the testimony is there any suggestion that the first wife was generally reputed or believed to be dead, or that she was not known to Steeger to be living. On the contrary, it appears, at least inferentially, that he knew his first wife was living; but he explained his second marriage upon the plea that he thought his first wife had remarried, and he further testified that he did not find out his mistake until, after his marriage to Clara Steeger, he was served with divorce papers in an action brought by his first wife. Nowhere is it established that a full five-year period elapsed from the date of separation from the first wife in 1928 to the date of the second marriage in 1933, and the trial court might well have concluded from the testimony presented that the former wife had not been absent for the statutory period fixed by section 61 of the Civil Code. Furthermore, Steeger's testimony was that he "left" his first wife. Under such circumstances, it was his duty to keep her advised of his whereabouts (Jones v. Zoller, 32 Hun [N.Y.] 280, 285), and it would be a legal inconsistency to predicate a presumption as to the death of a wife upon an absence resulting from the husband's "leaving" or deserting such wife and failing to keep in touch with her.

We must hold that the witness Steeger, although he had gone through a marriage ceremony in due form after obtaining a proper license to marry appellant Clara Steeger, was not brought within either of the exceptions of section 61, Civil Code, and that therefore his purported marriage to her was, as denominated by that section, "illegal and void from the beginning."

The status of such a purported marriage has been reviewed by our courts. In Re Estate of Harrington, 140 Cal. 244, 73 P. 1000, 98 Am.St.Rep. 51, upon which appellants place strong reliance, Harrington left his wife in Michigan and settled in California. After a period of about ten years, during which she did not hear from him, and believing him to be dead, as indeed he was reputed to be, the wife remarried in good faith one Carley, no divorce from Harrington having been procured. Harrington did not remarry. Upon the latter's death in California she sought to administer upon his estate under the claim that she was his widow. The court held that she was not the widow of Harrington, but the wife of Carley, her marriage to the latter coming within the exceptions of section 61 of the Civil Code and therefore being valid until declared null by a court of competent jurisdiction.

A situation more nearly in point with the facts of the instant case is presented by In re Estate of Newman, 124 Cal. 688, 57 P. 686, 45 L.R.A. 780. There the wife, left alone in New Hampshire while the husband came to California and accumulated property, married another man, but with knowledge that her first spouse was living. In fact, at the very time of her bigamous marriage the first husband was sending her money for her support. Holding the second marriage illegal and void, the court allowed her as the widow of her first husband to administer in California upon his estate at his death.

The distinction between the two cases above referred to appears to be that in the

Harrington Case the subsequent marriage was valid until adjudged null by a competent tribunal, because at the time the wife remarried, her first husband was absent and not known to her to be living for a period of five successive years and was generally reputed to be dead; while in the Newman Case the subsequent marriage was invalid and void because the wife at time of remarriage knew her first husband, although he had been absent more than five years, was living. In the latter case no court adjudication was necessary to establish the nullity of the subsequent marriage. Proof of the facts was sufficient to establish the invalidity of the union. So in the case before us, the facts, not bringing the subsequent marriage of the witness Steeger to appellant Clara Steeger within either of the exceptions of section 61 of the Civil Code, branded the marriage as "illegal and void from the beginning."

[1] An enlightening discussion of void and illegal marriages and the distinction between void and voidable unions is found in Re Estate of Gregorson, 160 Cal. 21, 116 P. 60, 62, L.R.A.1916C, 697, Ann.Cas. 1912D, 1124, wherein Mr. Justice Sloss lays down the rule that "a marriage prohibited as incestuous or illegal and declared to be 'void' or 'void from the beginning' is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material." The same case is also authority for the proposition that although section 80 of the Civil Code provides a means for judicial determination of void marriages, that does not undertake to establish an exclusive method of questioning the validity of the purported marriage. Says Justice Sloss: "The judgment merely declares an existing fact—viz., that the marriage is void—and this fact may be shown even though it may not have been so adjudicated."

[2] Upon the authority of the above-cited case, we hold that the court in the instance before us for consideration, having before it facts showing the purported marriage did not come within the excepted classes of section 61 of the Civil Code, did not commit error in permitting the collateral attack upon the subsequent Steeger marriage. Its conclusion that the second marriage was void and illegal, that the purported marriage between the witness Steeger and appellant Steeger was in fact no marriage at all, that the witness and Clara Steeger were not husband and wife, and that he therefore might testify against her unrestricted by the limitations of sections 1881 of the Code of Civil Procedure and 1322 of the Penal Code, followed inescapably. No error appears in the court's ruling. Incidentally in this connection, as pointed out by respondent, the fact that a second marriage has been contracted under the erroneous impression that the first marriage was void or had been annulled or dissolved is not even a defense to a charge of bigamy. People v. Hartman, 130 Cal. 487, 62 P. 823.

[3] Appellants also urge that because the witness Steeger was an accomplice his testimony was therefore subject to the limitation that it must be corroborated by other evidence tending to connect appellants with the commission of the offense. Pen.Code, § 1111. Disregarding his testimony, appellants argue, there was insufficient evidence to connect his codefendants with the crimes charged. This contention overlooks the testimony offered by the prosecution of the handwriting expert as to the altered document, and of appellants themselves when they appeared in the probate court in an effort to prove the forged instrument as Cheney's last will. Clearly, the connecting testimony, tending to inculpate appellants and pointing to their guilt, even if the testimony of the accomplice be disregarded, sufficiently meets the test which the law imposes. People v. Morton, 139 Cal. 719, 73 P. 609.

[4] Much insistence is placed by appellants upon the refusal of the trial court to allow them to show that the witness Dabney had admitted at a preliminary hearing that she was guilty of the possession of narcotics. The court did permit proof that the witness was at the time of the within trial charged with a felony, to wit, possession of narcotics, but refused appellants' offer to show that she had been in court and admitted the charge. Such offered evidence is not in accordance with the method prescribed by the Code for impeaching a witness.

[5] The court also refused to allow appellants to place before the jury the fact that when the Dabney file from the district attorney's office was produced in court at the within trial on December 24, 1935, the jacket of said file contained a notation as follows: "January 15, 1936, on motion of district attorney, case is dismissed in the interest of justice." It is appellants' contention that this notation as to a matter to

be done at a future date indicated unmistakably that the district attorney had agreed to dismiss the charges against Dabney at a later date provided the witness testified for the prosecution in the within will forgery case. The jurors in this action were apprised of the pendency of the felony charges against the witness, and the knowledge of that fact undoubtedly influenced them in considering the weight to be given to her testimony. Even conceding, as argued by appellants, that it may have been proper to place before the jurors the additional fact that the witness had at a preliminary hearing admitted the truth of the charges against her, and conceding for the sake of the argument that the notation upon the district attorney's file as to any future disposition of her case should have been admitted in evidence, the error, if any, in view of the facts actually placed before the jury, was inconsequential and could not have prejudicially affected the outcome of the case.

[6, 7] Appellants' final points have to do with the nature of the two charges in the indictment. Mrs. Glab was convicted of forgery and also of preparing false evidence. Appellant Steeger was acquitted of forgery and convicted of preparing false evidence. It is argued that the two charges grew out of the same circumstances, that they were part of the same transaction, and that therefore in effect there was but one crime committed. In the case of appellant Steeger it is argued that her acquittal on one count must automatically operate as an acquittal on the other. Conversely it is argued that in the case of appellant Glab (whose sentences on the two counts were pronounced to run consecutively) the court committed error because in fact only one offense was committed, and therefore the judgment upon the second count at least should be reversed. The answer to these contentions is contained in the two sections of the Penal Code, numbers 134 and 470, under which the indictment herein was framed. Clearly, two separate offenses are set forth, and it is plain that each offense required proof of facts additional to those involved in the other. This is the law's test as to whether a single act or series of acts may constitute two separate offenses. In re O'Connor, 80 Cal.App. 647, 252 P. 730.

Discussion as to inconsistencies in the testimony of various witnesses and as to the weight or credibility to be accorded to the evidence is not pertinent where, as here, overwhelming evidence supports the verdict and judgment.

The judgment and order appealed from are affirmed.

We concur: WOOD, J.; CRAIL, P. J.

5. Constitutional law ⇐15

In interpreting constitutional provision, each word must be given some value.

6. Judges ⇐16(1)

Under constitutional provision that cause in superior court can be tried by judge pro tempore upon stipulation of "parties litigant," "parties litigant" means parties who are taking part in litigation and have appeared therein (Const. art. 6, § 5, as amended in 1928).

Term "parties litigant" means the antagonistic sides of a controversy. A "litigant" is a party to a lawsuit; one engaged in litigation; usually spoken of active parties, not of nominal ones.

7. Stipulations ⇐17(2)

Active parties to litigation can bind passive parties by stipulation.

8. Judgment ⇐477

Judgments and orders of superior court with judge pro tempore presiding are entitled to same presumption of regularity as are judgments and orders of superior court with regular judge presiding, notwithstanding that judge pro tempore is selected under stipulation of parties litigant by approval and order of a regular judge, since judge pro tempore acts for superior court (Code Civ.Proc. § 259a; Const. art. 6, § 5, as amended in 1928).

9. Judges ⇐16(1)

Failure of record in probate proceedings to show that certain heirs or litigants stipulated in writing or orally to selection of judge pro tempore does not destroy presumption of regularity of proceedings in absence of showing that such heirs or litigants did not stipulate, and failure of heirs and litigants to appear would be assumed to be "stipulation" within constitutional provision that cause in superior court can be tried by judge pro tempore upon "stipulation" of parties litigant (Code Civ.Proc. § 259a; art. 6, § 5, as amended in 1928).

[Ed. Note.—For other definitions of "Stipulate; Stipulation," see Words & Phrases.]

10. Evidence ⇐82

Special judges are presumed to have been properly selected.

11. Judges ⇐16(1)

Under constitutional provision that cause in superior court can be tried by judge

8 Cal.2d 154

In re KENT'S ESTATE.

CALIFORNIA TRUST CO. v. CASSIDY et al.

L. A. 15336.

Supreme Court of California.

April 27, 1936.

As Modified on Denial of Rehearing May 25, 1936.

1. Courts ⇐212

Whether District Court of Appeal was duly constituted court of appeal when it rendered decision would not be considered on transfer of cause to Supreme Court (Const. art. 6, § 4c).

2. Courts ⇐212

Decision of District Court of Appeal in cause ordered transferred to Supreme Court is not effective as judgment and serves no further purpose than as brief on questions therein discussed (Const. art. 6, § 4c).

3. Judges ⇐14

Program of judicial council to make state judicial machinery more elastic and efficient must be interpreted broadly and applied liberally (Code Civ.Proc. § 259a; Const. art. 6, § 5, as amended in 1928).

4. Judges ⇐16(1)

Nonappearing heirs, legatees, and creditors are not "parties" to probate proceeding, and are not "parties litigant" within constitutional provision that cause in superior court can be tried by judge pro tempore upon stipulation of "parties litigant" (Const. art. 6, § 5, as amended in 1928).

[Ed. Note.—For other definitions of "Party," see Words & Phrases.]

pro tempore upon stipulation of parties litigant, written stipulation is not required, and stipulation made in open court will be presumed when required for regularity of order in absence of contrary showing affirmatively presented on record (Const. art. 6, § 5, as amended in 1928).

12. Executors and administrators ⇐513(9)

In probate proceeding for allowance of executrix' final account, failure of certain heirs and legatees to appear would be considered as a consenting that accounting could be settled.

13. Stipulations ⇐17(1)

Stipulation to which administrator was party that probate proceeding for allowance of executrix' final account might be heard by judge pro tempore *held* binding on heirs, since administrator represented heirs.

14. Executors and administrators ⇐103

Executrix *held* not liable for losses resulting through sales of stock which came into her possession during lowest depths of financial depression.

In Bank.

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge pro tem.

In the matter of the estate of Louise M. Kent, deceased. The California Trust Company, as administrator with the will annexed of the last will and testament of Louise M. Kent, deceased, filed its contest to the final account of Alice Cassidy, as executrix (now removed) of the last will and testament of Louise M. Kent, deceased. From an order, the administrator appeals.

Order affirmed.

For prior opinion, see 50 P.(2d) 457.

Chas. E. R. Fulcher, of Los Angeles, for appellant.

Russell D. Hardy, of Los Angeles, amicus curiæ.

Joe Crider, Jr., Arthur E. White, A. F. Mack, Jr., Arthur E. Briggs, and John M. Chamberlin, all of Los Angeles, and A. G. Axline, of North Hollywood, for respondent.

Ralph G. Lindstrom and Betty Marshall Graydon, both of Los Angeles, amici curiæ.

WASTE, Chief Justice.

This cause came to the Supreme Court on a petition for hearing after decision and judgment in the District Court of Appeal, Second Appellate District, Division 2.

[1, 2] The first pertinent contention made by the petitioner (appellant in the District Court of Appeal) is that the decision rendered by that court is void and of no effect for the reason that the court rendering the decision was not a duly constituted court of appeal. The court, during the consideration of the cause, was composed of the presiding justice and two justices pro tempore; the latter sitting by regular assignment made by the chairman of the Judicial Council. The question whether or not the court, thus composed, was a duly and regularly constituted court of appeal, has passed out of the picture, and requires no consideration. "The supreme court [has] power * * * to order any cause pending before a district court of appeal to be heard and determined by the supreme court." Const. art. 6, § 4c. When such an order of transfer is made, the opinion and decision of the District Court of Appeal is no more effective as a judgment than if it had not been rendered. It serves no further purpose than that it may be regarded as a brief on the questions therein discussed, and, if found satisfactory when taken over by this court on petition for hearing, it may be, and many times is, adopted as the opinion of the Supreme Court. For these reasons, the present appeal having for good cause been transferred here, there remain for consideration the additional grounds on which the cause was thus transferred, to wit, that the decision purports to overrule a decision of another division of the same District Court of Appeal [Toby v. Superior Court, 47 P.(2d) 338], resulting in a lack of uniformity of decision; and that the question involved was decided upon a point raised and argued only by amicus curiae, without participation by the parties to the appeal.

As we come to the consideration of the merits of the question as to whether Judge pro tempore Bischoff was entitled to sit in the probate court, we find the facts to be well collated and stated in the opinion prepared by Mr. Presiding Justice Crail of the District Court of Appeal. For this reason, we adopt portions of that opinion as the opinion of this court, viz.:

Louise M. Kent, deceased, left an estate consisting of securities appraised at $14,-239.38. By her will she bequeathed a total of $8,500 in cash to a number of legatees named therein. The residue was not disposed of by the instrument and went by operation of law to her heirs. Alice Cassidy was appointed executrix on April 20, 1931. On May 14, 1934, she was removed by order of court; and the trust company, objector, was appointed administrator with the will annexed. After her removal, Alice Cassidy filed her final account, to which objector (appellant) filed its contest, asserting several grounds for surcharging the account of the removed executrix. When the final account of the removed executrix came on for hearing after due notice to the world, all persons who had appeared in the proceeding stipulated in writing that the cause might be heard by Florence M. Bischoff as judge pro tempore. Miss Bischoff is a member of the bar and one of the three commissioners regularly presiding in the probate department of the superior court of Los Angeles county. She hears the uncontested or routine calendars as commissioner under section 259a of the Code of Civil Procedure. She hears contested matters when and only when all parties who have appeared in the proceeding consent in writing to her appointment as judge pro tempore. Her selection in the instant case was approved and ordered by the court in which the cause was pending. The court, Judge Bischoff presiding, after hearing the case, found against the removed executrix on all contested items except on one item for damages for alleged negligence for failing to sell listed stock of the estate within a reasonable time, and found in favor of the removed executrix on this charge of negligence. It is from this latter part of the order that the appeal is taken.

One of the contentions raised on this appeal is a jurisdictional one, and for that reason should be considered first. The contention is made that the order is void because Miss Bischoff was not duly authorized by stipulation of the parties to act as judge pro tempore. To state the contention in greater detail, it is said that she derived her power to act purely from a stipulation entered into between the attorneys for those who appeared in the estate and no others, and that the heirs at law, the devisees under the will and the creditors of the estate, all of whom were parties in interest but had not appeared, did not stipulate in writing or otherwise or at all that Florence M. Bischoff should act as judge pro tempore.

The court's jurisdiction to make the order which is appealed from, or its lack of jurisdiction, must be tested by the provisions of section 5, article 6, of the Constitution as amended in 1928, which reads as follows: "Upon stipulation of the parties litigant or their attorneys of record a cause in the superior court * * * may be tried by a judge pro tempore who must be a member of the bar sworn to try the cause, and who shall be empowered to act in such capacity in the cause tried before him until the final determination thereof. The selection of such judge pro tempore shall be subject to the approval and order of the court in which said cause is pending and shall also be subject to such regulations and orders as may be prescribed by the judicial council."

The question is one of great importance to the administration of justice in California. The amendment to the Constitution above quoted is a part of the program presented by the judicial council with the aim in view of giving to the judicial machinery of the state greater elasticity and efficiency. As a part of the same program, the Legislature, at its first session after the constitutional amendment of 1928 was adopted, enacted section 259a of the Code of Civil Procedure, which reads in part as follows: "Subject to the supervision of the court, every court commissioner of a county or city and county having a population of nine hundred thousand inhabitants or more shall * * * have power: * * * 4. To act as judge pro tempore when otherwise qualified so to act and when appointed for that purpose; provided, that while acting as such he shall receive no compensation therefor other than his compensation as commissioner; * * 6. (Uncontested actions.) When ordered by the court appointing him so to do, to hear, report on and determine all uncontested actions and proceedings other than actions for divorce, maintenance or annulment of marriage." * * *

[3] This program [of the judicial council] must be interpreted broadly and applied liberally if it is to succeed, with the proper safeguards certainly, but along the lines conducive to efficiency and vigor. Proper safeguards, so far as judges pro

tempore are concerned, were provided for in the amendment itself, which says: "The selection of such judge pro tempore shall be subject to the approval and order of the court in which said cause is pending and shall also be subject to such regulations and orders as may be prescribed by the judicial council." Const. art. 6, § 5, as amended in 1928.

The largest single use of judges pro tempore in Los Angeles county is in the probate department, where the three commissioners are accustomed to act as such, often in several proceedings each day. These commissioners, for days which have lengthened into months and now into years, have presided in the probate department as judges pro tempore. Their expertness in probate law and procedure is so well recognized, their judicial work so efficient, and the practice so satisfactory to all concerned, that these commissioners might well deserve the title of assistant judges. To a remarkable degree the result has been in consonance with the aims of the program for the expedition of judicial business. * * * (See Fifth Report of the Judicial Council, 1934, p. 5.)

It will be remembered that in probate proceedings the heirs, legatees, and creditors may be scattered to the four corners of the earth. Frequently their residences are unknown. Who the heirs and legatees actually are is not ordinarily determined in a probate proceeding until the final order of distribution. Rarely, although occasionally, the determination is made in advance of that order on a petition to determine heirship. If it is necessary for nonappearing heirs and devisees and creditors to join in such stipulations, then it is an impossibility. No such stipulations may be obtained. Furthermore, if such nonappearing heirs and devisees and creditors are parties to the proceeding and must join in stipulations before they are effective, then no stipulation in any probate proceeding may be entered into, not even with regard to the introduction of evidence or the conduct of the trial.

A decision that the order appealed from is void because of the failure to get such a stipulation from the nonappearing heirs and legatees and creditors will not only terminate this practice of appointing judges pro tempore, but will make void hundreds, possibly thousands, of orders which have been signed by such judges pro tempore, and unsettle the titles to vast amounts of real property in Los Angeles county. A decision sustaining the order will not only save the practice and save the titles to property, but will make it possible for the superior courts to expand their man power in case of temporary congestion and to decrease their man power when the emergency passes. The decision of the question is therefore an important one.

Who are parties in a probate proceeding? More than thirty years ago in the Estate of McDougald, 143 Cal. 476, 77 P. 443, 444, the Supreme Court of this state declared the law on the question, who are parties in a probate proceeding, in a well-reasoned opinion in which that question was the only question before the court, and the law so declared has been accepted and followed by the superior court of Los Angeles county and other counties from that day to this. That law has become a rule of property, followed alike by the title companies and all others interested in the vast amount of property which passes through the probate department of that court each year. In the McDougald Case, supra, the trial court had made an order settling a final account. From this order an appeal was taken, but no notice of appeal was served on the creditors who had not appeared, and the respondent moved to dismiss the appeal for the failure to serve such persons, on the theory that all of said persons were directly interested in the result, and hence were parties to the proceeding. We quote rather fully from the opinion: "If these contentions prevail, it is obvious that difficulties will arise in many cases. If a nonappearing creditor is an adverse party, so also would be a nonappearing heir or legatee. * * * The word 'party' should not be given so broad a meaning. That a person interested in an estate, although his name and his interest are disclosed on the face of the record, is not necessarily a party to the cause or proceeding, is manifest from a consideration of the different cases where persons interested may or may not appear, at their option. In a proceeding to probate a will, any person interested, whether as devisee, legatee, or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet it would not be contended that an heir, devisee or legatee who fails to ap-

pear at the time of the hearing of the petition is in any sense a party to such proceeding. So, with the petition for administration, there may be many persons who are entitled to letters, and who are interested in the matter of the appointment. But if they fail to appear or contest the right of the petitioner, it is manifest that they cannot be considered parties. Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and as such, has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account, or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding. The only effect of such a notice, so far as this question is concerned, is to give them an opportunity to become parties, so that, if they desire, they may appear and make themselves parties in some appropriate manner. Unless they do so appear, they are to be considered as having no objections to the account as rendered, and as consenting [stipulating] that it may be settled accordingly. If thereupon other interested persons do appear, and by virtue of a contest secure a decision which inures to the benefit of those persons who do not appear, this does not make the nonappearing persons parties to the contest, notwithstanding their failure to appear, so that it becomes necessary to serve upon them notice of an appeal from the order made upon the contest." The court's position is supported by citations therein from numerous decisions, including In re Ryer's Estate, 110 Cal. 556, 558, 42 P. 1082; In re Calkins' Estate, 112 Cal. 296, 297, 44 P. 577; In re Bullard's Estate, 114 Cal. 462, 46 P. 297; and other cases. See, also, In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072. This also is the rule throughout the nation. In all but a few of the probate cases when the question is raised it is held that the several persons having an interest in the subject-matter of the action, who do not appear, are not parties. See cases collected in 88 A.L.R. 442.

This law was stated again in almost the same language in McKenzie v. Hill, 9 Cal. App. 78, 98 P. 55, 56, as follows: "In a proceeding to probate a will any person interested, whether as devisee, legatee, or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet it would not be contended that an heir, devisee, or legatee who fails to appear at the time of the hearing of the petition is in any sense a party to such proceeding. * * * Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and as such has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding."

Affording some indication of the common understanding of the above law as it applies to judges pro tempore, it may be noted, though not suggested as more than of persuasive force, that the jurisdiction of courts presided over by judges pro tempore under similar circumstances has been assumed and taken for granted both by the courts and the litigants in each and all of the cases which have come up on appeal except the Toby Case, supra. For illustration, see In re Estate of Price, 138 Cal.App. 462, 32 P.(2d) 994; In re Estate of Rozen-Goldenberg, 1 Cal.App.(2d) 631, 37 P.(2d) 132; In re Estate of Price, 136 Cal.App. 257, 28 P.(2d) 717; In re Estate of Giambastiani, 1 Cal.App.(2d) 639, 37 P.(2d) 142; In re Estate of Mahn, 2 Cal.App.(2d) 111, 37 P.(2d) 478.

[4-6] All of the above has been stated in support of our decision that nonappearing heirs and legatees and creditors are not parties to a probate proceeding. It is even more obvious that they are not "parties litigant." Under the customary rules of constitutional interpretation, each word should be given some value. In the constitutional provision the word "litigant" qualifies the word "parties," and the two words must be given some value beyond the one word "parties." Obviously the phrase "parties litigant" means the parties who are taking part in the litigation—those who have appeared therein. There are many causes at law and in equity where the rights of parties are determined, although the parties themselves do not conduct the litigation. These actions, where contested, proceed under the direction of parties to the controversy who

have appeared— who are "parties litigant." At the same time the proceeding determines the rights of other parties in interest but not litigant. Among such cases are receiverships, representative suits, actions by and against trustees, and, assuming that nonappearing heirs and devisees and creditors are parties, then the several proceedings in probate.

[7] "Parties litigant, a term which has been construed to mean the antagonistic sides of a controversy." 47 Cor.Jur. 246. "Litigant. A party to a lawsuit; one engaged in litigation; usually spoken of active parties, not of nominal ones." Black's Law Dictionary. Webster gives "litigant" the same meaning as "one engaged in a law suit; as, parties litigant." Courts in other jurisdictions have upheld the authority of special judges to act upon the agreement of the active parties to the litigation, although other persons' interests may be affected. Landrum v. Chamberlin, 73 Ga. 727; Pottlitzer v. Citizens' Trust Co., 60 Ind.App. 45, 108 N.E. 36; Jensen v. Angelus B. & M. Co., 87 Wash. 392, 151 P. 825. In Ernest v. Canary, 139 Okl. 128, 281 P. 574, a probate proceeding tried by a special judge was held to be valid. Active parties to the litigation may bind passive parties by stipulation. State ex rel. Brookfield Co. v. Mart, 135 Or. 603, 283 P. 23, 295 P. 459; Zeitinger v. Hargadine-McKittrick Dry Goods Co., 309 Mo. 433, 274 S.W. 789.

[8-12] While a judge pro tempore is selected under the stipulation of the parties litigant by the approval and order of a "regular" judge, still, when acting, the judge pro tempore is acting for the superior court. The judgments and orders of the superior court, a judge pro tempore presiding, are entitled to the same presumption of regularity as a court with a regular judge presiding. Consequently the failure of the record herein to show that certain heirs or litigants stipulated in writing or orally to the selection of the judge pro tempore, in the absence of any showing in the record that they did not stipulate, is ineffective to refute the presumption of the regularity of the proceedings. Special judges are presumed to have been properly selected. In re Corralitos Cooperative Co., 130 Cal. 570, 62 P. 1076; People v. Ah Lee Doon, 97 Cal. 171, at page 177, 31 P. 933, citing Code Civ.Proc. § 1963; In re Newman's Estate, 75 Cal. 213, 221, 16 P. 887, 7 Am.St.Rep. 146; People v. Mellon, 40 Cal. 648, 655. This is the general rule. 33 Cor.Jur., §§ 235, 236, p. 1026; State v. Sachs, 3 Wash. 691, 29 P. 446. The constitutional provision authorizing judges pro tempore does not require a written stipulation. Stipulations made in open court when required for the regularity of an order are presumed, in the absence of a contrary showing affirmatively presented on the record. Leadbetter v. Lake, 118 Cal. 515, 50 P. 686; Mulcahy v. Glazier, 51 Cal. 626. Under the authority of the McDougald Case, supra, the failure of heirs and legatees to appear will be considered "as consenting" that the account may be settled.

[13] Furthermore, under our system, the administrator represented the heirs (Dennis v. Bint, 122 Cal. 39, 44, 54 P. 378, 68 Am.St.Rep. 17; 11B Cal.Jur. p. 83), and the stipulation is binding on them.

In the Toby Case, supra, the order annulled was one made, or purporting to be made, by a judge pro tempore, vacating a decree of settlement of account and final distribution. The petitioners for the writ of review were heirs to whom distribution had been made in the decree of distribution. It was held, in effect, that such distributees were not bound by the proceeding before a person appointed judge pro tempore, where consent to such appointment had not been given by the distributees or by any person authorized by them, and it was held further that the attorney, representing the estate and administratrix only, was not authorized to bind the distributees by assuming to make stipulation in their behalf. The decision in the Toby Case, limited in its application to the rights vested in distributees named in a duly entered decree of distribution, is not necessarily in conflict with the principles recognized in our decision in the instant case.

[14] Considering the facts otherwise relevant to the appeal, it appears that the respondent, Alice Cassidy, was duly appointed the executrix of the last will and testament of Louise M. Kent, deceased, who left an estate consisting of real property, personal property, cash, and stocks, all of the appraised value of $12,839.38. After serving for three years, Alice Cassidy was removed from her position as executrix, and an administrator with the will annexed was appointed in her place. After her removal, she filed her account, to which the administrator with the will annexed (appellant here) filed objections as to certain

items, on the grounds that the former executrix had been negligent in failing to care for and in not renting nor attempting to rent the real property; that she was liable for failure to account for certain funds held in trust for the estate, and for losses accruing through carelessness and negligence in failing to sell listed stocks of the estate. After examining the account and considering the objections, the trial court made and filed its findings which are in accord with the evidence. The final and supplemental account of the executrix was corrected to allow her certain credits, not first claimed, due to established errors, and was surcharged as to certain items specially noted in the findings. Briefly, these were that for over thirty-three months the executrix carelessly and negligently allowed the real property belonging to the estate to remain idle, resulting in a loss to the estate of $1,005; that she failed to pay out of a trust fund, created by the deceased for the specific purpose, the funeral expenses of the decedent amounting to $317.60. The order settling the account directs the former executrix to pay only these amounts to the present administrator with the will annexed. The findings as to the alleged losses to the estate through the failure of the executrix to sell the stocks belonging to the estate are full as to the various stocks and the transactions had by the executrix concerning them. There is no finding that any loss to the estate was caused thereby. From the order thus settling the account the administrator with the will annexed has appealed.

We may conclude, from the dates when certain of the stocks were sold by the executrix, and later by the administrator with the will annexed, and by the period during which the executrix had control of the stocks, that the trial court was of the view that the executrix was not legally, or properly, liable for any losses resulting through sales of stock which came into her possession when the financial depression of the nation was at its lowest depths.

The order appealed from is affirmed.

We concur: SHENK, J.; CONREY, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

6 Cal.2d 372

HEWITT v. SAN JOSE PAC. CO., Limited, et al.

S. F. 15634.

Supreme Court of California.

May 14, 1936.

As Modified on Denial of Rehearing June 11, 1936.

Appeal and error ⇐627(2)

Plaintiff's appeal was dismissed on ground that printed transcript of record on appeal was not filed within prescribed time, upon showing that bill of exceptions was prepared and settled and time for printing and filing transcript had long expired.

In Bank.

Appeal from Superior Court, Alameda County.

Action by Maud Hewitt against San Jose Pacific Company, Limited, as trustee, and another. From an adverse judgment, the plaintiff appeals. On motion to dismiss plaintiff's appeal.

Motion granted.

A. J. Hennessy and Kenneth B. Dawson, both of San Francisco, for appellant.

Breed, Burpee & Robinson and Harold C. Holmes, Jr., all of Oakland, for respondents.

PER CURIAM.

Respondents move to dismiss the appeal from the judgment in the above-entitled action on the ground that the printed transcript was not filed within the prescribed time. The affidavit on behalf of the moving parties and the certificate of the county clerk of Alameda county which accompanied the motion show that a bill of exceptions was prepared and settled, and the time for printing and filing of the transcript of the record on appeal in this court expired six months ago.

Appellant seeks to avoid a dismissal of the appeal on the ground that the bill of exceptions was improperly settled and allowed, and that thereafter appellant sought an order of the trial court to resettle, revise and amend the bill; that said application was denied. Appellant further contends that from this judgment of denial an appeal is now pending in this court. Investigation of the records of this court fails to show such appeal; but, on petition for rehearing, the plaintiff has filed herein a certified copy of "Notice of Appeal from Special

Order Made after Final Judgment," on file in the office of the clerk of the superior court in and for the county of Alameda. Notwithstanding the filing of such notice of appeal in the court below, we are of the view that the effort of appellant to procure from the court below a special order vacating the settlement and engrossment of the bill of exceptions in said action, and an order resettling and re-engrossing said bill of exceptions, is but another step in the delay incident to the perfecting of the appeal from the judgment herein. At the time of the argument on this motion, appellant requested a delay of five days to permit the appellant to petition for a writ of mandate to compel the trial court to take certain steps toward perfecting an appeal from the order denying revision of the bill of exceptions. While no extension of time was granted, the period of time requested has more than elapsed.

The motion to dismiss the appeal from the judgment is granted, and the appeal is dismissed.



6 Cal.2d 302

HUYSMAN et ux. v. KIRSCH.

L. A. 14448.

Supreme Court of California.

May 1, 1936.

1. Action ⇐27(1)
Limitation of actions ⇐31

Action for injuries patient sustained by reason of negligent or unskilled treatment by physician or surgeon sounds in tort and is barred within one year (Code Civ.Proc. § 340, subd. 3).

2. Limitation of actions ⇐55(3)

Action against surgeon for failing to remove rubber drainage tube, inserted in patient's abdomen during operation, after tube had served its purpose *held* not barred until year from time when tube was removed by surgeon, who had been continuously treating patient, since surgeon's negligence continued from time tube should have been removed until removal of tube (Code Civ.Proc. § 340, subd. 3).

3. Limitation of actions ⇐55(3)

Action against surgeon for failing to remove rubber drainage tube from patient's abdomen after its use in operation *held* not barred until one year after surgeon removed tube, since operation was not complete until wound had been closed and all appliances used in operation removed (Code Civ.Proc. § 340, subd. 3).

4. Limitation of actions ⇐95(1)

Action against surgeon for failing to remove rubber drainage tube inserted in patient's abdomen during operation *held* not barred until one year after surgeon removed tube, since limitation did not run against patient's right during time patient was in ignorance of cause of her physical condition and could not ascertain such cause by reasonable care (Code Civ.Proc. § 340, subd. 3).

5. Appeal and error ⇐714(5)

Statements of counsel in their briefs relative to evidence which may be produced at trial cannot be considered by reviewing court in passing on sufficiency of complaint.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Christian Huysman and Clara E. Huysman, husband and wife, against Ralph L. Kirsch. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Prior opinion, 47 P.(2d) 332.

Frank C. Dunham, Louis Semon and E. De Young Vasse, all of Pasadena, for appellants.

W. I. Gilbert, Gibson, Dunn & Crutcher, Wm. M. Rains, and Philip C. Sterry, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal from a judgment rendered by the court after the sustaining of an objection by the defendant to the introduction of any evidence in support of the allegations of the complaint, on the ground that the complaint showed on its face that plaintiffs' cause of action was barred by the statute of limitations, subdivision 3 of section 340 of the Code of Civil Procedure, the provisions of which were affirmatively pleaded by the defendant in his answer.

The action is one for damages against the defendant and respondent, a physician and surgeon, based upon certain acts of alleged negligence on the part of respondent in the performance of an operation upon one of the plaintiffs. The plaintiffs are husband and wife. In their complaint they allege that prior to the operation the plaintiff Clara E. Huysman, the wife, was in ill health and suffering from a tumor of the uterus, and that on or about the 26th day

of December, 1930, said respondent advised the appellants that a surgical operation was necessary for the proper treatment and cure of the said Clara E. Huysman; that on or about said last-named date the appellants employed the respondent as such physician and surgeon to perform said operation upon said Clara E. Huysman and to treat and cure her of said ailment; and that respondent accepted said employment. It is further alleged that thereafter, to wit, on or about the 3d day of January, 1931, at the Pasadena Hospital, in the city of Pasadena, the respondent, pursuant to said employment, undertook to and did perform a surgical operation upon the said Clara E. Huysman, making an incision in her abdomen and removing her uterus therefrom; that, while performing said operation, the respondent did use and insert in the incision so made a rubber drainage tube, about nine inches in length and one-half inch in diameter, for the purpose of draining said wound; and that from the date of said operation, and in pursuance of the terms of said contract of employment, the respondent continued to treat and counsel the appellant Clara E. Huysman concerning her said illness and operation until on or about the 12th day of December, 1932.

Allegations V and VI of said complaint here are as follows:

"V. That in disregard of his duties and obligations under said contract of employment, and while still treating the plaintiff, Clara E. Huysman, for her said illness and operation under said contract of employment, and without the knowledge or consent of the plaintiffs, the defendant knowingly, carelessly and negligently permitted the aforesaid rubber drainage tube to remain inclosed in the abdomen of the said plaintiff, Clara E. Huysman, from on or about January 9, 1931, to and including September 26, 1932, and upon each and every day during that period of time. That on or about the said 26th day of September, 1932, the defendant for the first time removed the said rubber drainage tube from the abdomen of the plaintiff, Clara E. Huysman, at which time the plaintiffs first learned that the same had been permitted to remain in the body of the said plaintiff by the defendant, as aforesaid.

"VI. That by reason of the negligence of the defendant in permitting the said rubber drainage tube to remain inclosed in the abdomen of the plaintiff, Clara E. Huysman, during each and every day of said period of time, as aforesaid, there was created and maintained in the abdomen of the said plaintiff, Clara E. Huysman, upon and during each and every day from about the date of said operation to on or about November 15, 1932, numerous running, painful sores, continually discharging pus, and requiring constant care and attention, and ever since about the date of said operation the plaintiff, Clara E. Huysman, was made sick, and still is sick, and will continue sick for an indefinite period of time to come, and has suffered, and still suffers, and for an indefinite period of time to come will continue to suffer great mental anguish and great physical pain and during all this period of time she was, and still is, and for an indefinite period of time to come will be almost totally disabled for the performance of her family and household duties, all to her damage in the sum of Twenty Thousand ($20,000) Dollars."

Paragraph VII of the complaint sets forth the damage sustained by the husband through the negligence of the defendant in performing said operation by reason of his loss of the services of his wife, and for expenditures made by him for nursing care, medicine, and appliances.

The answer of respondent consisted of denials of certain allegations of the complaint and the affirmative defense that plaintiffs' cause of action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure. Upon the trial the respondent objected to the introduction of any evidence in support of the allegations of the complaint on the ground that it appeared from said allegations that plaintiffs' cause of action was barred by the statute of limitations, which objection was sustained, and basing its action upon the order sustaining said objection, the trial court entered judgment dismissing said action.

It will be noted from the allegations of the complaint that respondent undertook to perform said operation on or about January 3, 1931, on which date he closed the wound and left therein the rubber drainage tube, and that said tube was not removed until September 26, 1932, a period of over twenty months. The complaint was not filed until January 7, 1933. The statute of limitations pleaded by respondent provides that an action for injury caused by the wrongful act or neglect of another must be commenced within one year from the date of the injury. The position of the respondent, which was acceded to by the trial court, is that the negligence of the respondent was his failure

to remove the drainage tube after it had served its purpose, and this failure the respondent contends occurred on January 9, 1931, and therefore the date of the injury was January 9, 1931, at which date plaintiffs' cause of action accrued, and was barred one year thereafter. In other words, the respondent contends that plaintiffs' cause of action was barred by the statute before they, or either of them, knew that any such cause of action existed. It should furthermore be stated that the complaint shows that the plaintiffs' ignorance of their rights was due directly and solely to the negligence of the respondent. In this factual situation, can respondent's position be maintained? As we have said, the trial court ruled with respondent. On appeal to the District Court of Appeal, that court affirmed the judgment. Thereafter, on petition of the appellants, the case was transferred to this court.

The District Court of Appeal in its opinion stated that its "conclusion leads to harsh injustices and affords a cloak for the careless and ignorant, but it seems to us that it is the only consistent construction that the courts can give to the statute." 47 P.(2d) 332, 334. In arriving at its conclusion, the District Court of Appeal relied almost, if not wholly, on the case of Gum v. Allen, 119 Cal.App. 293, 6 P.(2d) 311, which the court stated was on all fours in principle with the instant case. No petition for hearing of the Gum v. Allen Case was ever made to this court, and accordingly this court never gave it any consideration. Our attention has not been directed to any instance when the precise point here involved has been before us. It is, therefore, a question of first impression in so far as this court is concerned.

[1] It is the settled law in this state that an action by a patient against a physician and surgeon for injuries sustained by the former, by reason of the negligent or unskilled treatment of the latter, is an action sounding in tort and not upon a contract. Such an action is therefore barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure one year after the date of the injury. Harding v. Liberty Hospital Corporation, 177 Cal. 520, 171 P. 98; Kershaw v. Tilbury, 214 Cal. 679, 8 P.(2d) 109. In the case of Gum v. Allen, supra, the action was based upon the negligence of the attending surgeon in leaving a gauze pack within the abdominal cavity of the patient after the operation was completed. The action was not begun until more than a year after the operation, but was begun within a year from the time the pack was removed, which was the first knowledge the plaintiff had that it had not been removed at the conclusion of the operation. The defendant pleaded the bar of the statute. Its plea was sustained, and the judgment of the trial court was affirmed on appeal. The case is then in principle much like the instant case. That case in turn relied upon the case of Wetzel v. Pius, 78 Cal.App. 104, 248 P. 288, where the act of negligence charged against the attending surgeon was the improper setting of a fracture of the femur bone of the patient's leg. It was there held that where an act of negligence, such as the improper setting of the femur bone, causes damage, the cause of action is complete and cannot be split up so as to give a separate and independent action because of subsequent acts which merely aggravate the damage already done, or later developments which add new elements of damage. It was further held that such subsequent acts or developments will not revive the cause of action for the ordinary injury if the same has become barred.

The present case we think may readily be distinguished from the case of Wetzel v. Pius, supra, as in the instant case the operation, in so far as it consisted in opening the abdomen, removing the diseased organ, closing the wound, and leaving in the abdominal cavity the drainage tube, was properly performed. The alleged negligence of the respondent happened after all these acts were completed. This negligence consisted in leaving the drainage tube in the abdominal cavity after the purpose for which it had been left therein had been fully accomplished. This negligence continued up to the time of its removal on September 26, 1932, and it is contended appellants' cause of action did not accrue until that date. While we find no California cases holding to the contrary except the case of Gum v. Allen, supra, neither do we find any supporting authority in the decisions of this state. In other jurisdictions, however, the question has been given consideration with the following results:

In the case of Sly v. Van Lengen, 120 Misc. 420, 198 N.Y.S. 608, 610, a sponge was left within the body of the patient, and not removed until two and one-half years thereafter. It was held that the patient's cause of action accrued upon the removal of the sponge. In its decision the court stated the law as follows: "It will

be noted that the complaint alleges that the injuries complained of were occasioned, not only because defendant closed the incision without removing the sponge from plaintiff's pelvic cavity, but also because defendant negligently allowed the foreign substance to remain in plaintiff's body from day to day for upwards of 2½ years, while he continued to treat her. Accepting the allegations of the complaint as true, plaintiff's cause of action accrued as much by reason of the alleged continuous breach of duty on the part of the defendant in treating the plaintiff up to September, 1921, and in failing to remove the sponge, as it did because of the alleged negligent act of the defendant on the day of the operation, when he sewed up the opening without removing the foreign substance. According to the complaint the tort was a continuing one. 'Where the tort is continuing, the right of action is also continuing.' Moak's Underhill on Torts, p. 69."

In that case the court refers to the case of Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865, 870, 93 Am.St.Rep. 639. In this latter case we found the following apt statements: "Therefore, if we call malpractice a tort in this case, it is a tort growing out of a breach of contract which the law implies from the surgeon's employment and undertaking to perform the operation. We have seen that it was a continuous obligation, and recognized by the law, and it was alive and binding so long as the relation of physician and patient subsisted. If so, it was the ever-present duty of the surgeon to remove the sponge from the body of the patient. It was a constant and daily obligation to use ordinary skill and care, and, if omission or negligence had left a foreign substance within the walls of the incision at the operation, it behooved him to afford timely relief. * * * Neglect of this duty, imposed by a continuous obligation, was a continuous and daily breach of the same, and, as the facts show, caused continuous, increasing, daily, and uninterrupted injury.

"Should she have brought her action immediately following the sewing up of the walls inclosing the sponge? If she had done so, there were, as yet, no injurious consequences, and but nominal, if any, damages, could have been recovered. The injury consisted not so much in leaving the sponge within the cavity, as negligently continuing it there, or allowing it to remain there from day to day for about a year, and until he dismissed her from his attentions. The grievance of the plaintiff was not alone confined to the negligence in the operation, but also in the painful consequences which followed, and which, as he repeatedly assured her, would soon disappear, if she would but patiently wait. * * *

"If the doctrine is sound, and we think it is, the mere closing of the incision in question over the sponge was not the plaintiff's cause of action, if no injurious consequences followed. But if evil consequences followed, and plaintiff was injured, her cause of action accrues when her injuries occurred; and if these injuries blended and extended during the entire period the surgeon was in charge of the case, her right of action became complete when the surgeon gave up the case without performing his duty.

"Indeed, it would be inconsistent to say that the plaintiff might sue for her injuries while the surgeon was still in charge of the case, and advising and assuring her that proper patience would witness a complete recovery. It would be trifling with the law and the courts to exact compliance with such a rule, in order to have a standing in court for the vindication of her rights. It would impose upon her an improper burden to hold that, in order to prevent the statute from running against her right of action, she must sue while she was following the advice of the surgeon, and upon which she all the time relied. * * *

"The facts in the case at bar show a continuous obligation upon the plaintiff in error so long as the relation or employment continued, and each day's failure to remove the sponge was a fresh breach of the contract implied by the law. The removal of the sponge was a part of the operation, and in this respect the surgeon left the operation uncompleted. See Akridge v. Noble [114 Ga. 949] 41 S.E. 78, where this is expressly held."

Respondent contends that the case of Gillette v. Tucker has been repudiated by this court. We do not so understand our decisions. Respondent relies upon the cases of Krebenios v. Lindauer, 175 Cal. 431, 166 P. 17, and Harding v. Liberty Hospital Corporation, 177 Cal. 520, 171 P. 98. In the first of these two cases the court held that Gillette v. Tucker was not relevant to any question involved in that case, and in the latter of said cases, where the question for decision was whether the action against the hospital for the negligent treatment of a patient's fractured leg was an action ex contractu or an action ex delicto, and where the court held it was an action ex delicto, the court said (177 Cal. 520, at page 523, 171 P. 98, 99): "In this latter case (Kreb-

enios v. Lindauer) the court refers to and disposes of the case of Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865, 93 Am.St.Rep. 639, upon which the appellant herein particularly relies. That was a case of malpractice on the part of a physician, which consisted in the careless leaving of a sponge in the patient's wound after an operation. The court called attention to the fact, adverted to by the Ohio tribunal in its decision of said case, that the neglect of the physician was that of leaving the sponge in the wound until a period within the statute, during which his treatment of the case continued, but that in that case the Ohio tribunal held the action to be one ex delicto." The court then went on to analyze the case before it where there were direct and positive averments in the complaint that the negligent acts of the physician (the improper setting of a broken leg) which caused the immediate injury, accrued on a definite date, and "that the plaintiff's damage was solely referable thereto." Rather than discrediting the case of Gillette v. Tucker, we think our former decision might well be held to have approved the rulings therein.

[2] The foregoing authorities, in our opinion, announce a just and most equitable rule, and we are disposed to follow them. The case now before us is much stronger than either of the cases from the New York and Ohio courts. In each of those cases, the negligent act consisted in not removing the sponge from the body of the patient at the time of the operation. It might be well said that the negligence involved in those cases occurred in the performance of the operation. In the present case the operation, up to the closing of the wound and the leaving of the drainage tube therein, was entirely proper. The negligence occurred thereafter, by reason of the surgeon neglecting to remove the tube left in the patient's wound after it had served its purpose. This negligence continued during the entire time the tube was left in the body of the patient, and only ended upon the removal of said tube. With much greater reason than that which prompted the Ohio and New York courts to hold as they are shown to have done, cannot this court now hold that the surgeon's negligence continued up to the removal of said tube, and that the appellants' cause of action then accrued and would not be barred until one year thereafter? Such is the holding of this court which necessitates the overruling of the case of Gum v. Allen, supra.

[3] There is another principle supported by eminent authority upon which it might be held that appellants' cause of action is not barred, and that is, that an operation like that performed upon Mrs. Huysman is not complete until the wound has been closed and all appliances used in the operation have been removed.

In the case of Barnett's Administrator v. Brand, 165 Ky. 616, 622, 177 S.W. 461, the court states this principle as follows: "In performing an operation, it is the duty of a surgeon to exercise reasonable care and skill. The operation begins when the incision is made and ends when the opening has been closed in the proper way, after all the appliances necessary to a successful operation have been removed from the body. Throughout the operation the law imposes on the surgeon the duty of exercising such care and skill. The removal of the sponges or pads is a part of the operation, and an operation cannot be said to be concluded until such removal takes place." In that case the sponge was left in the body only two days, but upon the surgeon attempting the removal of it, the patient died.

In the case of Akridge v. Noble, 114 Ga. 949, 959, 41 S.E. 78, 81, the court used similar language as follows: "It seems to us that the operation begins when the opening is made into the body, and ends when this opening has been closed in a proper way after all appliances necessary to the successful operation have been removed from the body. From the time the surgeon opens with his knife the body of his patient until he closes the wound thus made, in a proper way, the law imposes upon him the duty of exercising not only due care, but due skill as well. During the entire time he must not only know what to do, but he must do it in a careful and skillful manner." In that case a sponge was left in the body of the patient and remained there for over a year, and was finally passed out of the body through the rectum. Upon the principle announced in these cases, the appellants' cause of action is not barred. In neither of these cases, however, was the question of the statute of limitations an issue.

[4] In the case of Marsh v. Industrial Accident Commission, 217 Cal. 338, 18 P. (2d) 933, 86 A.L.R. 563, an award by the commission was before this court in which the commission denied compensation in one case to an employee, and in the other two cases to the dependents of employees, who were injured in the course of their employ-

ment by inhaling dust laden atmosphere resulting in the serious impairment of the health of one, and the death of the two others. Compensation was denied in all three cases on the ground that the causes of action were barred by the six months' limitation in one case and the year's limitation in the other within which proceedings might be begun for compensation after the date of the injury. We annulled the awards, and held that the date of the injury was not the date of the exposure, nor even the date of the last exposure to the dust laden atmosphere, but rather the time when the employees became aware that their injuries were due to such exposure, or when by the exercise of reasonable care and diligence they might have ascertained that fact. In other words, we held that the statute of limitations did not run against these employees until they knew the causes of their injury, or by reasonable care and diligence should have known the cause of their injury. Our decision was amply supported by authorities from many jurisdictions. The principle running through all these authorities, and approved by our decision, was that the statute of limitations should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause. If we apply this principle to the facts in the present action, the same results will follow as the appellants in this action had no knowledge of the presence of the drainage tube in the body of Mrs. Huysman until it was removed therefrom by the respondent on September 26, 1932. During all this time she was under the exclusive care of the respondent, a reputable and skillful physician and surgeon, and both Mrs. Huysman and her husband relied solely upon him for information as to her physical condition and as to her failure to regain her health. It cannot be said, therefore, that they had any knowledge whatever of the cause of her failure to recover from the operation, or that they could have gained that knowledge by the exercise of due care and diligence prior to September 26, 1932. Before that date they were as completely in the dark as to the cause of Mrs. Huysman's injury as were Marsh and his fellow workers while they were inhaling the dust laden air in their employer's factory until the disease resulting therefrom had reached such a stage as to indicate its cause. We can see no good reason why, if the statute of limitations did not begin to run in one case, that it should run in the other. There is one very material element present in the case before us which was lacking in the Marsh Case. In that case the ignorance of the employees was due to the nature of the business in which they were employed and not to any improper or negligent act of their employer. In the present case, the ignorance of the appellants as to Mrs. Huysman's condition was due solely to the negligent act of the respondent. This fact in our opinion makes the present action even stronger than the Marsh Case in respect to the running of the statute. The Marsh Case was not cited by counsel for either of the parties herein, nor was the principle therein approved advanced in support of the appeal. We, however, consider that the case is applicable to the question involved in the present action, and have for that reason included it in the discussion of the appeal.

[5] The question of fraudulent concealment as affecting the right of respondent to plead the statute of limitations has not entered into our discussion for the reason that appellants in their supplemental brief express doubt that, even if the complaint sufficiently alleged that respondent knowingly allowed said tube to remain in the patient's body, and therefore fraudulently concealed that fact from the appellants, they might be able to produce proof of the truth of said allegation. It would therefore be a useless proceeding to reverse the judgment on the ground that the complaint was sufficient in that respect and then upon a retrial to have judgment again rendered against the appellants herein due to their failure to prove the allegations of their complaint. However, statements of counsel in their briefs relative to the evidence which may be produced at the trial have no bearing upon the question of the sufficiency of a complaint, and cannot be considered by the court in passing upon that question. Stone v. Imperial Water Co., 173 Cal. 39, 43, 159 P. 164.

For the reasons expressed herein, the judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CONREY, J.

6 Cal.2d 371

In re HARDENBERG'S ESTATE.

GARRAHAN et al. v. ROBINSON et al.

L. A. 15627.

Supreme Court of California.

May 14, 1936.

1. Attorney and client ⇐76(1)

Litigant has right to change attorneys at any stage of a proceeding.

2. Attorney and client ⇐76(1)

Appellant could change attorneys when briefs were on file and cause was ready for calendar, notwithstanding charge that appellant was influenced through misstatement of facts as to litigation, or was bribed to withdraw from her present attorneys or desired change as result of blackmail growing out of criminal difficulty in which she found herself.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding in the matter of the estate of Mary A. Hardenberg, deceased, wherein an appeal was taken by Zola Garrahan and others, Frederick Fay Robinson, administrator, being the respondent. On Zola Garrahan's motion for substitution of attorneys.

Motion granted.

Hugh M. Bole, of Los Angeles, for appellant Zola Garrahan.

G. F. Peck, of Long Beach, and Stewart & Stewart, of Los Angeles, for other appellants.

P. E. Keeler and Fred S. Patch, both of Los Angeles, for respondents.

PER CURIAM.

Zola Garrahan, one of the appellants in this cause, has made a motion for substitution of attorneys. The motion is based on affidavits and a written notice, signed by the appellant and directed to the respondents. From this notice it appears that the appellant is very much dissatisfied with certain alleged actions of the attorneys, for which reason she asks them to step aside and to no longer represent her in the cause. Opposition to the substitution is based upon the allegations contained in counter affidavits to the effect that appellant has been led to make the same through a "misstatement of the facts as to this litigation, or is the result of her being bribed to withdraw from her present attorneys, or is the result of blackmail growing out of criminal difficulty in which she now finds herself."

[1, 2] While the showing tendered by these counter affidavits raises a rather serious question, it is none the less the right of a litigant to change attorneys at any stage of a proceeding. The record discloses that all the briefs in the cause are on file, and the cause is ready for the calendar.

The motion to substitute attorneys is granted.



6 Cal.2d 381

BENNETT v. CALIFORNIA TRUST CO. et al.

L. A. 15649.

Supreme Court of California.

May 15, 1936.

1. Mortgages ⇐413

While main object of Moratorium Act is to preserve investments of owners of property, means to that end are designed as well to protect interests of creditors (St.1935, p. 1208).

2. Mortgages ⇐511

In mortgage foreclosure proceeding, whether equitable grounds are present, authorizing court to postpone sale, is addressed primarily to sound discretion of court on hearing of application (St.1935, p. 1210, § 5).

3. Mortgages ⇐511

Refusal to postpone sale of realty under a trust deed *held* not abuse of discretion, where owner had been unable to comply with provisions of order granting relief under Moratorium Act, and there was no showing of present ability to comply with order of extension made on condition that beneficiary should be reimbursed for advancements for taxes and other disbursements (St.1935, pp. 1210, 1216, §§ 5, 31).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmett H. Wilson, Judge.

Petition by Manerva D. Bennett, as executrix of the estate of William H. Bennett, deceased, and individually, against the California Trust Company and others. From an order denying the petitioner's second application for an order to postpone sale of real property under a trust deed, petitioner appeals, and defendants move to dismiss the appeal or affirm the judgment.

Motion granted, and judgment affirmed.

T. Frank Courtney, of Los Angeles, for appellant.

Swanwick, Donnelly & Proudfit and Tom W. Henderson, all of Los Angeles, for respondents.

SHENK, Justice.

The respondents moved to dismiss the appeal or affirm the judgment under rule 5, section 3.

The appeal is from an order denying the petitioner's second application for an order to postpone the sale of real property under a trust deed. This application was filed on July 19, 1935, by the petitioner as executrix of the will of William H. Bennett, deceased, pursuant to the Mortgage and Trust Deed Moratorium Act of 1935 (St.1935, p. 1208). After hearing the court made its findings and concluded therefrom that the petitioner had not made a sufficient showing for relief under the act. The sole point made on the appeal is that the court abused its discretion in denying the relief sought.

The facts upon which the court based its conclusion are briefly the following: In his lifetime, William H. Bennett and the petitioner, his wife, executed two notes, one for $6,000, due May 21, 1932, and the other for an additional $6,330 due July 15, 1933. These notes were secured by deeds of trust on the real property which is now a portion of the estate of William H. Bennett, deceased. At the times hereinafter mentioned there remained unpaid on the principal of the first note the sum of $5,400 with interest from August 21, 1932. On the second note apparently no part of the principal or interest had been paid. There was also due under the terms of the deeds of trust certain sums advanced by the beneficiary to pay taxes and improvement bond assessments. The property covered by the trust deeds was appraised at $25,000, and the net worth of the estate was shown to be about $60,000.

On April 19, 1935, the petitioner, as such executrix, commenced a proceeding pursuant to the provisions of the first 1935 Moratorium Act (Stats.1935, c. 7, p. 56), for an order postponing a sale pursuant to the deeds of trust. An order of postponement to September 1, 1935, was granted by the court to which that application was made. The order was conditioned upon the payment by the executrix to the respondents on or before June 1, 1935, of the sums advanced to relieve the property of the liens for taxes and improvement bond assessments, which aggregated at that time about $1,000, together with interest due on such advancements; and upon the further payment by the executrix to the respondent of the sum of $25 per month which was shown to be all the revenue derived from the property covered by the deeds of trust. The court reserved the power to modify or annul the order upon a showing that the conditions of the postponement were not complied with. On June 5, 1935, the respondents in that proceeding made a motion for a vacation of the order on the ground that the terms and conditions thereof had not been performed by the petitioner. Upon hearing, the motion was granted and the order of postponement was discharged.

At the time of the hearing on the second application, filed on July 19, 1935, there was a total of $2,254.72 due from the estate for advancements on account of taxes, etc., together with interest thereon. It further appeared that no payments had been made on account of said advancements, nor any further sums paid on account of the principal or interest of said notes. The court on denying relief upon this second application found that the petitioner, as executrix and individually, was and had been for a long time past wholly unable and unwilling to comply with the provisions of any order granting relief under the Moratorium statute. There was no showing made before the court of any present ability to comply with any order of extension made on condition that moneys advanced for taxes, etc., be reimbursed to the beneficiary, should such an order be made.

[1-3] The contention that the foregoing facts do not support the finding of the court that no equitable grounds exist for a further order of postponement and that an abuse of the exercise of the court's dis-

cretion, in making the order denying the present application is shown, cannot be deemed meritorious. The petitioner does not question the support for the finding that she was unable to reimburse the beneficiary for advances theretofore made, nor was there any showing that such payments could have been made within a reasonable time. The petitioner in this connection questions the truth of the finding that she was "unwilling" to comply with an order for payment of advancements. It is mere pretense, however, for one to insist that he is willing to pay when he is unable to do so. The substance of the petitioner's position on this appeal is that she was entitled to the relief sought merely upon a showing of inability to perform any of the obligations or make any of the payments required by the deed of trust. Such is not the effect of the Moratorium Act. While the main object of the act is to preserve the investments of the owners of the property, the means to that end is designed as well to protect the interests of creditors. Section 31, Stats.1935, p. 1208, 1216. By section 5 of the act the court was given power to make its order of postponement if it found equitable grounds for relief, otherwise to dismiss the proceedings. Whether such equitable grounds are present is a question addressed primarily to the sound discretion of the court on the hearing of the application. No abuse of the court's exercise of such discretion has been shown. Other points do not require discussion.

The motion is granted, and the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; CONREY, J.; LANDON, J.



6 Cal.2d 373

ROBERTS v. TITLE INSURANCE & TRUST CO. et al.

L. A. 15583.

Supreme Court of California.

May 14, 1936.

1. Mortgages ⇨357

Where petition for court order to postpone sale of realty under trust deed foreclosure was not filed within 90 days of notice of default or within 30 days of effective date of Moratorium Act, trial court was without jurisdiction to consider petition (Civ.Code, § 2924, St.1935, p. 1208, and page 1209, § 2).

2. Statutes ⇨279

Provision of Moratorium Act defining period within which petition may be filed for postponement of sale of realty under trust deed foreclosure *held* qualification of statutory right and not mere statute of limitations, and hence need not be affirmatively pleaded by demurrer or answer (St.1935, p. 1208, and page 1209, § 2).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Bessie Roberts against the Title Insurance & Trust Company and others. From an order of dismissal, plaintiff appeals.

Affirmed.

George P. Cook, of Los Angeles, for appellant.

William L. Kuehn and Franz R. Sachse, both of Los Angeles, for respondents.

CONREY, Justice.

In this action for equitable relief plaintiff petitioned pursuant to the Moratorium Act (Stats.1935, c. 348, p. 1208 et seq.) for an order of court to postpone or stay a threatened sale of real property under trust deed foreclosure. Defendants are respectively the trustee and beneficiary named in the trust deed and the alleged assignee of the beneficiary. The petition alleges that the trust deed was executed by plaintiff on September 20, 1932, to secure her promissory note for $9,000, and that notice of default (section 2924, Civ.Code) was recorded April 10, 1935, the date of threatened sale being August 6, 1935. Defendants filed no formal appearance, either by answer or demurrer, but, when the case was called on August 29, 1935, their counsel objected to the hearing. The court sustained the objection and ordered that the petition be dismissed. From this order plaintiff appealed, and the cause is now before us on motion of defendants to dismiss said appeal or to affirm the judgment.

[1] The trial court correctly ruled that it was without jurisdiction to hear the petition for the reason that it was not filed within the time required by the act, section 2 (Stats.1935, p. 1209). Said section provides: "At any time within ninety days from and after the recording of notice of default under section 2924 of the Civil Code, or at any time within thirty days after the effective date of this act, but not later than January 1, 1937, the trustor under any deed of trust upon real property * * * may file a petition * * * praying for an order postponing the sale of such property." The act was approved by the Governor on June 21, 1935, and was declared to be an urgency measure effective immediately. Plaintiff's petition was filed July 26, 1935, more than 30 days thereafter, and more than 90 days after the date of recording the notice of default (April 10, 1935). Appellant's contention that the petition could be filed at any time prior to January 1, 1937, is without merit. Obviously the clause of section 2, "but not later than January 1, 1937," fixes the termination of the period during which the act is to be in effect, and it may not be construed as permitting the filing of petitions at any time prior to such date, regardless of other limitations.

[2] Appellant argues the further question of whether the provisions of said section 2, defining the period within which petitions may be filed, constitute merely a statute of limitations or whether they set forth a qualification of the right or remedy created by the statute. Appellant contends that the provisions fall within the former classification, and she seeks to invoke the familiar rule that a statute of limitations must be affirmatively pleaded by demurrer or answer or its benefits are waived. 16 Cal.Jur. 603. We think that the provisions fall within the latter classification and state a jurisdictional requirement rather than an affirmative defense. This becomes apparent upon reference to the terms of the act, which expressly declare that it is an urgency measure, creating a special form of relief available only over a limited period, to a certain class of persons under particular circumstances. Referring to the wide distinction existing between pure statutes of limitation and special statutory limitations qualifying a given right, it is stated in 37 Corpus Juris, p. 686, as follows: "In the latter instance, time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation." This principle is recognized in the case of People v. Kings County Development Co., 48 Cal.App. 72, 191 P. 1004. It follows that the order of the court below was a proper dismissal of the proceeding for lack of jurisdiction.

The above conclusion renders unnecessary a discussion of respondents' contention on motion to dismiss that, inasmuch as a sale of the property under the deed of trust was duly held on September 6, 1935, the questions presented by the appeal have become moot and the appeal must in any event be dismissed.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



6 Cal.2d 386

CITIZENS NAT. TRUST & SAVINGS BANK v. MAHER.

TITLE INS. & TRUST CO. v. SAME.

L. A. 15572.

Supreme Court of California.

May 15, 1936.

Rehearing Denied June 11, 1936.

1. Appeal and error ⊜679(1)

Failure to make constable's return of sale a part of record on appeal *held* to preclude any claim that complaint, in action by pledgee of stock against purchaser of stock at execution sale to quiet title thereto, was insufficient because constable's return affected more stock than claimed by plaintiff.

2. Appeal and error ⊜544(2)

Objection by buyer of stock at execution sale, sued by pledgee of stock to quiet title thereto, that court had failed to make specific findings as to certain issues raised by affirmative defense would not be considered on an appeal taken on the judgment roll alone.

3. Appeal and error ⇐544(2)

On appeal on judgment roll alone, only question for consideration, other than whether complaint stated cause of action, was whether findings were within the issues and supported the judgment.

In Bank.

Appeal from Superior Court, Ventura County; H. S. Schaffer, Judge.

Separate actions by the Citizens National Trust & Savings Bank and by the Title Insurance & Trust Company against John Maher. Judgment for plaintiff in each case, and defendant appeals.

Judgments affirmed.

John C. Campbell, of Los Angeles, for appellant.

Hugh Ward Lutz, of Los Angeles, for respondents.

SHENK, Justice.

The defendant was sued in two separate actions to quiet title against any claim asserted by him in certain shares of stock of Kadota Mutual Water Company, represented by certificates described in the respective complaints. One action was brought by Citizens National Trust & Savings Bank and the other by Title Insurance & Trust Company, each of whom claimed as pledgee of W. G. Loomis. Prior to the commencement of the actions, execution had been levied upon such shares as the property of W. G. Loomis, the judgment debtor, and a sale of the shares to the defendant was had. In each action the defendant interposed the defense and prayer for affirmative relief based on his allegations of ownership of such shares by virtue of the execution sale to him. The cases went to trial on the issues framed by the complaints and answers, i. e. on the question of the validity of the sale to the defendant. The court in each case made its findings that the proceedings on execution and the sale to the defendant were void as against the plaintiffs' titles and that the plaintiffs were respectively the owners of the shares of stock involved in each action, and were in the possession and entitled to the possession of the certificates representing such stock. Judgment accordingly was entered in each case.

The defendant prosecuted an appeal from the judgment in each case. The appeals were taken on the judgment roll alone and are presented in a single record.

[1] It is contended that the complaint in the action brought by the Title Insurance & Trust Company does not state a cause of action because the description of the stock was defective. A defect in that respect is claimed to exist by virtue of the asserted fact that the constable's return of sale affected more stock than claimed by the plaintiff in that action. There are two sufficient answers to the contention. The return is not made a part of the record; and the complaint on its face sufficiently describes the property claimed by the plaintiff.

[2] The defendant next specifies several issues raised by the affirmative defense and claimed to be material, and as to which it is contended that the court made no specific findings. He contends that he is entitled to findings on all material issues. This is not an objection which will be considered on an appeal taken on the judgment roll alone. This is so for the reason that in the absence of the record of the evidence the court cannot determine whether evidence was offered on the issues tendered by the defendant and claimed to be material and as to which no findings were made. Mohr v. North Rawhide Min., etc., Co., 177 Cal. 264, 170 P. 600; Dickenson v. Kallusch, 91 Cal.App. 141, 266 P. 816; 2 Cal.Jur. p. 689.

[3] There are on these appeals only two additional questions for review, viz.: Are the findings within the issues and do they support the judgment? Norton v. Newerf, 45 Cal.App. 10, 187 P. 57; 2 Cal.Jur. p. 691. The findings made in each case are within the issues raised by the respective sets of pleadings and are unquestionably sufficient to support the judgment based thereon.

There is no merit to any point advanced for reversal.

The judgments are and each is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; CONREY, J.; LANGDON, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6 Cal.2d 368

CONSOLIDATED STEEL CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 15659.

Supreme Court of California.

May 13, 1936.

Master and servant ⇔419

Evidence that employee's fractured finger had healed in a deformed shape and with a definite loss of function and that there was a progressive destruction of the bone occurring after the original fracture had healed *held* to sustain implied finding of Industrial Accident Commission that there was a new and further disability extending time for filing claim for compensation (St.1917, p. 841, § 11(c).

In Bank.

Proceedings by the Consolidated Steel Corporation, Limited, employer and self-insurer, to review an award of the Industrial Accident Commission of the State of California, granting compensation to Ray Roldan, employee.

Award affirmed.

For prior opinion, see 50 P.(2d) 76.

Loeb, Walker & Loeb, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent.

THOMPSON, Justice.

The petitioner, Consolidated Steel Corporation, Limited, which is self-insured under the Workmen's Compensation Act (St.1917, p. 831, as amended), initiated this proceeding in review to obtain an annulment of an award of the respondent commission imposing upon petitioner liability for further medical treatment of the applicant, Ray Roldan.

Roldan received injuries in the course of and arising out of his employment on September 4, 1930, among them an injury to his left little finger. He received medical and surgical treatment and was paid compensation until February 12, 1931, having returned to work some time in January of that year. On August 29, 1934, Roldan filed an application for adjustment of his claim for further medical attention and treatment.

The petitioner contends the claim is barred by section 11 of the act (St.1917, p. 841), not having been commenced within six months of the injury or of the last payment of compensation or benefits. The commission found Roldan was entitled to further treatment and to compensation during the periods of disability caused by or resulting from the treatment, thus impliedly finding that the claim was not barred by lapse of time due to the existence of a new and further disability. Section 11, (c). It is this finding which petitioner attacks as being unsupported by the evidence.

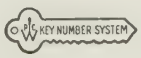
It appears from the reports of the medical witnesses contained in the record, that the fractured little finger of the left hand healed in a deformed shape and with a definite loss of function. Roldan was discharged from the hospital apparently with his finger in this condition when the period of disability caused by his other injuries had ceased. In August of 1931 Roldan sought further treatment and was examined by Dr. French of the Golden State Hospital, where he had been treated before; Dr. Herzikoff of Dr. French's staff; and Dr. Carey. An X-ray report was made by a Dr. Goin. It appears from the reports of Dr. Carey, which incorporate the X-ray findings, that there was considerable displacement and deformity of the little finger of the left hand due to the old fracture and a destruction of the distal head of the left fifth metacarpal bone which caused a tender prominence in the left palm. Dr. Carey recommended surgery to remove the deformity in the palm and to "prevent further destruction of the bone adjacent to the present destroyed joint." Dr. Herzikoff was of the opinion that plastic surgery would not greatly improve the situation, but agreed to attempt it in accordance with the suggestion of Dr. Carey. On the day appointed for the operation Roldan and Herzikoff disagreed and nothing was done. In October, 1934, Dr. Gillis examined Roldan and reported that there had been "no appreciable change since then (September, 1931), and evidently the same indications for operation are present now as were present at that time."

In Armstrong v. Industrial Accident Commission, 219 Cal. 673, 28 P.(2d) 672, where the applicant had had an accident necessitating the amputation of part of

several fingers, the limitation of motion which developed in the joints subsequent to the injury and amputation was held to be a new and further disability bringing him within subdivision (c) of section 11 so as to extend the period within which he might make application to 245 weeks after the date of injury. We think the same principle applies here. One doctor at least reported a progressive destruction of the bone occurring after the original fracture had healed. The malalignment and loss of function of the finger closely parallel the facts in the Armstrong Case. In neither case was the extent of this functional disability determinable at the time of the original injury.

The implied finding of a new and further disability is sustained by the evidence. The award of the commission is therefore affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; CONREY, J.



6 Cal.2d 376

CASPER v. CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15628.

Supreme Court of California.

May 14, 1936.

1. Municipal corporations ⇐1000(5)

Testimony *held* sufficient to support court's findings in action to enjoin issuance and sale of municipal bonds for sewer extension that improvements described in proceedings for issuance of bonds authorized by electors were not completed, that municipality always intended to extend sewer, that proceedings for issuance and sale of authorized bonds for such extension were valid, and that extension was necessary for protection and efficiency of sewer.

2. Evidence ⇐383(3)

Documentary evidence in action to enjoin issuance and sale of municipal bonds for extension of sewer, constituting one of several projects for which electors authorized bond issue, that extension of existing sewers to termini in "vicinity" of designated points for estimated sum necessary to complete all such projects was specifically authorized, *held* not to show that bond proceedings were so restrictive as to require cancellation of remainder of authorized bonds after construction of sewer to certain street intersection and initiation of new proceedings for extension thereof.

The word "vicinity" is defined as "quality or state of being near, or not remote; nearness; propinquity; proximity"; "a region about, near or adjacent"; and "adjoining space or country," and hence does not express any definite idea of space or distance, but signifies propinquity or nearness in place, not more immediate closeness or connection imported by word "neighborhood."

[Ed. Note.—For other definitions of "Vicinity," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Stephen A. Casper against the City and County of San Francisco and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Orrick, Palmer & Dahlquist, of San Francisco (W. H. Orrick, George Herrington, and W. J. Kenney, all of San Francisco, of counsel), for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondents.

Aaron N. Cohen, C. K. Bonestell, and Sidney Rudy, all of San Francisco, amici curiæ.

SHENK, Justice.

This is an appeal from a judgment for the defendants in an action to enjoin the issuance and sale of certain sewer bonds of the City and County of San Francisco.

At an election held for the purpose in 1928, a bond issue was authorized in the sum of $2,200,000 for the construction and extension of the sewer system in the City and County of San Francisco. This construction and extension program was made applicable to five different sewer projects, one of which was to be on "Alemany

Boulevard (Islais Creek), from Mission Street to the vicinity of Revere Avenue and Industrial Street." Contracts were let on all five projects, four were completed, and as to the remaining project, designated the fourth, a concrete sewer was built to the intersection of Revere avenue and Industrial street. To carry on the work thus far done, bonds in the sum of $1,809,000 were issued and sold. The city and county now proposes to construct an extension of the Alemany boulevard or Islais creek sewer from the intersection of Revere avenue and Industrial street toward San Francisco Bay as far as Hudson street, a distance of some 3,100 feet, and to issue and sell bonds of said issue for that purpose in the remaining sum of $391,000.

The plaintiff, a taxpayer, commenced this action to enjoin the issuance and sale of the bonds in the remaining sum on the asserted ground that the purposes for which the entire bond issue had been authorized had been fully accomplished, and that authority in the municipality was therefore lacking to construct the improvement now proposed from the proceeds of the remainder of said bonds.

The issues as framed by the pleadings presented the question whether the bond proceedings from their inception were so limited and restricted that the purposes of the bonds as voted had been fully accomplished or whether such proceedings were sufficiently flexible to permit the construction contemplated.

[1] The trial court considered the undisputed facts, the documentary evidence showing the record of the bond proceedings from the beginning, and the oral evidence as to the circumstances surrounding the particular proposed improvement. The court found, among other things not necessary to be related, that it was not true, as alleged by the plaintiff, that the improvements described in the proceedings leading up to the issuance and sale of the bonds had been completed, but, on the contrary, "that said work had not been fully completed or constructed and that there yet remains unfinished certain sewer construction work to be done and performed in the vicinity of Revere avenue and Industrial street, to-wit, the extension of said Alemany Boulevard (Islais Creek) sewer for a distance of approximately three thousand one hundred (3100) feet"; that "it was always the intention of the city and county of San Francisco to fully extend said Alemany Boulevard (Islais Creek) sewer from Mission Street to a point as close to the bay as possible, and that it was not the intention of said city and county of San Francisco to construct said Alemany Boulevard (Islais Creek) sewer only to the intersection of Revere Avenue and Industrial street and no further." The court further found that all the proceedings leading up to the proposed issuance and sale of the remainder of said bonds were regular and valid and that the improvement proposed was necessary to protect and save and make more efficient the sewer heretofore constructed from Mission street easterly and known as Alemany boulevard or Islais creek sewer.

The plaintiff contends that the findings are unsupported by the evidence. The only oral evidence received was the testimony of N. H. Ohmen, chief civil engineer of the engineering department of the city and county. From his testimony it is shown that from the beginning of said bond proceedings it was deemed necessary that a concrete sewer be constructed on Alemany boulevard, not only as a sewage carrier, but also as a watershed run-off carrier, and that this sewer be eventually constructed to the bay on the east; that the open ditches on each side of the boulevard would have to be displaced by the underground conduit; that the sewage conveyed by the open ditch running easterly toward the bay had become a menace to the public health and would have to be taken care of by the construction of a permanent closed sewer; that a temporary wooden conduit had been constructed for a distance easterly from the present terminus of the concrete sewer, but that this wooden box or conduit was originally only about one-half the capacity of its adjoining concrete structure, and had since become so disintegrated and dilapidated that it would not function as an outlet, and had become so filled with obstructions as to cause the water and sewage to back up and overflow the boulevard; that it was realized from the beginning that the proceeds of the entire bond issue would probably be insufficient to complete the other four projects and also construct the extension of the Alemany or Islais creek sewer all of the distance to the bay; that the extent to which it could be extended into that territory would depend in large measure upon the amount of money necessary to complete the other four projects which were in other parts of the

city and which should be fully completed before further work on the Islais creek extension was undertaken; that, because the cost of construction of the other four projects had been much less than originally estimated, there remained a larger sum to be devoted to the Islais creek extension, which result was greatly to the advantage of the city in advancing an improvement necessary to be made in order to protect and render efficient the improvement already constructed.

[2] The oral evidence was amply sufficient to support the findings based thereon, and it only remains to determine whether the documentary evidence of the bond proceedings themselves were so restrictive as to require in effect the cancellation of the remainder of said bond issue and the initiation of entirely new bond or other proceedings to carry out the project. An inspection of this documentary evidence shows that no definite sum was ever set apart for carrying out each project; that the amount of the bonds which the electors were called upon to authorize was an estimate of the sum necessary to complete the several projects as a whole; that the work of extending existing sewage systems was specifically authorized; that the termini of these extensions were not definitely fixed; that, when a terminus was indicated, it was not fixed at a definite point, but placed in the "vicinity" of that point. Webster's New International Dictionary (2d Ed.) (unabridged), defines the word "vicinity" as : "1. Quality or state of being near, or not remote; nearness; propinquity; proximity; as towns in close vicinity. A region about, near or adjacent; adjoining space or country; neighborhood; as, the vicinity of London." The word does not, therefore, express any definite idea of space or distance. It signifies "propinquity, or nearness in place, but not that more immediate closeness or connection which the Anglo-Saxon word 'neighborhood' imports." Durand's Case, 124 Me. 59, 126 A. 164, 165. As applied to the proceedings in question, the extension of the Alemany boulevard or Islais creek sewer is plainly in the vicinity of Revere avenue and Industrial street. All through the proceedings the proposed sewer is denominated an extension of an existing sewer, and such it must be deemed to be. The fact that it is further described as being in the vicinity of the streets mentioned makes for sufficient definiteness to satisfy the requirements of the law.

Counsel for the parties and amici curiæ cite numerous authorities bearing upon the legal requirements in connection with bond issues. The controversy here presents no legal difficulties when once it is determined that the facts as presented by the record support the findings and conclusion of the trial court to the effect that the proposed work is well within the uncompleted purposes of the bond proceedings and that said proceedings are in all respects regular.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; CONREY, J.



6 Cal.2d 365

FLEISCHMANN et al. v. LOTITO et al.

L. A. 15599.

Supreme Court of California.

May 12, 1936.

1. Appeal and error ⇐192(1)

Party proceeding to trial upon merits without making objection to manner of pleading cannot raise formal defects for first time on appeal.

2. Pleading ⇐433(2)

Judgment, although not relieving from complete absence of necessary averment, will cure all defects in averments as may by fair and reasonable intendment be found to have been pleaded, although only inferentially.

3. Pleading ⇐433(8)

In action to set aside fraudulent transfers, complaint alleging recovery of judgment against defendants, return of execution unsatisfied, and that conveyances were made with intent to defraud plaintiffs, *held* sufficient statement of cause of action, notwithstanding absence of direct allegation that plaintiffs were still owners of unpaid judgment, where complaint had not been demurred to.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

Action by Theodore Fleischmann and another against John Lotito and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Henry Haves, of Los Angeles, for appellants.

Lane & Lane, of Glendale, for respondents.

THOMPSON, Justice.

This is an appeal from a judgment in favor of the plaintiffs in an action to set aside as fraudulent certain transfers of property. The appeal is taken on the judgment roll alone, and the only question raised is that the complaint does not state facts sufficient to constitute a cause of action.

The complaint alleged the recovery of a judgment in the Los Angeles municipal court on a debt owed the plaintiffs by the defendants Frank and Mike A. Lotito; that execution was issued and returned wholly unsatisfied; that, after the contracting of the debt, real property was conveyed by Mike Lotito to John Lotito, a younger brother, without consideration, and personal property was purchased in the name of John Lotito with funds belonging to Frank and Mike Lotito, all of which was transferred by John Lotito to the defendant corporation, West Coast Winery, Inc.; that the transfers to John Lotito and from him to the West Coast Winery, Inc., were without valuable consideration and made with intent to hinder, delay, and defraud creditors, including the plaintiffs; that the defendants John Lotito and West Coast Winery, Inc., received the conveyances and transfers with knowledge of the fraudulent intent; and that the defendants had no other property in the state out of which the plaintiffs' claim could be satisfied.

The trial court found, in accordance with the allegations of the complaint, that plaintiffs had recovered a judgment against Mike A. and Frank Lotito, that execution had been returned unsatisfied and the judgment recorded prior to the commencement of this action, that the defendants had no other property in this state out of which the plaintiffs could realize their claim, that the conveyances were made fraudulently without valuable consideration, and in contemplation of insolvency, and that the defendants John Lotito and West Coast Winery, Inc., took with knowledge of the fraud, concluded that the transfers were void and all of the property subject to the lien of the plaintiffs' judgment, and rendered judgment accordingly.

It is objected by the appellants that no cause of action is stated for the reason that it is not directly alleged that the judgment recovered in the municipal court was unpaid, nor that the plaintiffs are still owners of the judgment.

[1, 2] While defendants' objection would undoubtedly have been sustained upon special demurrer, no demurrer, either general or special, was interposed; hence this case falls within the rule that, having proceeded to trial upon the merits without making objection to the manner of pleading, appellants cannot raise formal defects for the first time in the reviewing court. It has been many times said that, while a judgment will not relieve from a complete absence of a necessary averment, it will cure all defects in such averments as may by fair and reasonable intendment be found to have been pleaded, although only inferentially. People v. McDonald, 200 Cal. 716, 255 P. 180, and cases there cited; Adams v. Bell (Cal.Sup.) 56 P.(2d) 208.

[3] From the allegations that the plaintiffs recovered a judgment against the defendants, that execution thereon was returned unsatisfied, and that the defendants had no other property, except that fraudulently conveyed subsequent to the contracting of the debt, out of which the plaintiffs could satisfy their claims, we think it may fairly be inferred that the judgment constituted an existing claim against the defendants. It is also alleged that the conveyances were made with intent to hinder, delay, and defraud the creditors of the defendants, "including these plaintiffs." This allegation necessarily implies that the defendants were indebted to the plaintiffs at the time the latter were seeking to have the conveyances set aside and the property subjected to the judgment.

It should also be noted that this is not a case where the suit is directly upon the judgment, nor on contract, where the failure to pay constitutes the breach, but is "an action for equitable relief against the obstruction caused by a transfer, which

hinders him [the creditor] in satisfying his claim by the ordinary process of law; that is to say, by an execution. If, then, he has put himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right." Sewell v. Price, 164 Cal. 265, 128 P. 407, 409. The plaintiffs here alleged the recovery of the judgment, the issuance of execution, and its return unsatisfied. Under the above rules this was sufficient except as against a timely special demurrer.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; CONREY, J.



6 Cal.2d 389

COBB et al. v. CALIFORNIA BANK et al.

L. A. 15655.

Supreme Court of California.

May 15, 1936.

1. Mortgages ⊂=357

Where notice of trustee's sale under trust deed was duly published and posted, postponement of sale by proclamation made at time of postponement did not invalidate sale where trust deed empowered trustee to postpone.

2. Evidence ⊂=383(7)

Recitals in trustee's deed to realty sold under trust deed foreclosure that copy of notice of trustee's sale was posted in conspicuous place on property to be sold *held* conclusive on question of notice, where trust deed provided that recitals in trustee's deed of any matters of fact affecting regularity or validity of foreclosure sale should be conclusive (Code Civ.Proc. § 692, subd. 3).

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by Leroy James Cobb and another against the California Bank and others. From an adverse judgment, plaintiffs appeal. On defendants' motion to dismiss appeal or affirm judgment.

Motion granted and judgment affirmed.

R. C. W. Friday, of Los Angeles, for appellants.

Swanwick, Donnelly & Proudfit and Tom W. Henderson, all of Los Angeles, for respondents.

CURTIS, Justice.

Motion to dismiss appeal or affirm judgment on the ground that the appeal is taken for delay only, and the questions upon which the decision of the cause depends are so unsubstantial as not to require further argument.

The points relied upon by appellants in their briefs are: (1) In the sale of real property under a trust deed, where a number of continuances were had, the sale was illegal when the only notices of such continuances were given orally at the time of such continuances; and (2) no notice of sale was posted upon the premises to be sold, as required by section 692, subdivision 3 of the Code of Civil Procedure.

[1] Answering the first point made above, this court in two recent cases has held that, where the trust deed provides that the trustee may from time to time postpone such sale by proclamation made at the time of postponement, no further notice need be given by posting or publication. The trust deed under which the property involved herein was sold contained such a provision. There is no merit, therefore, in appellants' first point. Alameda County Home Investment Co. v. Whitaker, 217 Cal. 231, 18 P.(2d) 662; Craig v. Buckley, 218 Cal. 78, 80, 21 P.(2d) 430.

[2] The second point is equally untenable. The deed of trust under which the property was sold contains the usual recitals that the recitals in the trustee's deed of any matters of fact affecting the regularity or validity of the foreclosure sale shall be conclusive proof of the truthfulness thereof, and that said trustee's deed shall be conclusive against all persons as to all matters of fact therein recited. The trustee's deed recites that a copy of the notice of trustee's sale was posted in a conspicuous place on the property to be sold. The appellants herein were concluded by these recitals in the trustee's deed. Sorensen v. Hall, 219 Cal. 680, 28 P.(2d) 667; Central National

Bank of Oakland v. Bell (Cal.Sup.) 54 P. (2d) 1107.

The motion to affirm is granted, and the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CONREY, J.



6 Cal.2d 390

McGEE v. CITY OF LOS ANGELES.

L. A. 15688.

Supreme Court of California.

May 15, 1936.

1. Stipulations ⊂=3

In condemnation proceeding, owner of land may agree with agents of condemnor as to value of his property, and may stipulate accordingly, such stipulations being regarded as establishing facts stipulated and as taking place of evidence with regard thereto.

2. Estoppel ⊂=62(4)

Where two condemnation proceedings were instituted by city against property owner for street purposes and in first proceeding parties stipulated as to value of condemned property and award to be made under each proceeding and where first proceeding was completed and one payment provided for in second proceeding made, city *held* estopped to dismiss second proceeding after property owner demolished building and built new one in reliance on condemnation stipulation and in conformance therewith.

3. Equity ⊂=1

Equity does not wait on precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by William M. McGee against the City of Los Angeles. From an adverse judgment, the plaintiff appeals.

Reversed.

Prior opinion, 51 P.(2d) 1109.

George E. Cryer and R. Alston Jones, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for respondent.

WASTE, Chief Justice.

This is an appeal from a judgment entered upon the sustaining of a demurrer to the complaint without leave to amend.

By this action appellant seeks to recover the amount of a judgment awarded him in a condemnation action which was subsequently abandoned by the respondent city. The allegations of the complaint disclose that appellant is the owner of a parcel of real property situate at the corner of Olive street and Venice boulevard in the city of Los Angeles. The parcel had a frontage of 120 feet on Olive street and 100 feet on Venice boulevard. Erected thereon and covering the entire parcel was a two-story brick office, store, and garage building. The respondent city proposed to widen each street, and thereupon instituted a proceeding to condemn a 30-foot strip of appellant's property facing Olive street, and on which a portion of the building was situated. At the same time the city made it known that it would shortly thereafter commence a second proceeding to condemn a strip of land along Venice boulevard for the purpose of widening and straightening that street. By this proceeding it was proposed to take a 10-foot strip of appellant's lot facing on Venice boulevard with that part of the building located thereon.

In the course of the trial of the Olive street action it was stipulated between appellant and the city that the proposed improvements would destroy appellant's building beyond the possibility of practical repair and reconstruction. It was further stipulated that the value of the building was $58,777.34, and that this amount should be awarded appellant in two sums, $44,083 in the Olive street action, then on trial, and $14,694.34 in the Venice boulevard action, to be thereafter instituted. The Olive street action was prosecuted to final decree and the respondent city paid appellant the stipulated award therein. The Venice boulevard action proceeded to interlocutory decree and was subsequently abandoned. In the interim, however, and in reliance on the stipulation and understanding with the city through its counsel in the Olive street action, the appellant proceeded to and did demolish and remove

his building and erected another, built to the property lines as the city proposed to establish them in the two actions, at a cost of $51,500 in excess of the amount received by him as damages in the Olive street action. This action was thereupon brought by appellant to recover the sum of $14,694.34, which by the stipulation was to be awarded to him in the abandoned Venice boulevard action.

The stipulation underlying the present controversy was entered into between the deputy city attorney in charge of the Olive street action and appellant's then attorney. It recites in part:

"Whereas, the improvements and conditions herein described will destroy said brick building beyond practical repair and reconstruction, and it appears that the least expensive and most practical solution is the purchase of the said building by the City of Los Angeles, a municipal corporation, plaintiff in this action, and its removal entirely; and

"Whereas, the said building will probably be removed by the proceedings in the above entitled action [Olive Street action, then on trial] before Referees or Court make an award to this defendant [appellant here] for the damage caused the defendant in the action for the * * * widening and straightening of Venice Boulevard * * * and it is intended by stipulation to fix the damage in each of said actions so that the plaintiff may proceed at once in the improvement contemplated in the above entitled [Olive Street] action, * * * and

"Whereas, the value of said building is hereby agreed to be the sum of $58,777.34, * * *

"Now Therefore, It is Hereby Stipulated, in view of the foregoing facts, all of which are made a part of this stipulation, that in the above entitled [Olive Street] action * * * the defendant William M. McGee shall be awarded the sum of $44,083 as the damage accruing to him by reason of the removal of said building, and that in the action * * * for the widening and straightening of Venice Boulevard * * * which action is not yet filed, but it is contemplated will soon be filed, the defendant shall be awarded the sum of $14,694.34 as the damage accruing to him by reason of the removal of said building."

[1] It is settled that in a condemnation proceeding the owner of land may agree with the agents of the condemnor as to the value of his property, and may stipulate accordingly. In City of Los Angeles v. Oliver, 102 Cal.App. 299, 332, 283 P. 298, 311, it is stated that "such stipulations have always been regarded by the courts as establishing the facts stipulated and as taking the place of evidence with regard thereto." In each of the condemnation proceedings here involved the trial court by its findings accepted the stipulated value of the building and in each instance made the award agreed upon, one of which, as stated, has been paid to the appellant.

[2] Under the circumstances here present, we cannot accept the contention of the city that when the awards were made as agreed between the parties, the purpose of the stipulation had been fulfilled and the city was thereafter free to abandon the second condemnation proceeding without paying to the appellant the award therein provided. As we read the stipulation, it was more than a mere agreement fixing the value of the destroyed building, which agreement was to take the place of evidence on the subject. The stipulation expressly referred to the then pending Olive street improvement proceeding and to the then contemplated, but later abandoned, Venice boulevard improvement, the joint effect of which was, as recognized in the stipulation, to make appellant's building valueless. With this thought in mind, the parties stipulated to the value of the building, a portion of which was to be awarded in each proceeding, "so that the plaintiff [city] may proceed at once" with the Olive street improvement, the parties at all times also having in mind, and so stating in their stipulation, that appellant's "building will probably be removed by the proceedings in the above entitled [Olive Street] action before Referees or Court make an award to [appellant] for the damage caused" by the Venice boulevard improvement proceeding. The fact that appellant then proceeded to and did demolish and remove his building, as contemplated by the parties, prior to the abandonment of the second or Venice boulevard improvement proceeding, and at great expense to himself had erected a new building to conform to the proposed new lines of both streets, estops the city to deny liability to the appellant in the amount of that portion of the value of the building agreed between the parties as the award to be made in the abandoned proceeding.

[3] In our opinion this cause presents one of those exceptional situations, recog-

nized in Times-Mirror Co. v. Superior Court, 3 Cal.(2d) 309, 44 P.(2d) 547, 557, and in City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002, where justice and right require the invocation of the principle of estoppel in pais in favor of a citizen or private party and against a municipality. As stated in the case first above cited, "equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention."

The complaint alleges, in substance, that on the faith of the stipulation with the respondent city, entered into during the trial of the Olive street improvement proceeding, which stipulation was thereafter approved by the court in each improvement proceeding and one of the payments therein provided for made by the city, the appellant demolished a valuable building prior to the abandonment of the Venice boulevard improvement proceeding, as in the stipulation it was expressly contemplated he "probably" would do, and erected another building at great expense conforming to the proposed new lines of both streets, in the firm and, in our opinion, warranted belief that the city would keep and perform the remaining portion of the stipulation providing for the payment to him of $14,694.34, the unpaid portion of the agreed value of the destroyed building. We experience no hesitancy in declaring that the complaint adequately pleads an estoppel and a cause of action against the respondent city.

The judgment is reversed.

We concur: SHENK, J.; CURTIS, J.; CONREY, J.; LANGDON, J.



6 Cal.2d 248

KAYSSER v. McNAUGHTON et al.

L. A. 15473.

Supreme Court of California.

April 30, 1936.

Rehearing Denied May 28, 1936.

1. Corporations ⇐391

Corporations are creatures of statute and subject to legislative control.

2. Constitutional law ⇐26

Legislature may exercise all legislative powers not denied to it by the State Constitution or not inconsistent with State or Federal Constitution.

3. Corporations ⇐217

Repeal of self-executing constitutional provision relating to stockholders' liability for corporate debts *held* not to repeal statute which related to same subject and was not in conflict with Constitution, so that liability of stockholders continued under the statute after repeal of constitutional provision (Civ. Code, § 322; Const. art. 12, § 3, as amended in 1928).

4. Constitutional law ⇐26

Legislature may pass statute imposing same liability as is imposed by self-executing provision of Constitution, so long as statute is consistent with Constitution.

5. Corporations ⇐215

Statute providing that no person should be liable on instrument whose signature does not appear thereon *held* not to relieve corporate stockholders from liability on ground stockholders' names did not appear on instruments evidencing corporate debts, since stockholders' liability arose by operation of law from creation of the debt by corporation and did not arise from written evidence of the indebtedness (Civ.Code, §§ 322, 3099; Const. art. 12, § 3, as amended in 1928).

6. Corporations ⇐217

In action based upon statutory stockholders' liability for corporate debts, that statute creating liability was repealed prior to date of renewal note which was not alleged to have been executed in payment of old note did not affect stockholders' liability which was created by original indebtedness (Civ.Code, § 322; St.1931, p. 444).

7. Corporations ⇐247

Statute providing that stockholders who are required to pay corporate debts are subrogated to claims of creditors against corporation *held* not to place stockholders in position of sureties as respects stockholders' liability; hence subsequent extension of time of notes evidencing obligation incurred by corporation did not operate to release stockholders (Civ.Code, § 322a, added by St.1931, p. 1784; § 322).

In Bank.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by G. Virginia Kaysser against Guy McNaughton and others. From an adverse judgment, the plaintiff appeals.

Reversed.

Prior opinion, see 46 P.(2d) 217.

Griffith & Thornburgh and Butcher & Haines, all of Santa Barbara, for appellant.

Pillsbury, Madison & Sutro, F. D. Madison, Marshall P. Madison, and Gerald S. Levin, all of San Francisco, Lawler & Degnan, Max Felix, and Garnet C. Rainey, all of Los Angeles (Edward D. Neuhoff, of Los Angeles, of counsel), amici curiæ.

E. W. Squier and J. F. Goux, both of Santa Barbara, for respondents Archambeault, Cobb, Hunt, and others.

T. H. Canfield, of Santa Barbara, for respondents Fred and Alice Jackson.

Frank M. Gunter and MacCutchen, Olney, Mannon & Greene, all of Los Angeles, amici curiæ.

SHENK, Justice.

The main question presented on this appeal is whether stockholders in a corporation are proportionately liable for the debts incurred by the corporation between November 4, 1930 (the date of the repeal of article 12, section 3, of the Constitution), and August 14, 1931 (the effective date of the repeal by the Legislature of section 322, Civ.Code). Stated another way, did the repeal of the constitutional provision repeal the provision of the Civil Code dealing with the same subject?

The question is presented on the following state of facts: Appellant, as assignee of certain claims against the Mortgage Securities, Inc., of Santa Barbara, a California corporation, brought this action against respondents, stockholders of the corporation when the debts were originally incurred, in an attempt to collect from the stockholders named their alleged proportionate stockholders' liability. The debts which form the basis of this action were all evidenced by negotiable promissory notes and were originally contracted, in the amounts set forth in the complaint, by the corporation with appellant's assignors, subsequent to November 4, 1930, but prior to August 14, 1931. Suit was filed in April of 1933. The complaint was in eight counts. Respondents demurred generally and specially. The demurrers were sustained without leave to amend. Appellant promptly filed a motion for leave to amend. The trial court denied the motion, judgment was entered dismissing the complaint, and this appeal perfected. In view of the motion for leave to amend, on this appeal we are concerned solely with the problems raised by the general demurrers. The main problem thus presented, as above indicated, is the date upon which the stockholders' liability was repealed.

Prior to its repeal on November 4, 1930, article 12, § 3, of the Constitution, read in part as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association."

Prior to its repeal on August 14, 1931, section 322 of the Civil Code, so far as pertinent here, read:

"Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation.

"Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith."

The repealing statute contained an express saving clause, which reads as follows (St. 1931, p. 444):

"Section 1. Sections 322 and 322a of the Civil Code are hereby repealed.

"Sec. 2. The repeal of said sections shall not in any way impair or affect any remedy or any cause of action for any liability incurred or accrued under said sections prior to the time this act takes effect."

On November 4, 1930, article 12, § 1, of the Constitution, was amended to read as follows: "The Legislature shall have

power, by general laws and not otherwise, to provide for the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders or members. All laws now in force in this state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed."

The purpose of this amendment is evidenced by the following language appearing therein (see St.1929, pp. 2238, 2239): "For the purpose of removing existing limitations upon the power granted by section 1 of article twelve of the Constitution amended as herein proposed, sections 2, 3, 9, 11, 12 and 14 of article twelve of the Constitution are hereby repealed."

Article 22, § 1, of the Constitution, as it has read since the present Constitution was adopted in 1879, and as it now reads, provides: "That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature; and all rights, actions, prosecutions, claims, and contracts of the state, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted. The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, eighteen hundred and eighty, unless sooner altered or repealed by the legislature."

Keeping the above constitutional and statutory provisions in mind, we turn directly to a discussion of the effective date of the repeal of section 322 of the Civil Code.

[1-3] The solution depends partially at least on an understanding of the history of stockholders' liability in this state. The liability of a stockholder for the debts of the corporation was unknown at common law. French v. Teschemaker, 24 Cal. 518. In this state, no constitutional authority would be required for the imposition of such a liability. Corporations are, of course, creatures of statute and subject to legislative control. The Legislature may exercise all legislative powers not denied to it by the State Constitution or not inconsistent with the state or Federal Constitution. In the absence of a constitutional prohibition, the Legislature could have passed a statute imposing a stockholders' liability. However, since 1849 and until November 4, 1930, there has existed a constitutional provision that has acted as a restraint or limitation on the Legislature's powers. The Constitution of 1849, art. 4, §§ 32 and 36, contained provisions on the subject. These provisions were not self-executing and, without a legislative enactment, would have been ineffectual to impose any liability. This was one of the holdings in French v. Teschemaker, supra. In 1853 such a statute was passed. Comp. Laws 1850–53, pp. 273, 277. In the French Case it was held that this statute was consistent with the constitutional provision. In 1872 section 322 of the Civil Code was enacted, the substantive portion of which read substantially as above quoted. This section was based partially on prior statutes, but contained some additions. The section is in two parts. The portion above quoted imposed the substantive liability. The balance of the section dealt with procedure. It is quite obvious that, when this section was passed in 1872, the constitutional provision in question not then being self-executing, the Code section operated to impose the liability. The Constitution of 1879 included therein article 12, § 3, above quoted, which is practically identical with the substantive provisions of section 322. This constitutional section was self-executing. In Gardiner v. Bank of Napa, 160 Cal. 577, 586, 117 P. 667, 671, it was held that section 322 of the Civil Code was not inconsistent nor in conflict with article 22, § 3, and was therefore still in force. After first referring to article 22, § 1, of the Constitution, above quoted, expressly keeping in effect statutes not inconsistent with the Constitution, and quoting from Borland v. Haven (C.C.) 37 F. 394, it was stated:

"If, therefore, the provisions of section 322 quoted are not inconsistent with the provisions of article 12, § 3, they are, in express terms, continued in force. As we have already seen, they are clearly not inconsistent, but in all respects in harmony. Under both, the stockholder is liable in the aggregate for his proportion of all debts and liabilities of the corporation contracted while he was a stockholder, and no more. The Constitution does not provide how the liability shall be enforced, wheth-

er against each stockholder separately, or all jointly, while the statute goes further, and does so provide for its enforcement, and that provision is not inconsistent with the provision of the Constitution, but in the end it reaches the same result. Larrabee v. Baldwin, 35 Cal. 155, 156, and other cases affirming it, establish this point. Were section 322 to be formally re-enacted now by the Legislature, would anybody pretend that it would be inconsistent with the constitutional provision now in question in such sense as to render it unconstitutional and void? I apprehend not. If it would not be inconsistent, and therefore unconstitutional and void, if formally re-enacted, it cannot be inconsistent, and therefore repealed now. If it could stand with the Constitution upon re-enactment, it can stand with it now. Not being inconsistent, as we have seen, it is in express terms continued in force."

What, then, was the source of the stockholders' liability subsequent to 1879? In the many cases decided on the subject since that date some refer to the Constitution as the source of the liability, others to the Code section, and many to both. Inasmuch as the Constitution and the Code section were for all practical purposes identical, it is obvious that, until the constitutional provision was repealed, there was no need to determine whether the Code section served to impose the liability. Now that that question is directly presented, it seems clear that prior to 1930 the liability was imposed by both the Constitution and the Code section. The repealing provision of the constitutional measure of 1930 did not directly repeal the Code section, and we have concluded that it did not repeal it by implication.

[4] This conclusion follows from several different premises. In the first place, there is no prohibition in the Constitution, nor is there any general principle of law, which would prevent the Legislature from passing a statute imposing the same liability as is imposed by a self-executing provision of the Constitution, so long as the statute is consistent with the Constitution. In the second place, section 322 was passed at a time when the constitutional provision then existing was not self-executing, and therefore the Code section, as originally passed, served to impose the liability. The Constitution of 1879 did not repeal section 322, but, on the contrary, by article 22, § 1, it expressly continued it in force. When the constitutional provision was repealed in 1930, there was nothing in the repealing provision indicating an intent to repeal the Code section; in fact, the language used, as above quoted, shows simply an intent to release the Legislature from the restraints formerly existing. When section 322 of the Civil Code was originally passed, it secured its vitality from the general powers of the Legislature as they existed in 1872. No express constitutional authorization was necessary to adopt it and thus create the liability. After 1879, its continued vitality rested upon both that power and article 22, § 1, of the Constitution. Its effectiveness was never wholly dependent upon article 12, § 3, one of the main purposes of which was to circumscribe the powers of the Legislature otherwise vested in that body. Therefore the repeal of that section did not disturb the continued existence of the Code section.

Respondents place some reliance upon the case of Coombes v. Getz, 285 U.S. 434, 442, 52 S.Ct. 435, 436, 76 L.Ed. 866, wherein the court stated that the repeal of another portion of article 12, § 3, "put an end to the rule for the future." The court was there considering the so-called directors' liability, which was to be found solely in the constitutional provision. Obviously, when the constitutional provision was repealed, there was no other source of the liability. That is not the situation here presented.

The problem here involved has been before the courts, both federal and state, on several occasions. In both jurisdictions the decisions are conflicting. In Fine & Son v. Hall, 21 P.(2d) 697, the District Court of Appeal, Third District, held that the stockholders' liability, as imposed by section 322 of the Civil Code, continued until August 14, 1931. A hearing was granted in that case, but the appeal was dismissed before decision by this court. The United States District Court for the Southern District of California in In re Motor Transit Terminal Corporation, 4 F. Supp. 841, came to the same conclusion, as did likewise the Court of Appeal for the Fourth Appellate District, in Rainey v. Michel, 48 P.(2d) 147. A hearing in the last-named case was granted by this court, and an opinion and decision therein is filed concurrently herewith. On the other hand, the United States District Court for the Northern District of California, in Hoffman v. W. H. Worden Co., 2 F.Supp. 353,

and the Second Appellate District, Division 2, in the present case (46 P.(2d) 217), held that the repeal was effective November 4, 1930. For reasons hereinbefore stated, the holdings of the three cases first above mentioned are necessarily preferred.

[5] Another contention of respondents is based upon the fact that, according to the allegations of the complaint, all of the corporate debts upon which the action is predicated were evidenced by negotiable promissory notes. It is argued that as to any corporate indebtedness arising between November 4, 1930, and August 14, 1931, evidenced by a negotiable promissory note, no stockholders' liability arose because of the provisions of section 3099 of the Civil Code. That section provides in part: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided."

It is argued that, since respondents' signatures do not appear on the notes, and that since section 3099 of the Civil Code was enacted subsequent to section 322 of the Civil Code, and that since between the dates here involved the sole source of the liability was section 322, it necessarily follows that section 3099, being inconsistent and later in time of passage, and applying to a specific type of liability, must be deemed controlling. The argument cannot be given the effect contended for. The stockholders' liability as it existed prior to August 14, 1931, did not arise out of any written evidence of indebtedness executed by the corporation, such as a promissory note. The liability arose by operation of law from the creation of the debt by the corporation. Such liability was independent of the note. This was held in Winona Wagon Co. v. Bull, 108 Cal. 1, 40 P. 1077, Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335, and Tierney & Lawford, Inc., v. Wilshire Cafe Co., 209 Cal. 605, 289 P. 621. The respondents are not being sued as parties to a negotiable instrument, but as stockholders, for the liability which attached to them when the indebtedness was incurred. Section 3099 of the Civil Code, therefore, has no application to this case.

[6] This same reasoning disposes of other contentions of respondents with respect to the sixth and eighth counts of the complaints. In the sixth count, it is alleged that on March 12, 1931, one of the appellant's assignors lent to the corporation in which respondents were then stockholders $15,000; that the debt was evidenced by a negotiable note, which is set forth in hæc verba in the complaint; that upon maturity of the note—June 10, 1931—the note was renewed and a new note payable September 8, 1931, was executed; that on September 8, 1931, the renewal note, together with another note for $5,000, then falling due, was again renewed and a new renewal note executed. The eighth count alleges the creation of a $5,000 indebtedness on June 8, 1931; the execution of a promissory note evidencing the same; also that on September 8, 1931, that note, together with another note then falling due, was renewed, and a new renewal note executed. In both counts it is alleged that interest was paid until December 7, 1931. It is first contended that, section 322 having been repealed before the renewal notes were executed, no stockholders' liability attached. This contention is answered by the foregoing conclusions. The stockholders' liability springs from the original indebtedness, not from the note or the renewal note. The date of the renewal note is immaterial, since it is not alleged that it was executed in payment of the old note. United States National Bank of Los Angeles v. Stiller, 216 Cal. 324, 14 P.(2d) 78.

[7] The next contention as to these two counts is based upon section 322a of the Civil Code, adopted in 1931 (St. 1931, p. 1784). It provides: "Any shareholder who because of his proportionate stockholder's liability under statutes heretofore in effect and not in discharge of his obligation to pay the full consideration agreed to be paid for his shares, has heretofore made or shall hereafter make any payment in discharge in whole or in part of any debt or liability of the corporation shall be subrogated to the extent of such payment to the claim of the creditor against the corporation."

It is contended that, by accepting the alleged renewal notes after section 322a was adopted, the payee, by thus extending the time of payment and modifying the obligation to pay interest, exonerated the stockholders from liability. The theory of this contention is that by said section stockholders have become mere sureties or quasi sureties for the corporation, and that the extension of time released them. The unsoundness of the argument is apparent. Whatever effect section 322a had on the rights of the stockholder as against the corporation, it could not lawfully affect the rights of a creditor against a stockholder

without impairing the obligation of contract. As already stated, the sixth and eighth counts are not based on the renewal notes, but on the original obligations. There was no waiver or relinquishment of the original liability. Clark v. Berlin Realty Co., 33 Cal.App. 50, 164 P. 333. Appellant's causes of action were based upon the pre-existing obligations, and were necessarily determinable by the law in existence when the obligations arose. The direct and original liabilities on which the present action is based, including the liabilities set forth in the sixth and eighth counts, were created during the life of section 322 and prior to the passage of section 322a. The liability imposed by section 322 was not derivative or secondary, but primary and independent. Neilson v. Crawford, 52 Cal. 248. It was not the liability of a surety but that of a principal debtor. Sonoma Valley Bank v. Hill, 59 Cal. 107; Young v. Rosenbaum, 39 Cal. 646; Hyman v. Coleman, 82 Cal. 650, 23 P. 62, 16 Am. St.Rep. 178; Ellsworth v. Bradford, supra. The relationship between creditor and stockholder prior to August 14, 1931, was contractual. Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A.L.R. 1380. If section 322a purported to change the existing primary liability into one of suretyship, such change would be an unlawful impairment of the obligations of the contract.

For the foregoing reasons, the judgment appealed from is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; CONREY, J.; SEAWELL, J.



6 Cal.2d 259

RAINEY, State Superintendent of Banks, v. MICHEL et al.

L. A. 14462.

Supreme Court of California.

April 30, 1936.

Rehearing Denied May 28, 1936.

1. Statutes ⇐72, 76(1), 80(1)

Term "general laws" as used in amending constitutional provision so as to authorize Legislature to legislate as to corporations "by general laws and not otherwise" was used in opposition to "special laws," and did not mean that any law dealing with subject of stockholders' liability must apply generally to all stockholders of all corporations, even though valid basis for classification might otherwise exist (Const. art. 1, § 11; art. 4, § 25, subd. 33; art. 12, § 1, as amended Nov. 4, 1930, see St.1929, p. 2239).

[Ed. Note.—For other definitions of "General Law" and "Special Law," see Words & Phrases.]

2. Statutes ⇐80(1)

Amendment to constitutional provision so that Legislature was authorized to legislate as to corporations "by general laws and not otherwise" *held* not to repeal provisions of Code authorizing classification of corporations as to formation, organization, and regulation (Civ.Code, § 414 et seq.; Const. art. 12, § 1, as amended Nov. 4, 1930, see St.1929, p. 2239).

3. Statutes ⇐68

Legislative act applicable to one class only, when that class is reasonably subject to classification, is a "general law," and is not in conflict with any constitutional provisions prohibiting special legislation (Const. art. 1, §§ 11, 13, 21; art. 4, § 25).

4. Constitutional law ⇐70(1)

Question as to whether any legal basis exists for a particular legislative classification is primarily one for legislative determination, and courts will not interfere unless such classification is manifestly unreasonable or arbitrary.

5. Constitutional law ⇐48

Constitutionality of legislative enactment is presumed, and any doubt respecting its constitutionality will be resolved in its favor.

6. Statutes ⇐80(1)

Bank Stockholders' Liability Act *held* not invalid as in conflict with constitutional provision authorizing Legislature to prescribe liability of corporate stockholders "by general laws and not otherwise" because act imposed liability on stockholders of state banks and none on those of other corporations, since act was a "general law," as it was applicable to all persons within a class founded on a natural, intrinsic, and constitutional distinction (St.1931, p. 338; Const. art. 1, §§ 11, 13, 21; art. 4, § 25; art. 12, § 1, as amended Nov. 4, 1930, see St.1929, p. 2239).

7. Statutes ⇐80(1)

Banks are engaged in business affected with public interest and are subject to regulation under police power, which warrants special classification.

8. Constitutional law ⇐70(3)

Whether special treatment of banks should extend to stockholders' liability as well as regulation of ordinary business of banks is matter for legislative discretion.

9. Statutes ⇐80(1)

Banking business is so highly specialized and connected with public interest that statute imposing liability on stockholders of state banks and not on stockholders of other corporations is valid for protection of depositing public and to insure careful administration on part of banking corporation of its public trust (St.1931, p. 338; Const. art. 1, §§ 11, 13, 21; art. 4, § 25; art. 12, § 1, as amended Nov. 4, 1930, see St.1929, p. 2239).

10. Constitutional law ⇐299

Bank Stockholders' Liability Act *held* not to deny due process because it made action of superintendent of banks conclusive on stockholders of necessity for assessment without giving stockholders right of hearing, where act did not deprive stockholder of right to urge in court any legitimate defense that he had when sued for assessment and stockholder could only by suit be compelled to pay assessment (St.1931, p. 339, § 2).

11. Statutes ⇐49

Bank Stockholders' Liability Act *held* not invalid as too vague and uncertain to be enforced for reason that full extent of liability thereunder could not be ascertained (St.1931, p. 338).

12. Statutes ⇐225¾

Presumption existed that Legislature in enacting statute based upon federal statute which had been construed prior to enactment of state statute intended that construction given federal statute should apply to state statute (St.1931, p. 338).

13. Constitutional law ⇐80(2)

Bank Stockholders' Liability Act giving superintendent of banks right to determine necessity for liquidating banks and right to fix amount of assessments against stockholders and making such determination conclusive *held* not unconstitutional as vesting judicial power in superintendent of banks (St. 1931, p. 338).

14. Constitutional law ⇐154(2)

Bank Stockholders' Liability Act imposing liability based upon ownership of stock prior to passage of act *held* not unconstitutional as impairing obligation of stockholder's contract, in view of constitutional provision existing at time stock was purchased allowing corporate laws to be altered at any time (St. 1931, p. 338; Const.U.S. art. 1, § 10; Const. Cal. art. 1, § 16).

15. Constitutional law ⇐154(2)

Constitutional provision that corporate laws may be altered at any time must be read into charter of every corporation, and contract between stockholder and corporation is subject to exercise of such power reserved by constitutional provision (Const. art. 1, § 16).

16. Constitutional law ⇐48

Where language of statute is subject to more than one interpretation, that interpretation which would not render act unconstitutional must be adopted.

17. Constitutional law ⇐48

Bank Stockholders' Liability Act *held* applicable only to debts and liabilities contracted or incurred after effective date of act, notwithstanding act was susceptible to construction that it applied also to debts contracted prior to such date, where such construction would have rendered act unconstitutional (St.1931, pp. 338, 339, §§ 1, 2; Const. Cal. art. 1, § 16; Const.U.S. art. 1, § 10).

18. Constitutional law ⇐154(2), 299

Bank Stockholders' Liability Act, if construed to permit superintendent of banks to levy assessments on stockholders to pay indebtedness of bank contracted prior to effective date of act, would be unconstitutional as to those acquiring stock prior to effective date of act as impairing obligation of contract and depriving stockholders of due process (St. 1931, p. 338; Const.U.S. art. 1, § 10; Const. Cal. art. 1, § 16; art. 12, § 3, repealed Nov. 4, 1930).

19. Constitutional law ⇐50

What Legislature is prohibited from doing directly it cannot do indirectly.

20. Banks and banking ⇐49(8)

That liabilities of bank contracted after effective date of Bank Stockholders' Liability Act far exceeded amount of assessment *held* sufficient showing of necessity for assessment (St.1931, p. 338).

21. Appeal and error ⇨173(2)

In action by superintendent of banks to enforce assessment liability of stockholder under Bank Stockholders' Liability Act, stockholder waived right to question necessity for assessment by failing to appropriately raise question as defense in trial court (St. 1931, p. 338).

In Bank.

Appeal from Superior Court, Los Angeles County; Georgia Bullock, Judge.

Action by Edward Rainey, State Superintendent of Banks, against Herman Michel and others. From an adverse judgment, Herman Michel appeals.

Affirmed.

Prior opinion, 48 P.(2d) 147.

Ivan G. McDaniel, of Los Angeles (John Dales, Jr., of Los Angeles, of counsel), for appellant.

Holcomb, Holcomb & Kempley, of Los Angeles, Devlin & Devlin & Diepenbrock, Pillsbury, Madison & Sutro, Alfred Sutro, Eugene M. Prince, and Francis N. Marshall, all of San Francisco, C. F. Metteer and Elliott, Atkinson & Sitton, all of Sacramento, Gibson, Dunn & Crutcher, E. E. Bacon, and Henry B. Ely, all of Los Angeles, White, Miller, Needham, Harber & Mering, of Sacramento, Swing & Swing, of San Bernardino, and Frank M. Gunter, of Los Angeles, amici curiæ.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

Griffith & Thornburgh and Butcher & Haines, all of Santa Barbara, amici curiæ.

SHENK, Justice.

The defendant Herman Michel appeals from a judgment in favor of the plaintiff for $75,550, rendered in an action brought by the superintendent of banks in an attempt to enforce a stockholder's liability under the Bank Stockholders' Liability Act (Stats.1931, p. 338).

The Marine Bank of Santa Monica was organized under the banking laws of this state. Its shares of capital stock were of the par value of $100 each, with 1,166 shares outstanding. The defendant owned 780½ of these shares on August 14, 1931.

The bank became insolvent, and the plaintiff, in the exercise of his statutory powers as superintendent of banks, on December 18, 1931, took possession of the property, business, and assets of the bank, and is now in possession thereof, for the purpose of liquidating its affairs. In the process of liquidation, and in order to satisfy the creditors of the bank, the plaintiff found it necessary to levy a par value assessment on the outstanding stock. This he did under date of January 2, 1932. Upon default in payment on the part of some of the stockholders, this action was brought and went to trial as to the defendant Herman Michel, the sole answering defendant, resulting in the judgment from which this appeal is taken. Defendant's total liability was found to be $78,050, of which $2,500 had been paid, resulting in judgment for the sum of $75,550.

The allegations of the complaint disclose that all of the statutory requirements were followed with reference to the call, levy, and collection of the assessment. These allegations are not denied. The answer is based solely on two affirmative defenses: (1) That the defendant became the owner of his stock prior to the passage of the Bank Stockholders' Liability Act in 1931; (2) "that all debts of said Marine Bank of Santa Monica now owing or which were owing on January 2, 1932, were incurred prior to the passage" of said act, which became effective August 14, 1931. The allegations of the first affirmative defense were found by the court to be true. The finding as to the second defense was made in conformity with a stipulation of the parties as follows: That, at the time the plaintiff took possession of the property and assets of the bank, the total amount of the debts of the bank was the sum of $925,055.42; that, of said sum, debts to the amount of $413,042.35 were incurred prior to August 14, 1931, and the remaining sum of $512,013.07 was incurred after that date.

The 1931 act, under which the superintendent of banks has proceeded, is entitled: "An Act to define the liability of stockholders in California state banks and to provide for the enforcement and collection of that liability by the superintendent of banks of the State of California." Section 1 of that act (page 338) provides: "The stockholders of every banking corporation organized under the laws of the State of California shall be held individually liable, equally and ratably, and not one for another, for all contracts, debts and

engagements of such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

In enacting the statute of 1931, the Legislature assumed to act pursuant to section 1 of article 12 of the Constitution, as amended November 4, 1930, which reads as follows: "The legislature shall have power, by general laws and not otherwise, to provide for the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders or members. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." The amendment further provided: "For the purpose of removing existing limitations upon the power granted by section 1 of article twelve of the Constitution amended as herein proposed, sections 2, 3, 9, 11, 12 and 14 of article twelve of the Constitution are hereby repealed. * * *" See Stats.1929, p. 2239.

The first attack made upon the judgment is that the statute of 1931, under which the superintendent of banks purported to act, is unconstitutional in that it was enacted in violation of the following sections: Section 1, article 12, of the Constitution, above quoted, which empowers the Legislature to provide "by general laws and not otherwise" for the liabilities of stockholders of corporations; section 11 of article 1, providing that "all laws of a general nature shall have a uniform operation"; section 25 of article 4 providing that the Legislature shall not pass special laws in thirty-three specifically enumerated cases, the last of which is "in all other cases where a general law can be made applicable"; section 13 of article 1, providing that no person shall "be deprived of life, liberty, or property without due process of law"; and section 21 of article 1, providing that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

The questions thus raised resolve themselves in substance into the sole question of whether, under the constitutional provisions above noted, and particularly under the provisions of article 12, § 1, the Legislature may select stockholders of a bank and impose upon them a liability not imposed on stockholders of other corporations. Stated another way, are bank stockholders a proper subject for a valid legislative classification, so far as the question of liability is concerned?

The defendant urges that since 1849 the general constitutional policy of this state has been to treat the stockholders of all corporations alike, so far as liability, based on stockholdings, is concerned. A brief history of stockholders' liability will be helpful in understanding the discussion that follows:

The liability of a stockholder for the debts of the corporation was unknown at common law. French v. Teschemaker, 24 Cal. 518, 540. Whether constitutional authority was necessary as a basis for legislative imposition of such liability need not here be decided, for such authority was imposed, but not self-executing, by sections 32 and 36 of article 4 of the Constitution of 1849. In 1850 the liability was attempted to be imposed on all stockholders, but not with sufficient particularity. Comp. Laws 1850–53, p. 286, Act of 1850, § 32. By section 16 of an act of 1853 (Stats.1850–53, pp. 273, 277), it was provided: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company, contracted or incurred during the time that he was a stockholder. For recovery of which, joint or several actions may be instituted and prosecuted." This enactment was held to be in conformity with the provisions of the Constitution of 1849 in the case of French v. Teschemaker, supra, decided in 1864.

In 1872 section 322 of the Civil Code was enacted, based primarily upon prior statutes, but with additions, imposing stockholders' liability applicable to all stockholders of all corporations, and without distinction as to the nature and business of various corporations. This section was later amended, but always preserving its characteristic as a law applicable to all stockholders of all corporations until its repeal in 1931 (St.1931, p. 444), unless its repeal was effected by the adoption of the constitutional amendment on November 4, 1930, a question which, for reasons later appearing, is not decided in this case.

The Constitution of 1879 continued the stockholders' liability. Section 3, art. 12. In McGowan v. McDonald, 111 Cal. 57, 67, 43 P. 418, 420, 52 Am.St.Rep. 149, this

court said: "But the provisions of the constitution of 1849 applied to the stockholders of all corporations, without regard to the character of the business to be transacted; and the same is true of the constitution of 1879." In that case, among other things, it was held that a statute of 1862 which attempted to exempt from liability the stockholders of savings banks organized under the act was unconstitutional as beyond the power of the Legislature.

In 1917 an act was passed relating to the liquidating of banks by the superintendent of banks and empowering him to levy assessments against stockholders of banks in liquidation. Stats.1917, p. 581, amended Stats.1925, p. 905. By section 2 of this act it was provided that the superintendent of banks should have the right to assess the stockholders of a bank in liquidation for such an amount as he might determine to be necessary to pay the creditors of the bank in full, which was a liability in excess of that prescribed by the Constitution and general laws of the state. The validity of that statute was involved in the more recent case of Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A.L.R. 861, wherein it was held that under article 12, § 3, as it then read, it was beyond the power of the Legislature to single out the stockholders of banking corporations for the imposition of liability to creditors in any way different from the stockholders of other corporations.

In 1908 it was considered necessary to amend section 3 of article 12, in order to exempt from the general liability imposed by article 12 those stockholders in corporations organized to promote the San Francisco International Exposition then in contemplation. Again, in 1926, the same section was amended to provide that stockholders in corporations organized under the law of this state with the word "Limited" or the abbreviation "Ltd." following the name of the corporation should not be generally subject to stockholders' liability, but to liabilities which might thereafter be imposed by the Legislature.

From this brief history of the subject it cannot be doubted that since 1849 the Constitution and the valid statutory enactments passed pursuant thereto have dealt with stockholders' liability by treating all stockholders alike. It is also apparent that, whenever the Legislature, prior to 1931, has attempted either to prefer by exemption the stockholders of certain banking corporations or to impose on such stockholders a liability not imposed upon stockholders of corporations in general, such attempts have been held unconstitutional. However, a reading of French v. Teschemaker, McGowan v. McDonald, Wood v. Hamaguchi, and the other cases relied upon by the defendant on this point, clearly indicates that all they decided was that under both the Constitution of 1849 and the Constitution of 1879, until 1930, the Legislature was prohibited from classifying any one group of stockholders differently from any other group, so far as liability was concerned. In other words, all that was decided in those cases was that the Constitution had placed all stockholders in one group, so far as liability was concerned, and that the Legislature was therefore prohibited from classifying such stockholders for purposes of legislation. Although there is broad language to be found in both French v. Teschemaker and Wood v. Hamaguchi to the effect that the Legislature is without power to classify bank stockholders differently from stockholders generally, such language was necessarily used with reference to the then provisions of our Constitution. The repealing and amendatory provisions adopted in 1930, and above referred to, undoubtedly had the effect of removing the constitutional restraints formerly existing, and of placing in the hands of the Legislature the entire subject of stockholders' liability; that is, the 1930 amendments freed the Legislature from the former constitutional prohibitions respecting liability of stockholders and placed the subject matter of such legislation in the hands of the Legislature, subject to the limitation that any legislative enactment dealing with that subject must be by "general laws and not otherwise."

[1] We cannot agree with the defendant in his contention that the expression "by general laws and not otherwise," found in article 12, section 1, as amended in 1930, has a meaning broader in scope than the expression "all laws of a general nature shall have a uniform operation," found in article 1, § 11, and the prohibition against special laws "in all other cases where a general law can be made applicable," found in article 4, § 25, subd. 33. The quoted provisions of all three sections have substantially the same meaning. It appears to be the defendant's position that

the expression "by general laws and not otherwise" in article 12, § 1, must be interpreted to mean that any law dealing with the subject of stockholders' liability must apply generally to all stockholders of all corporations, even though a valid basis for classification might otherwise exist. To give this effect to the expression "general laws" would be to give it a meaning directly contrary to that given by the courts in many cases to the same expression found in the other two sections quoted. When the expression "general laws" was used in the new constitutional provision, we must assume that it was intended to be used in accordance with prior adjudications, in great number, with reference to the meaning of that phrase as elsewhere employed in the Constitution. The expression "general laws," as interpreted, is always used in opposition to "special laws," and we must assume that this is the meaning of the expression in article 12, § 1.

[2] That the defendant's interpretation of the expression is incorrect is clearly demonstrated by a consideration of the effect his interpretation would have on the law applicable to corporations generally. The phrase "by general laws and not otherwise" in article 12, § 1, applies, not only to the Legislature's power to pass laws applicable to stockholders' liability, but also to the Legislature's power "to provide for the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities." If the defendant is correct in his interpretation, then not only could the Legislature not classify as to stockholders' liability, but also all corporations would have to be formed, organized, and regulated by a law applicable alike to all corporations. From early days in this state the Legislature has been authorized to classify corporations as to formation, organization, and regulation. Division 1, part 4, titles 2 to 24 of the Civil Code (section 414 et seq.), now provides for the formation and organization of a score or more of different types of corporations. It may hardly be contended that the constitutional amendment of 1930 operated as a repeal of all these provisions of the Code.

[3] In view of the many decisions on the subject, it seems unnecessary to point out the distinction between a general and special law, but, due to the insistence of counsel for the defendant and of numerous supporting amici curiæ that the act here in question is a special law, it will serve to clarify the matter if brief reference is made to the controlling principles. It has been consistently held that an act of the Legislature applicable to one class only, when that class is reasonably the subject of classification, is a general law, and is not in conflict with any of the provisions of the State Constitution prohibiting special legislation. This court in Re Weisberg, 215 Cal. 624, 629, 12 P.(2d) 446, 449, stated the established rule as follows: "A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it."

The same general principle was applied by this court in State Savings, etc., Bank v. Anderson, 165 Cal. 437, 438, 449, 132 P. 755, 760, L.R.A.1915E, 675. That case involved the interpretation of certain provisions of the Bank Act of 1909, particularly those permitting the superintendent of banks to take possession of an insolvent bank's assets—provisions applicable only to those engaged in the banking business. In upholding the act as well within the power of the legislative branch and in negativing the contention that the act was a special law because applicable only to banks, this court stated: "The act deals solely with a matter pertaining to the public welfare and within the police power of the state to regulate. These regulations have substantial relation to and are intended and reasonably designed to protect and safeguard the people of the state against insecure banking or the further continuance in business of such institutions of that character as have become unsafe. These regulations while applying to the banking business alone, apply to all who are engaged in that business either as corporations or individuals; they are all within a class subject to control and regulation by the state; the regulations prescribed operate upon all without any discrimination and within the legal rules declared for determining their validity are violative of no constitutional guaranty which the plaintiff has invoked." See, also, People v. Central Pac. R. Co., 105 Cal. 576, 38 P. 905; In re Sutter-Butte By-Pass Assess. No. 6, etc., 191 Cal. 650,

218 P. 27; Martin v. Superior Court, 194 Cal. 93, 227 P. 762; Matter of Application of Stoltenberg, 21 Cal.App. 722, 132 P. 841; In re West, 75 Cal.App. 591, 243 P. 55; 5 Cal.Jur. 819, and cases therein referred to.

It is obvious from a consideration of the above cases that, if the classification of stockholders of banking corporations different from other corporate stockholders is based upon any reasonable grounds, the present act, applying only to bank stockholders, is a general law, and is not violative of the constitutional provisions above referred to. Before directly passing to a consideration of the question as to whether there is any reasonable basis for such a classification, brief reference should be made to certain basic rules of construction.

[4] It is elementary that the question as to whether any legal basis exists for a particular legislative classification is primarily one for legislative determination, and the courts will not interfere unless such classification is manifestly unreasonable or arbitrary.

In Martin v. Superior Court, supra, 194 Cal. 93, at page 101, 227 P. 762, 765, the applicable rules of construction are summarized as follows: "The power to thus classify necessarily carries with it a wide discretion in the exercise thereof. The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason. [Citing cases.] It follows that in any given case if the existence of a state of facts of which the court may take judicial notice seems to have been made the basis of a particular piece of legislation, and if it may be reasonably said that such facts afford good ground for the making of a particular classification, the legislative enactment will be upheld, although the reason therefor does not appear prima facie in the law itself." See, also, In re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A.1915F, 850; In re Sutter-Butte By-Pass Assess. No. 6, supra; Wores v. Imperial Irrigation Dist., 193 Cal. 609, 227 P. 181; In re Schmolke, 199 Cal. 42, 43, 248 P. 244; In re West, supra; People ex rel. v. Mullender, 132 Cal. 217, 64 P. 299.

[5] It is also well established that the constitutionality of a legislative enactment will be presumed and any doubt respecting its constitutionality will be resolved in its favor. 5 Cal.Jur. pp. 612, 821, and cases therein cited.

[6-8] Under the foregoing conception of the term "general law," and bearing in mind the rules of construction above referred to, we have no hesitancy in holding that the Bank Stockholders' Liability Act is a general and not a special law, and that the classification therein contained is within the legislative power. The act is applicable to all persons in the specified class, and that class is based upon a natural, intrinsic, and constitutional distinction which carves out that class from others of a somewhat similar nature. This conclusion necessarily follows from the fact that banks are engaged in a type of business which everywhere has been recognized as subject to treatment different from that affecting other corporations. This difference in treatment is justified, not only as to the regulation of the actual business of banking corporations, but also as to the treatment of their corporate stockholders. Banks are engaged in a business affected with a public interest and are subject to regulation under the police power, which clearly warrants special classification. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; State Savings, etc., Bank v. Anderson, supra; Engel v. O'Malley, 219 U. S. 128, 31 S.Ct. 190, 55 L.Ed. 128; Noble State Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.(N.S.) 1062, Ann.Cas.1912A, 487. Just how far this special treatment should go, that is, whether it should extend to stockholders' liability as well as the regulation of the ordinary business of banks, is in the main a matter of legislative discretion. In Murphy v. Pacific Bank, 130 Cal. 542, 62 P. 1059, there was under consideration the constitutionality of a statute distinguishing between stockholders of a bank who were depositors, and depositors generally. The court held the classification to be a reasonable one.

It is also significant that many states and the federal government have seen fit

to impose on stockholders of banks different and more onerous liabilities than those imposed on stockholders of other corporations. We have not been referred to any authority, nor has independent research discovered any, where such a classification has been held to be unreasonable in the absence of constitutional prohibition such as existed in this state prior to 1930. We agree with the reasoning of the Ohio Supreme Court in Allen v. Scott, 104 Ohio St. 436, 135 N.E. 683, 685, where the court was considering a constitutional provision of that state imposing a double liability on stockholders of banks. In pointing out the justification for such a provision, the court stated: "Depositors in private banking corporations are seeking no profit from the corporation, and are therefore in a very different situation from those persons who contract upon a speculative basis with other corporations. Experience has demonstrated the necessity of throwing greater safeguards around the administration of private banking corporations, and this amendment is a salutary provision designed to cause the officials of private banking corporations to be conservative in their business ventures."

[9] It would not be proper at this time to indicate whether the power to classify stockholders of state banks differently from other stockholders includes the power to classify the stockholders, so far as liability is concerned, of all the different types of corporations provided for in the Civil Code as to formation and powers. It is sufficient now to hold that the business of banking is so highly specialized and so connected with the public interest that the same convincing arguments used in sustaining various statutes dealing with the regulation of banks differently from other corporations, found in the cases cited above, apply with convincing force to the statute here under consideration. Such a statute is aimed primarily at protecting the depositing public and to insure on the part of the banking corporation a careful administration of its public trust. Experience has demonstrated the necessity for such safeguards.

[10] The next contention of the defendant is that the act is unconstitutional in that, by its terms, it makes certain of the determinations of the superintendent of banks, in levying the assessment, conclusive upon the stockholders. The pertinent language of the statute is as follows:

"Whenever the superintendent of banks shall hereafter take possession of the business and property of any bank doing business in this state, for the purpose of liquidating its affairs, as provided by law, he may at any time during the process of such liquidation, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders set forth in section 1. For the purpose of enforcing such liability, the superintendent of banks may call for a ratable assessment upon the stockholders of such bank without previous judicial ascertainment of the necessity for such action, and the action of the superintendent of banks in calling for such assessment shall be conclusive on the stockholders of the necessity for such assessment. * * *

"If any stockholder of said bank shall fail to pay said assessment in full upon the date specified in said order as the date upon which said assessment shall be due and payable, a right of action shall immediately accrue to the superintendent of banks to recover the amount of said assessment or the amount remaining unpaid thereon from the stockholder or stockholders failing to pay the assessment in full.

"The superintendent of banks shall have power to maintain an action or actions in this state, or in any other state or country to enforce and collect any sums or amounts due and payable and remaining unpaid upon any such assessments from any stockholder or stockholders failing to pay the same in full; and in any such action the superintendent of banks may join as defendants one or more stockholders; and in any such action the superintendent of banks shall have the right of attachment as in other actions upon unsecured debts; provided, however, that the superintendent of banks shall not be required to give bond on attachment or pay filing fees or other court costs. * * *

"If, after the payment of all liabilities against such bank, and the costs and expenses of liquidation, any surplus shall remain, the court in the liquidation proceedings shall determine and provide for any equities as between the respective stockholders, including proportions belonging to each stockholder and of any surplus of any of the assets remaining after payment of all liabilities and the costs and expenses of liquidation by reason of full or partial payment of any such assessment or assessments, and shall direct the payment there-

of by the superintendent of banks accordingly." Stats. 1931, pp. 338, 339, § 2.

For various reasons, it is contended that these provisions violate the due process of law clauses of both the Federal and State Constitutions. The contention is that the stockholder is thereby deprived of a court hearing and is thus foreclosed of an opportunity to urge possible defenses against the action of the superintendent of banks. We find nothing in the section that deprives the stockholder of the right to urge in court any legitimate defense that he may have when he is sued for his assessment, and it is only by suit that he may be compelled to pay. All that the section does is to make the action of the superintendent of banks conclusive "of the necessity for such assessment," a provision which the practical exigencies of the case make necessary.

The general question of the validity of a statutory provision making the determination of an administrative officer conclusive as to the necessity for making an assessment on bank stockholders is not one of first impression. The provisions of the act under consideration were closely patterned after similar provisions of the National Bank Act. On the question of due process the decisions of the federal courts are convincing. In Kennedy v. Gibson, 8 Wall. (75 U.S.) 498, 505, 19 L.Ed. 476, the leading case interpreting the federal act, the United States Supreme Court stated:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. * * *

"It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute, that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit."

The foregoing has been consistently followed, not only in interpeting the federal act, but also in determining whether state acts violate the Federal Constitution. Minnesota passed a statute imposing a stockholders' liability on stockholders of banks and making the determination of the administrative officer not only conclusive as to the necessity for the levy but also as to the amount thereof. In upholding the statute, the United States Supreme Court, in Bernheimer v. Converse, 206 U.S. 516, 528, 27 S.Ct. 755, 758, 51 L.Ed. 1163, said: "This statute came before the supreme court of Minnesota in Straw & Ellsworth Manufacturing Company v. Kilbourne Boot & Shoe Company, 80 Minn. 125, 83 N.W. 36. In that case it was given full consideration and its constitutionality sustained, and it was held that while the assessments upon the outstanding shares of stock in an amount necessary to meet the deficiency in the assets of the corporation was conclusive upon the stockholders as members of the corporation, yet the statute, properly construed, did not have the effect to deprive a person, when sued for the amount assessed on shares of stock under the provisions of the act, from showing that he was not a stockholder, or that he was not the holder of so large an amount of stock as was alleged, or that he had a claim against the corporation which, in law or equity, he might be enabled to set off as against a claim for assessments, or from making any other defense per-

sonal to himself; and that the order of assessment was conclusive upon stockholders only in so far as it decided the amount of assets or liabilities of the insolvent corporation and the necessity of making an assessment upon the stock to the extent and in the amount ordered."

[11, 12] The argument that the act is too indefinite, vague, and uncertain to be enforced, for the reason that the full extent of the liability thereunder cannot be ascertained is untenable. The federal act, upon which our act is largely based, had many times prior to 1931 been interpreted by the federal courts. In United States ex rel. Citizens' Nat. Bank v. Knox, 102 U.S. 422, 26 L.Ed. 216, this same objection was discussed, and the court found it to be without merit. In that and other cases the same court, prior to 1931, gave an interpretation to the language in question which we must assume the California Legislature had in mind in adopting the section.

[13] The next contention of the defendant is that the act, by permitting the superintendent of banks to take possession of the assets of an insolvent bank, and to determine the necessity for, and the amount of, the assessment "without previous judicial ascertainment of the necessity for such action," and to make the determination of the superintendent of banks conclusive as to the necessity for an assessment, has conferred judicial powers on an administrative officer in violation of article 6, § 1, of the California Constitution. It may be assumed that the Legislature in California, except as expressly provided in the Constitution, has no power to confer judicial powers on state-wide boards, or commissions, or on administrative officers. Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874. It also may be assumed that, if the act here under consideration did attempt to confer judicial powers on the superintendent of banks, the act to that extent would be in violation of article 6, § 1. Such principles have no application here, because the powers here in question are not judicial, but are administrative or executive in their nature, and are well within the power of the Legislature to confer on an administrative or executive officer. Limiting the discussion solely to bank acts similar to the one here in question, and not relying on the host of cases dealing with other administrative officers or boards, an examination of many cases discloses that it has never been held that the powers in question are judicial. The many cases collected and commented upon in an exhaustive annotation entitled: "Statute relating to closing of bank and assessment of stockholders as subject to constitutional objection of conferring judicial power upon administrative or executive officers," in 78 A. L.R. 774, establish that fact. The following statement appearing at the beginning of that annotation is amply borne out by the many cases later analyzed therein: "Under all statutes thus far brought in question, the power given administrative officers to take charge of the affairs and property of insolvent banks, or those in an unsafe condition, and, if necessary, or under stated circumstances, to levy an assessment against stockholders has been upheld, as against the constitutional objection that such power is judicial and may not be validly conferred upon administrative officers. The view generally taken, although language bearing on the point is not always precise, is that power of the sort in question is not in strictness, or in the constitutional sense, judicial, but consists merely of a practical discretion reasonably incident to the exercise of police power."

It is conceded by the defendant that the National Bank Act has withstood many attacks on this ground (see Bushnell v. Leland, 164 U.S. 684, 17 S.Ct. 209, 41 L.Ed. 598; Casey v. Galli, 94 U.S. 673, 24 L.Ed. 168; Kennedy v. Gibson, supra; United States ex rel. Citizens' Nat. Bank v. Knox, supra; In re Chetwood, 165 U.S. 443, 17 S. Ct. 385, 41 L.Ed. 782), but it is his contention that under the Federal Constitution the Congress may confer judicial powers on administrative officers and boards, while under the California Constitution the Legislature possesses no such general power. Assuming that this distinction in powers exists, there are two answers to the contention. In the first place, the United States Supreme Court has directly held that the comparable powers conferred on the Comptroller of the Currency are not judicial. Concord First National Bank v. Hawkins, 174 U.S. 364, 373, 19 S.Ct. 739, 43 L.Ed. 1007. In the second place, in every state where the question has been presented and where a determination was required under constitutional provisions similar to our own, it has been held that the powers involved are not judicial. See cases collected in American State Bank v. Jones, 184 Minn. 498, 239 N.W. 144, 78 A.L.R. 774.

[14, 15] The next point urged is based upon one of the admitted facts in this case, namely, that all of the stock held by the defendant upon which liability has been imposed was acquired by him prior to the effective date of the statute—August 14, 1931. It is contended that to impose liability on a stockholder, based upon ownership of stock owned prior to the passage of the statute imposing the liability, is to impair the obligation of the stockholder's contract in violation of article 1, § 10, of the United States Constitution, and article 1, § 16, of the State Constitution. The contract referred to must be deemed to be the contract between the stockholder and the corporation. The question then is, Can the Legislature, in the absence of constitutional prohibition, lawfully impose a liability on the ownership of stock which, when acquired, was not subject to such liability? Section 1 of article 12 of the State Constitution, both before and after its amendment in 1930, expressly provided: "All laws now in force in this state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." This section contains a complete answer to the question now being considered, and this is so, even if it be assumed that the laws in force at the time the stock was purchased are read into and become a part of the stockholder's contract with the corporation, for the very obvious reason that the provision above quoted must be read into the charter of every corporation. The contract between the stockholder and the corporation is subject to the exercise of this reserved power. A case in point is McGowan v. McDonald, 111 Cal. 57, 43 P. 418, 52 Am.St.Rep. 149, an action against the stockholders of a bank under the general stockholders' liability act then existing. The stockholders defended on the ground, among others, that the bank was organized at a time when the statute under which it was formed provided for no such liability as to them. It was held that there was no merit in the defense. Speaking of the power of the Legislature to change the contract between the stockholder and the corporation, the court stated (111 Cal. 57, at page 66, 43 P. 418, 420, 52 Am.St.Rep. 149):

"It is objected, however, that, if the provisions of the Code and constitution are applicable, they impose obligations upon appellants for which they were not liable when they became stockholders, and are in conflict with that provision of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore as to them unconstitutional and of no effect.

"The answer to this objection is that the constitution of 1849 provided: 'Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.' [Const.] art. 4, § 31.

"Under the authority thus conferred, both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States."

The principles above enunciated are in accord with the decisions of the United States Supreme Court and with the overwhelming weight of authority in other jurisdictions. Sherman v. Smith, 1 Black (66 U.S.) 587, 17 L.Ed. 163; Barth v. Pock, 51 Mont. 418, 155 P. 282; Melaven v. Schmidt, 34 N.M. 443, 283 P. 900; Williams v. Nall, 108 Ky. 21, 55 S.W. 706; Somerville v. St. Louis Min. & Mill. Co., 46 Mont. 268, 127 P. 464, L.R.A.1915B, 811; Maxwell v. Thompson, 232 N.Y. 619, 134 N.E. 596; Bank of Blytheville v. State, 148 Ark. 504, 230 S.W. 550.

It is true that some of the cases cited by the defendant hold that a new liability cannot lawfully be imposed on a stockholder by a legislative enactment passed after he has purchased his stock, but an examination of most of those cases discloses that they were decided in states where, when the stock was purchased, there was no constitutional provision reserving in the Legislature the power to alter or amend or repeal the existing laws as to corporations. See, for example, Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N.W. 798, L.R.A. 1917A, 1223; Schramm v. Done, 135 Or. 16, 293 P. 931; Hammons v. Watkins, 33 Ariz. 76, 262 P. 616. Such cases are not in point.

[16] The next point urged by the defendant and by many amici curiæ is that the 1931 act is unconstitutional in so far as it attempts to impose a liability on any stockholder for debts incurred prior to the effective date of the statute. Under the principles last above discussed, a stockholder is liable, as limited in the act, regardless of when he purchased the stock, for that

portion of the bank's indebtedness arising subsequent to August 14, 1931. In other words, the act is constitutional as to all stockholders, regardless of when they acquired their stock, in so far as its prospective operation is concerned. It is earnestly urged, however, that as to debts of the corporation incurred prior to August 14, 1931, it is unconstitutional to assess stockholders to pay any portion of that liability. It is contended that to impose the liability as to such antecedent debts would be to impair the obligation of the contract between the stockholder and the creditor. The language of the act itself is such that it is susceptible of the interpretation that the assessment collected thereunder may be used by the superintendent of banks to pay all the debts of the insolvent bank, including those incurred prior to August 14, 1931. Section 1 of the act (page 338) provides that "the stockholders of every banking corporation * * * shall be held individually liable * * * for all contracts, debts and engagements of such corporation." Section 2 (page 339) provides in part that, when the superintendent of banks finds it necessary to levy an assessment "to pay the debts" of the bank, "all sums collected from any such assessment * * * shall be used * * * against the liquidation of claims in the same manner as the assets of the bank are so used. * * * If, after the payment of all liabilities against such bank," any surplus shall remain, the stockholders are entitled to a pro rata return. Although this all-inclusive language can be interpreted so as to include a liability for antecedent debts, inasmuch as the language can also be interpreted to apply only to future debts, under well-settled principles of interpretation we must adopt the latter construction, if to adopt the former would render the act unconstitutional.

[17] Although there are cases to the contrary, the better reasoned cases, in our opinion, hold that such an act must be interpreted to apply only to prospective debts, and that to apply it to antecedent debts would be to render the act unconstitutional.

The question as to the date on which section 322 of the Civil Code was repealed is determined in the case of Kaysser v. McNaughton (Cal.Sup.) 57 P.(2d) 927, this day decided. It is held in that case that the old stockholders' liability remained in effect until August 14, 1931, the date of the taking effect of the repeal of said section 322. Under the doctrine of Coombes v. Getz, 285 U.S. 434, 52 S.Ct. 435, 76 L. Ed. 866, the creditors whose debts were created prior to August 14, 1931, possessed certain contractual rights against the then stockholders. These rights were to proceed directly against the then stockholders for the proportion of the debts, as provided in section 322. If the creditors brought suit within the statutory period, they could have enforced this liability against the stockholders, and, for all that appears in this action, may have done so. If the creditors did not see fit to pursue this remedy, they must be deemed to have waived it. Under Coombes v. Getz, supra, the repeal of the liability did not affect the contractual rights of existing creditors.

[18, 19] By a parity of reasoning, the stockholders as to those prior debts likewise had certain contractual rights. If the contract of the creditor is entitled to constitutional protection, so must the contract of the debtor. These rights were that the stockholders were to be liable only to the extent provided in section 322. The record shows that defendant owned all the stock upon the ownership of which liability is here sought to be imposed, prior to August 14, 1931. We are not here presented with the question of the power of the Legislature to impose liability for prior debts on those who acquired their stock subsequent to August 14, 1931. The question here presented is as to the power of the Legislature to impose an additional liability on defendant for debts incurred prior to August 14, 1931. As to defendant and others similarly situated, to impose the additional and so-called double liability here sought to be imposed for those past debts would be to give the creditors owning those debts a right against defendant which they did not possess when the debt was incurred and, by the same reasoning, to impose on the defendant a liability not existing when the debt was incurred. This would impair, not only the obligation of contract, but also would deprive defendant of his property, without due process. The mere fact that the additional liability against the stockholders cannot be enforced directly by the creditor, but is enforced by the superintendent of banks for their benefit, is immaterial. If the Legislature had attempted directly to amend section 322 of the Civil Code so as to confer additional liabilities on existing stockholders for past debts, such amendment would be obviously unconstitutional.

What the Legislature is prohibited from doing directly it cannot do indirectly.

The principles herein enunciated have been declared in many cases. Barnes v. Arnold, 23 Misc. 197, 51 N.Y.S. 1109, affirmed in 45 App.Div. 314, 61 N.Y.S. 85; Id., 169 N.Y. 611, 62 N.E. 1093; United States v. Stanford (C.C.) 69 F. 25, affirmed in (C.C.A.) 70 F. 346; Id., 161 U.S. 412, 16 S.Ct. 576, 40 L.Ed. 751; Pate v. Bank of Newton, 116 Miss. 666, 77 So. 601; Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893. In these and many other cases that could be cited, the particular stockholders' liability acts there being considered, many of them bank acts similar to the one here under consideration, although using language equally as inclusive as the California act, were held to apply only to debts incurred subsequent to the effective date of the act, so far as existing stockholders were concerned. The courts indicated that any other interpretation would render the act unconstitutional.

Plaintiff cites several cases, Davis, Bank Comm., v. Moore, 130 Ark. 128, 197 S.W. 295; Bank of Blytheville v. State, 148 Ark. 504, 230 S.W. 550; Donaghey v. Wasson, 190 Ark. 1123, 82 S.W.(2d) 856; Baumgardner v. State, 48 Ohio App. 5, 192 N.E. 349, that do hold that a stockholders' liability act such as the one here involved can be applied to antecedent acts. The weight of authority and, in our opinion, the better-reasoned cases are to the contrary.

In support of his argument that the act should be interpreted to include antecedent debts, and that, so interpreted, the act is constitutional, plaintiff contends that the present liability did not arise when the debts were incurred, but when the superintendent levied the assessment; that, if any stockholder after August 14, 1931, desired to avoid the possibility of liability for past debts, he could have sold his stock. This argument is not convincing. To compel the sale of property in order to avoid liability for past debts would, equally with an actual taking of the property, be to deprive such stockholders of their property without due process. The liability, although imposed when the superintendent of banks levies the assessment, if plaintiff is correct in his interpretation as to past debts, would be imposed for the benefit of creditors who had no such right when the debts were incurred, to the injury of existing debtors who had no such liability when the debts were incurred. This, as already held, would impair the stockholders' contract rights.

Plaintiff also seeks to sustain his contention on the argument that, either under the reserved power to alter or amend laws affecting corporations or under the police power, the Legislature has the power thus to affect past contract rights. Neither the police power nor the reserved power can justify the arbitrary imposition of a liability for past debts of a corporation on existing stockholders, when these debts created a contract between the creditor and the stockholder. Such an act would clearly be arbitrary and unreasonable.

For still another reason, if we hold that the act applies to antecedent debts, it would be unconstitutional to that extent. In Wood v. Hamaguchi, supra, it was held that, so long as article 12, § 3, was in the Constitution, no liability other than that provided in that section could be imposed on stockholders. That section was not repealed until November 4, 1930. Obviously, to impose any further liability on stockholders for debts incurred prior to that date would be to impose a liability that it was expressly held in Wood v. Hamaguchi could not be imposed. The same conclusion would follow as to liabilities incurred after November 4, 1930, and prior to August 14, 1931, for the reason that section 322 remained in effect until the latter date, and, until that date, the rights of the stockholders, as well as of the creditors, had become fixed under the then existing law.

[20, 21] For the foregoing reasons we therefore hold that the act now in effect, properly interpreted as to existing stockholders, applies only to debts incurred subsequent to August 14, 1931. This interpretation, however, does not require a reversal of the judgment. It is alleged, and not denied, that the subscribed and outstanding capital stock of the bank, at the times here involved, amounted to $116,600, divided into 1,166 shares of the par value of $100 each. The total amount that could possibly be raised by the par value assessment permitted by the act is therefore $116,600. According to the stipulation of the parties, the debts of the bank when the superintendent took possession were $925,055.42, of which amount the sum of $512,013.07 was incurred after August 14, 1931. It is obvious that the amount of the debts incurred since the act was passed far exceeds the amount of the assessment. This indicates sufficiently the necessity for the as-

sessment. It is no answer to say that the record does not show the assets of the bank and that the proportion of the assets lawfully allocatable to subsequently incurred debts, plus the assessment, might exceed those debts. The defendant has not questioned the necessity for the assessment. If he desired to do so, it was a matter of defense, and he must be deemed to have waived it by failing to plead it or otherwise appropriately raise the question. Under such circumstances, if the assessment plus the assets ultimately proves to be in excess of the liabilities to which the same lawfully may be allocated, then, under the express terms of the act, the defendant will be entitled to a pro rata return of the assessment.

Other points are urged by defendant, but, in our opinion, do not warrant further discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; CONREY, J.; SEAWELL, J.



13 Cal.App.2d 687

HAWKINSON et al. v. SCHOLZ et al.

Civ. 10332.

District Court of Appeal, Second District, Division 1, California.

May 7, 1936.

1. Appeal and error ⇐1002

Jury, rather than Court of Appeal, has right and duty to solve problem arising by reason of conflicting evidence.

2. Appeal and error ⇐930(2)

In automobile collision case, jury would be presumed to have considered all facts and circumstances surrounding accident after having been instructed on subject of negligence, contributory negligence, ordinary care, and other pertinent matters.

3. Automobiles ⇐245(15, 81)

In action for injury received by motorist when her automobile struck automobile which she was following when it suddenly stopped in highway, question of defendant's negligence, and motorist's contributory negligence, *held* for jury.

4. Automobiles ⇐246(58)

In action for injury received by motorist when her automobile struck rear end of defendant's automobile which she was following when it suddenly stopped in highway, evidence *held* to justify instruction on imminent peril.

5. Trial ⇐228(1)

In automobile accident case connecting instruction on imminent peril with preceding instruction on contributory negligence by word "so" *held* not error.

6. Trial ⇐296(3)

In automobile accident case, omission of instruction that negligence per se as defined in given instruction must have contributed directly to injury *held* not error, where other instructions supplied lack complained of saving repetition and were sufficient to protect rights of parties.

7. Trial ⇐296(4, 5)

In automobile accident case, failure to include elements necessary to absolve plaintiff from contributory negligence, in instruction on imminent peril, *held* not error in view of other instructions properly defining contributory negligence and negligence.

8. Automobiles ⇐246(45)

In action for injury received by motorist, when her automobile struck automobile which she was following when it suddenly stopped in highway, evidence *held* to justify instruction that it was unlawful for any person to drive vehicle on highway in so negligent a manner as to indicate wilful or wanton disregard of safety of persons or property.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Carrie Hawkinson and others against A. M. Scholz and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Albert J. Morrissey, Oscar Collins, and Robert R. Ashton, all of Los Angeles, for appellants.

John Coker, of San Diego, for respondents.

DESMOND, Justice pro tem.

Defendants appeal from a judgment entered upon a jury's verdict, awarding damages for injuries received in an automobile accident. Plaintiff, a nurse stationed at San Diego Navy Hospital, drove to Indio, accompanied by two other nurses, Misses Pipher and Leopold, for the purpose of meeting there Dr. and Mrs. Scholz, appellants in this case. Next morning the entire party breakfasted together at the Indio Hotel and then started for Palm Springs, about twenty miles to the west. Before leaving Indio, Dr. Scholz asked respondent if she knew the road; she told him she had never driven over it, and the doctor then told her to follow him. Miss Leopold rode with Dr. and Mrs. Scholz; respondent followed with Miss Pipher. The party traveled westerly along a well-paved, level highway, wide enough for two cars to pass each other, with shoulders of sand abutting upon this highway on either side. When they had covered about fifteen miles, at about 9 a. m., they approached another car, stuck in the sand by the roadside; both the moving cars stopped, the car in the rear colliding with the forward car, the injuries complained of then and there resulting.

Dr. Scholz testified: "I put out my arm and gave a stop signal and applied the brakes and drew over to the right. * * * I slowed up gradually. I looked in the rear vision mirror to see if Miss Hawkinson was anywhere near me * * * before I applied the brakes. Shortly after the right front wheel had left the highway I received a sudden and severe blow from the rear."

Respondent, on the other hand, testified that the doctor made a very sudden stop; that no arm signals were given nor any signals indicating any change in the speed of his car. She also testified that she stepped on her brakes as quickly as possible, but that she was too close to Dr. Scholz to be able to stop immediately, although the momentum of her car was lessened before the collision occurred; further, that Dr. Scholz had not changed the direction of his car prior to the accident; that when the collision occurred, "It was in a direct line with the highway," while her car at that time "was turned just a little to the left"; that after the collision Dr. Scholz's car was on the pavement and her own car, about ten feet away, "was directly behind his, except it was turned a little to the left, just to the middle of it."

For a distance of three to five miles before reaching the place of the accident, both cars had been rolling along at about forty miles per hour with a distance of fifty to sixty feet between them. Being asked, "Did you change the direction of your automobile before the collision occurred?" respondent answered: "Well, I was too close; I tried to swing out just a little to the left, but I was too close to miss him."

Appellants claim that the undisputed evidence shows that respondent was guilty of negligence as a matter of law, in that she failed to keep a proper lookout for traffic ahead of her; in that she followed appellants' car too closely; in that she did not have proper control of her car; in her failing to slow down or stop, if necessary, to avoid the collision. Appellants also add, as ground of appeal, errors claimed to have been committed by the court in instructing the jury.

[1-3] In arguing the first point, negligence on the part of respondent, appellants' counsel rely strongly on O'Connor v. United Railroads of San Francisco, 168 Cal. 43, 47, 141 P. 809, 811, where the court said: "It must be apparent that in operating a street car over a public street a motorman cannot, under ordinary circumstances, run down a vehicle proceeding in the same direction without having been negligent in the operation of his car. The mere fact that he does so furnishes cogent evidence of negligence which is rarely capable of explanation." That was a case in which, in the year 1909, a street car operating at an unlawful speed on Mission street, San Francisco, ran down and overturned a horse-drawn bus driven by plaintiff. There was no evidence that the bus stopped in the path of the car; on the contrary, the bus was in motion at the time the street car overtook it. Appellants there claimed contributory negligence on the part of the bus driver upon his testimony that he did not look back to observe oncoming traffic while traveling, just before the collision, a distance of 500 feet. Upon that point the court said: "Obviously, one cannot be expected to look simultaneously forward and back along the street." This was before the days of rear vision mirrors, such as the one attached to Dr. Scholz's car. The evidence also showed that no warning of the approach of the electric car was given the bus driver by the ringing of the bell or otherwise, while in the instant case Dr. Scholz knew that his car was being closely followed by the car of respondent. Enough has been said, disregarding the locale of the two accidents, to indicate that these are not parallel cases. A case more closely in point with the instant

case is Clendenin v. Benson, 117 Cal.App. 674, 4 P.(2d) 616, 617, decided in 1931, involving two motor vehicles, where a truck driver, without signaling for a stop suddenly halted his vehicle in a position on the highway where it was struck by an oncoming automobile, resulting in injury to the latter vehicle, for which damages were awarded. There the driver of the rear car testified: "That the truck driver gave no warning signal, and that, when he [the witness] realized that the truck had stopped, he applied his brakes, turned the automobile to the left, and that the two vehicles were about 60 feet apart when the truck came to a standstill; further that he was unable to turn the automobile sufficiently to avoid the collision." We have already stated that in this trial Dr. Scholz testified that he did give a stop signal, but respondent testified to the contrary on this and other important matters immediately incident to the collision. Where a problem arises by reason of a conflict in evidence, it is the jury's right and duty to solve it, not ours. In Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396, 399, a case involving a rear-end collision and cited by appellants and respondent, we find the following: "The mere fact that a vehicle is moving in close proximity to another one ahead of it, and keeping up with it, does not of itself constitute negligence per se; but whether in any particular case the operator of the rear vehicle is negligent if he drives his machine so as to cause a collision with the one ahead depends upon all the circumstances surrounding the happening of the accident, and almost invariably presents a question of fact for the decision of the jury or of the trial judge where, as here, the case is tried without a jury." This is a direct application to a case of rear-end collision of the general rule mentioned in Collins v. Marsh, 176 Cal. 639, 644, 169 P. 389, 391, where the court instructed the jury, "that, in passing on the issue of negligence, it must take into consideration all the facts and circumstances surrounding the particular transaction." See O'Connor v. United Railroads, supra. Being instructed, as they were, on the subject of negligence, contributory negligence, ordinary care, and other pertinent matters, this jury must be presumed to have considered "all the facts and circumstances." When they did so, they decided adversely to appellants, all the points which they here contend indisputably establish the plaintiff's negligence as a matter of law. We see no reason, and believe we have no right, under the circumstances, to interfere with the jury's disposition of these matters, submitted to their sound judgment as triers of the facts.

[4-7] Passing to the other ground of appeal, error in giving instructions, we shall take up the claimed errors seriatim. First, the court gave the jury an instruction, admittedly correct, upon "imminent peril." Appellants contend such an instruction was improper because there was no showing in this case of conditions to make such an instruction applicable. We do not take that view. See Wiley v. Young, 178 Cal. 681, 685, 174 P. 316; Potter v. Back Country Transp. Co., 33 Cal.App. 24, 26, 164 P. 342. Besides, we note that the instruction complained of reads: "If you find the plaintiff was suddenly put in danger," etc., clearly a notice to the jury that the instruction was to be disregarded unless they found a condition of imminent danger arising without negligence on the part of the plaintiff. Second, appellants complain because the instruction just mentioned was connected with a preceding instruction by the word "So." In considering this objection, we have read the two instructions as one and feel there was no impropriety in connecting the subject-matter of one with the other. Third, appellants state that, "the trial court erred in instructing the jury on negligence per se and omitting the instruction that the negligence must have contributed directly to the injury." Other instructions given by the court supplied the lack here complained of, saving repetition in instructions which is to be commended, and being altogether sufficient to protect the rights of the parties. Briggs v. Jess Mead, Inc., 93 Cal.App. 666, 677, 270 P. 263; Henderson v. Los Angeles Traction Co., 150 Cal. 689, 699, 89 P. 976; Dewhirst v. Leopold, 194 Cal. 424, 431, 229 P. 30. Fourth, appellants claim that prejudicial error arose when the court, in giving the instruction on imminent peril, failed to include the elements necessary to absolve respondent from contributory negligence. However, in the very instruction to which this instruction was connected by the word "So," contributory negligence was properly defined and another instruction was as follows on the subject of negligence: "It is the failure to use ordinary care or skill by one sought to be charged with negligence in the management of his property or person. It is not intrinsic or absolute, but always relates to some circumstance of time, place or persons. Hence, in determining the question of negligence as charged against either of the parties in this action, you will take

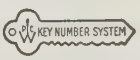
into consideration all of the circumstances that appear in evidence surrounding the doing of the act which is charged as negligence or the failure to do something which is charged as negligence. Acts which under some circumstances would constitute negligence under other circumstances would not constitute negligence. Ordinary care, as used in these instructions, is the care that ordinarily prudent persons exercise under the same or similar circumstances."

As respondent says in her brief: "The circumstances referred to in these instructions, of course, include circumstances of imminent peril as well as others. There is, therefore, not an absence of instructions on the standard of care of persons in imminent peril."

[8] Appellants also find error in the court's giving the following instruction: "It is unlawful for any person to drive any vehicle upon a highway in so negligent a manner as to indicate either a wilful or a wanton disregard of the safety of persons or property." It is claimed that: "There is nothing in the record, either in the pleadings or evidence, even taking the testimony of the plaintiff as the absolute truth, which by any stretch of the imagination could be construed as reckless driving or a wilful or wanton disregard of the safety of persons or property by the appellant." A reference to the plaintiff's testimony, applied to conditions surrounding the accident, summarized at the beginning of this opinion, refutes this contention.

Judgment affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



14 Cal.App.2d 48

HALL et al. v. MAZZEI.

Civ. 1316.

District Court of Appeal, Fourth District, California.

May 14, 1936.

1. Automobiles ⇐244(20)

Evidence that driver permitted automobile to leave pavement while attempting to pass overtaken automobile at 60 miles per hour *held* insufficient to establish "willful misconduct" authorizing recovery by guest (Civ.Code, § 1714¼; St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇐181(1)

"Willful misconduct" within automobile guest statute is intentionally doing something in operation of automobile which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or implied, that injury to guest will be probable result (Civ.Code, § 1714¼; St. 1931, p. 1693, § 141¾).

3. Automobiles ⇐181(1)

"Willful misconduct" within automobile guest statute relates to, and must be measured by, time, place, person, and surrounding circumstances (Civ.Code, § 1714¼; St. 1931, p. 1693, § 141¾).

4. Automobiles ⇐181(7)

Excessive speed under some circumstances may amount to negligence, under others to gross negligence, and under still others to willful misconduct within automobile guest statute (Civ.Code, § 1714¼; St. 1931, p. 1693, § 141¾).

Appeal from Superior Court, Tulare County.

Action by Irving W. Hall and another against Vernon R. Mazzei. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Everts, Ewing, Wild & Everts, A. W. Carlson, and L. N. Barber, all of Fresno, and Farnsworth, Burke & Maddox, of Visalia, for appellants.

McFadzean & Crowe, of Visalia, for respondent.

MARKS, Justice.

This is an appeal from a judgment of dismissal entered after the trial court granted defendant's motion for nonsuit at the close of plaintiffs' case.

In plaintiffs' opening brief the sole question argued is: Where an automobile is driven by the daughter of the owner, with his express or implied consent, and a guest

is injured through the alleged willful misconduct of the daughter, is the father, owner, liable to respond in damages to the guest where the injuries were caused by the willful misconduct of the daughter, driver, under the provisions of section 1714¼ of the Civil Code, and section 141¾ of the California Vehicle Act as in effect on August 25, 1931 (St.1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693)? Defendant argues this question in his brief and urges that the evidence fails to show Miss Mazzei, the driver, guilty of willful misconduct.

Defendant was the owner of a Ford automobile which, on August 25, 1931, the day of the accident, was being driven by his daughter with his knowledge and consent. The accident happened on a clear day on a straight dry road about one and one-half miles north of Mooney's grove near Visalia in Tulare county.

Plaintiff Dorothy Hall was the only witness testifying as to the accident and the events preceding it. She testified that Miss Mazzei drove from Mooney's grove north on this road at a speed of forty-five miles an hour; that a Ford coupé passed her; that the windshield on the Mazzei car became loosened and was tightened by Miss Mazzei while she was driving at a speed of forty-five miles an hour. Plaintiff continued her testimony as follows:

"Q. And while she was fixing this car the other machine passed and was immediately in front of you? A. Yes sir.

"Q. Did that machine stay immediately in front of you? A. No.

"Q. And what happened to it? A. It kept going away from us.

"Q. Do you remember when Miss Mazzei finished tightening the windshield at that time? A. Yes.

"Q. Now at that time how far in front of your car was the car that had just passed you, approximately? A. Three to four hundred feet.

"Q. That car that had just passed you was approximately was three to four hundred feet in front of you? A. Yes.

"Q. At that time and when the car was approximately three to four hundred feet ahead of you, you were still going forty-five miles an hour? A. Yes.

"Q. Now then just tell us what happened from then on. A. Well Miss ——— after or when she was fixing the windshield I asked her to please slow down or stop because she had to reach out to fix this screw and that when she had one hand on the steering wheel and we were going fast and she wasn't holding the car any too steady and after she got the windshield tightened she started to gain on the car and started going faster, and by the time we caught up with the car and were even with the car and the highway is narrow and she did not get past and the car started to slip and she jerked it back onto the highway and went to run into the other car and the other car went out, swerved to one side and she jerked the car back out into sand and as she jerked it back it turned over.

"Q. At the time that you were just about to pass this other automobile, how fast would you estimate the speed of the car driven by Miss Mazzei? A. At least sixty.

"Q. Yes. Now was there any conversation at that time between you and Miss Mazzei? A. Yes.

"Q. What was that? A. Well just as we caught up to the car, I had driven the car quite a bit and I realized it was almost impossible to pass the car, that the road was too narrow and the sides of the highway had just been worked on and this soft shoulder and I asked her not to try to pass the car because it was going fast itself.

"Q. What did you say; what words did you use? A. Let's not try to pass it.

"Q. And what did she say? A. She didn't say anything.

"Q. What did she do? A. She just laughed and kept on.

"Q. That highway you say is narrow. Do you know how wide it is? A. Around fifteen feet. * * *

"Q. Now what was the condition of those shoulders at that time, Mrs. Hall? A. Well the ground was soft.

"Q. Was it smooth like it is now? A. No.

"Q. When the car turned over, what happened to you? A. I was thrown out onto the highway and she was on the left-hand side of the highway and when the car turned over it turned over on my side and threw me onto the highway.

"Q. You were thrown clear of the car? A. Yes sir."

Willful misconduct has been so frequently defined that it seems unnecessary to repeat that definition here. See Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194;

Lennon v. Woodbury, 3 Cal.App.(2d) 595, 40 P.(2d) 292, 294, and cases there cited.

In both the foregoing cases excessive speed alone was held not sufficient to constitute willful misconduct. What was said on the question of excessive speed in the Lennon Case is applicable here:

"While this evidence with the reasonable inferences therefrom would support a finding of negligence, we think it is not sufficient under the established rule to sustain a finding of wilful misconduct. Any excessive speed which here appears is plainly attributable to a lack of care and not to a disregard of the probable consequences. While the driver of this car knew or should have known that an accident with the consequent injury to one of his guests was possible under the circumstances, we see in the evidence nothing to indicate that he knew or should have known that such an injury was probable. * * * We may say here as we said of the driver in the case of Howard v. Howard, supra [132 Cal.App. 124, 22 P.(2d) 279]: 'It clearly appears that, although he proved to be mistaken, he thought he could safely drive as he did even though the pavement was wet; that while he intended to drive rather rapidly he neither intended the result that happened nor was indifferent to the same; and that he was far from being in such a frame of mind that he did not care whether or not he injured any one. While this driver may have been negligent in a greater or less degree, in our opinion, no willful misconduct within the meaning of this statute is disclosed by this evidence.'"

[1, 2] In the instant case excessive speed seems to be the only real basis upon which Miss Mazzei could be found guilty of willful misconduct. The operation of adjusting the windshield had been completed at a considerable distance from the place of the accident. There were soft shoulders on both sides of the pavement, but the pavement was of sufficient width to permit her to drive at a speed of even sixty miles an hour and safely pass the only other car in the neighborhood without serious danger of leaving the pavement. It was careless of Miss Mazzei to permit her car to leave the pavement, but there is nothing to indicate that such an act was the result of anything more than her negligence. It was a momentary lapse in the exercise of care that had disastrous results and caused her death and the serious injury of her friend. Had the automobile remained on the pavement, it is highly improbable that there would have been an accident. We cannot conclude from the evidence that Miss Mazzei, at the time and place of the accident, intentionally did something in the operation of her motor vehicle which she should not have done, or intentionally failed to do something she should have done "under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result" [Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988, 990], which elements are necessary to establish willful misconduct on her part.

[3, 4] We do not wish to be understood as holding that mere speed may never constitute willful misconduct if indulged in under certain conditions. Willful misconduct, like negligence, must relate to the time, place, person, and surrounding circumstances, and must be measured by them. Excessive speed under some circumstances may amount to negligence, under others to gross negligence, and under still others to willful misconduct. In the instant case, circumstances sufficient to constitute willful misconduct are not disclosed by the record.

Counsel for both parties have argued at length the question of the liability of the owner of an automobile, who permits another to drive it, for damages to a guest caused by the willful misconduct of the driver. This court has already expressed its views on this question. Meek v. Fowler, 35 P.(2d) 410. We still adhere to the views there expressed after carefully considering the case of Gimenez v. Rissen (Cal.App.) 55 P.(2d) 292, where a contrary conclusion is reached. It is unnecessary for us to consider this question at length here, as whatever we might say upon it would be dicta in view of our conclusion that the evidence failed to establish willful misconduct on the part of Miss Mazzei.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

COAST SURETY CORPORATION v. WHITE et al.

Civ. 10938.

District Court of Appeal, Second District, Division 2, California.

May 13, 1936.

Hearing Denied by Supreme Court July 10, 1936.

1. Licenses ⊂=26

Surety on broker's bond for compliance with Corporate Securities Act cannot be *held* liable thereon for more than amount designated therein, and one recovery of full amount constitutes defense against all pending or future suits, though based on distinct wrongful acts of principal (Gen.Laws 1931, Act 3814, § 6, subd. 3).

2. Interpleader ⊂=19

Broker, giving bond for compliance with Corporate Securities Act, was not necessary party to surety's action in nature of interpleader to prorate amount of bond among various claimants; presence of all parties before court being unnecessary to establish plaintiff's liability to defendants (Gen.Laws 1931, Act 3814, § 6, subd. 3).

3. Licenses ⊂=26

Broker's bond for compliance with Corporate Securities Act *held* to cover false representations to customers that broker had direct telegraph wires to New York, could get first-hand information as to all stock and securities, would invest customer's money without risk of loss thereof or speculation, and would add to money deposited with them by customer an equal sum for investment in good securities (Gen.Laws 1931, Act 3814, § 6, subd. 3).

4. Appeal and error ⊂=843(2)

Whether trial court erred in modifying preliminary injunction, which plaintiff claimed should be maintained only until certain date, became moot question, which appellate court will not consider, after such date.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by the Coast Surety Corporation against Lulu C. White, Hazel A. Dunlap, and others. From a judgment for defendant Dunlap and an order modifying a temporary injunction against defendant White, plaintiff appeals.

Affirmed.

Leslie S. Bowden, of Los Angeles, for appellant.

Ben C. Cohen and Irving Cohen, both of Los Angeles, for respondent White.

Clarence Hansen, of Los Angeles, for respondent Dunlap.

McCOMB, Justice pro tem.

Plaintiff appeals from a judgment in favor of defendant Hazel A. Dunlap and an order obtained by defendant Lulu C. White, modifying a temporary injunction.

The facts are these:

Pursuant to the requirements of subdivision 3 of section 6 of Act 3814, volume 2, Deering's General Laws, page 1930, plaintiff, as surety, filed with the commissioner of corporations of the state of California a bond in the sum of $5,000 for the benefit of any interested person, providing for the faithful performance by Financial Guarantee Corporation, Limited, a broker, of all the terms and conditions of the Corporate Securities Act. Thereafter a duly authorized agent of the broker falsely represented to defendant Hazel A. Dunlap, for the purpose of obtaining from her $2,848.06, that (a) they had direct telegraph wires in communication with New York and were able to get first-hand information upon all stocks and securities; (b) they would invest her money without risk of loss or speculating with her money; and (c) they would add to money deposited with them by her an equal sum for the purpose of investing it in good securities. In fact, they returned to defendant Hazel A. Dunlap the sum of $624.99 only.

On May 11, 1934, she commenced an action against plaintiff to recover on the bond which it had executed.

April 26, 1934, defendant Lulu C. White obtained a judgment against plaintiff under its bond for $2,446.52, together with costs in the sum of $280.

June 19, 1934, plaintiff filed the present action in the nature of an interpleader, asking that (1) the court make an order prorating the amount of the bond among the various claimants, and (2) defendant Lulu C. White be restrained from executing the judgment she held unsatisfied until an order of proration had been made.

October 6, 1934, the trial court modified a previous injunction restraining defend-

ant Lulu C. White from executing the judgment which she had theretofore obtained by permitting her to levy an execution against plaintiff in the sum of $2,252, and on November 22, 1934, entered judgment in favor of defendant Hazel A. Dunlap in the sum of $2,223.07 and $77.80 costs.

Plaintiff relies for reversal of the judgment on these propositions:

First: The evidence is insufficient to support the findings of fact upon which the judgment was necessarily predicated.

Second: The trial court erred in proceeding to try the case, since the principal on the bond was not a party to the action.

Third: The bond furnished by plaintiff on behalf of the broker did not cover such acts as the evidence disclosed in the instant case.

Fourth: It was error to modify the preliminary injunction so as to permit defendant Hazel A. Dunlap to levy an execution prior to December 31, 1935.

As to plaintiff's first proposition, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgment in favor of defendant Hazel A. Dunlap and the order in favor of Lulu C. White were necessarily predicated. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Thatch v. Livingston (Cal.App.) 56 P.(2d) 549.

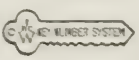
[1, 2] Appellant's second claim is untenable. A bond furnished pursuant to the requirement of subdivision 3 of section 6 of Act 3814, supra, does not create an unlimited and continuing liability on the surety issuing such bond, and the surety cannot be held liable for the aggregate in excess of the amount designated in the bond. One recovery of the full amount constitutes a defense against all pending or future suits, even though such suits are based upon distinct wrongful acts of the principal. Wiggins v. Pacific Indemnity Co., 134 Cal. App. 328, 25 P.(2d) 898. It was therefore unnecessary to have all parties before the court in order to establish plaintiff's liability to defendants.

[3] The third proposition urged by plaintiff is likewise untenable. Division One of this court has passed upon this identical question adversely to plaintiff's contention. White v. Financial Guarantee Corp., Ltd. (Cal.App.) 56 P.(2d) 550.

[4] The final contention presented by plaintiff it is unnecessary for us to decide for the reason that plaintiff claims the injunction should have been maintained until December 31, 1935, only. This date having passed, the question is now moot and therefore will not be considered by this court. 2 Cal.Jur. 803, § 472.

The judgment and order appealed from are, and each is, affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 118

FURLOTT et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 1779.

District Court of Appeal, Fourth District, California.

May 15, 1936.

1. Trial ⇐393(1)

Finding contained in judgment is sufficient.

2. Forcible entry and detainer ⇐6(2)

Statute extending summary remedy for possession of property to cases where property has been sold *held* inapplicable where party in possession raises complete issues as to title and right of possession in court of equity under which circumstances court has power not only to decide issues presented but to carry decrees into effect (Code Civ. Proc. § 1161a, subd. 3).

3. Equity ⇐17

In suit to determine title to property which had been sold under provisions of trust deed wherein issue was joined on question of right of possession, court *held* to have power to grant relief on such issue, notwithstanding that plaintiffs in possession were

not served with three days' notice to quit required by statute providing summary remedy (Code Civ.Proc. § 1161a, subd. 3).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Harry P. Furlott and others against the Security-First National Bank of Los Angeles and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

F. E. Davis, of Hollywood, for appellants.

Siemon, Claflin & Maas, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action to determine the title to a parcel of land which had been sold under the provisions of a deed of trust. The defendant bank was the trustee, and the defendants Ramsey, who were the beneficiaries under the trust deed, purchased the property at the sale.

In a first cause of action the plaintiffs set forth certain of the facts leading up to the sale, followed by certain facts purporting to show that the sale was wrongfully made. In a second cause of action they alleged that they were the owners and in possession of the property, that the defendants asserted title and right to the possession, and that these claims were without merit. They prayed that the sale under the trust deed be vacated and set aside and that the title to the property be quieted in them. The answer set forth more fully the facts leading up to the sale, including a copy of the deed issued in pursuance of the sale, and prayed that title to the property be quieted in the purchasers, and that they be given a writ of possession.

The court found in all respects in favor of the defendants and entered judgment quieting title in the individual defendants and directing the issuance of a writ of possession. From this judgment the plaintiffs have appealed on the judgment roll alone. The evidence is not before us and no attack is made upon those findings which relate to the claimed insufficiency of the sale under the trust deed.

[1] It is first contended that the court failed to find upon a material issue, in that it failed to find that the appellants were in actual possession of the property, when there was evidence to support such a finding. As a matter of fact the court found that the appellants were in actual possession of the property although this finding is found in the judgment. This, however, is sufficient. Shaingold v. Shaingold, 191 Cal. 438, 216 P. 603. However, this entire matter is immaterial and the real issue as to possession was as to which party had that right.

[2, 3] The main contention of appellants is that the judgment is erroneous since they were in possession of the property and since it was neither pleaded nor found that the respondents had served upon them a three-day notice to quit, in accordance with subdivision 3 of section 1161a of the Code of Civil Procedure. As we understand it, this contention does not affect that part of the judgment which quiets title in the respondents but the same affects only that portion of the judgment which directs the issuance of a writ of possession.

The Code section referred to, adopted in 1929, had the effect of extending the summary remedy which formerly existed in some cases to certain other cases where property has been sold. While an additional remedy was thus provided, this section has no application where a party in possession raises complete issues as to title and the right of possession in a court of equity. Under such circumstances, such a court has the power not only to decide the issues presented but to carry its decrees into effect. These appellants raised the question of the right of possession in this action in equity, issue thereon was joined, and the court had power to grant relief in that regard even though another and different remedy might have been available to the respondents had this action not been brought.

It is further contended that certain of the findings are contradictory. We are unable to find any such contradiction and it would serve no useful purpose to review the matter in detail.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

14 Cal.App.2d 96

BERNSTEIN v. CONGREGATION ANSHI SFART OF BOYLE HEIGHTS et al.

Civ. 10929.

District Court of Appeal, Second District, Division 2, California.

May 15, 1936.

Appeal and error ⇐766

Where appellant failed in opening brief to present each point separately under appropriate heading, showing nature of question to be presented and point to be made without any other matter appearing thereon, appeal would be dismissed, since appellate court would not search record for purpose of discovering errors not pointed out by counsel (Rules of Supreme Court and District Courts of Appeal, rule 8, § 2, p. 10).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Barnett Bernstein against Congregation Anshi Sfart of Boyle Heights and others. From a judgment for defendants, plaintiff appeals.

Appeal dismissed.

Max Schleimer, of Los Angeles, for appellant.

Arch H. Vernon, Earl E. Johnson, Lawrence L. Otis, and Gilbert E. Harris (by Arch H. Vernon), all of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondents after a trial before a court without a jury.

Appellant has failed in his opening brief to present each point separately under an appropriate heading, showing the nature of the question to be presented and the point to be made without any other matter appearing thereon. Rule 8, § 2, p. 10, Rules of the Supreme Court and District Courts of Appeal of the State of California.

In Adams v. Standard Accident Insurance Co., 124 Cal.App. 393, at page 394, 12 P.(2d) 464, Mr. Justice Conrey, then Presiding Justice of the District Court of Appeal, Second Appellate District, Division 1, in commenting upon this provision of rule 8, supra, accurately states the requirement thus: "Such assignment of error should take the form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of the judgment."

This court will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule 8, supra, in its entirety.

For the foregoing reasons the appeal is dismissed. Battson v. Kirkpatrick (Cal. App.) 53 P.(2d) 762; Ferslew v. Andersen (Cal.App.) 53 P.(2d) 768.

It is so ordered.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 169

AMERICAN SOLVENTS & CHEMICAL CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10194.

District Court of Appeal, First District, Division 2, California.

May 19, 1936.

Master and servant ⇐398

Advice of employer's physician who examined compensation claimant, and had no authority to treat claimant, that claimant discontinue work and rest for period of time *held* not to toll limitation statute which thus barred claim not presented until ten months after employer notified claimant that employer denied liability (St.1931, p. 2372, § 11).

Proceeding under the Workmen's Compensation Act by M. Susanj, claimant, opposed by the American Solvents & Chemical Corporation, employer, and the Globe Indemnity Company, insurer. The Industrial Accident Commission awarded compensation, and the employer and insurer petition for review.

Award annulled.

R. P. Wisecarver, of San Francisco, for petitioners.

E. A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

NOURSE, Presiding justice.

On June 25, 1933, one Susanj, an employee of petitioner, was operated on for appendicitis. He returned to work in August. A pain developed in his right arm and he laid off work until October 29, 1933. On November 22, 1933, petitioner arranged to have him examined by the company doctor. On December 4, 1933, the company notified Susanj that it did not admit any liability for his condition. On September 11, 1934, Susanj filed a claim for compensation. On March 30, 1935, the commission denied his application, but on rehearing made the award of $11.40 a week which is here under review.

The petitioner attacks the award upon the ground that the claim of the employee is barred by the six-month statute of limitations found in the Workmen's Compensation Act (St.1917, p. 841, § 11, as amended by St.1931, p. 2372). Though the commission expressly found that the claim was filed within six months from the last treatment, all the facts unquestionably required a contrary finding. In fact, no treatment was given the employee at any time. On November 22, 1933, the employer requested the employee to report to its physician for an examination and opinion, and such an examination was held on November 25th. On December 4, 1933, the employer notified the employee that, as a result of this examination, it appeared that his disability had no relation to his employment, and that liability, therefore, was declined. The claim for compensation was made ten months later.

The respondent placed some reliance upon the testimony of the physician that when he examined the employee he advised him to discontinue working until December 1st, and suggested that a rest might improve his condition. This is the "treatment" which the respondent cites as tolling the running of the statute of limitations. There are several answers to the argument, but it is sufficient to state that the examining physician had no authority to "treat" the employee and that his suggestion that the employee discontinue working was not intended as a treatment by the physician or by the employer, nor accepted as such by the employee.

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

13 Cal.App.2d 673

PEOPLE, by DEPARTMENT OF PUBLIC WORKS, v. EMERSON et al.

Civ. 1747.

District Court of Appeal, Fourth District, California.

May 6, 1936.

1. Eminent domain ⇐112

In condemnation action, owner whose land is being condemned in part may not recover damages to remainder of land caused by manner in which works are to be constructed, or operated on land of others, but detriment for which owner may recover compensation is that which will result from operation of works on his land alone.

2. Eminent domain ⇐112

Owner of land used for cattle range over which right of way for highway was condemned *held* not entitled to severance damages for failure to provide cattle crossing to give access to only water available through cattle crossing under old highway, where neither old cattle crossing nor spring was on property in question.

3. Eminent domain ⇐200

Landowner over whose cattle range right of way was condemned for highway *held* required to prove by competent evidence asserted easement through cattle crossing under old highway or lease of cattle crossing and of spring, to be entitled to severance damages based thereon for failure to provide new cattle crossing to give access to spring, where neither spring nor old crossing was on owner's property.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Proceeding by the People of the State of California, acting by and through the Department of Public Works, against E. E. Emerson, as administrator of the estate of Charles Emerson, deceased, and another. From an adverse judgment, the plaintiff appeals.

Affirmed in part, and reversed, with instructions, in part.

Clarence W. Morris and Leonard A. Worthington, both of San Francisco, for appellant.

Matthew S. Platz, of Bakersfield, for respondents.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

MARKS, Justice.

Plaintiff brought this action in eminent domain to condemn a right of way for a highway across land of the estate of Charles Emerson, deceased. The trial court awarded defendants $37.68 damages for the property taken, and $270.90 severance damages. While the appeal is from the entire judgment, plaintiff does not question the correctness of the award of damages for the property taken.

The decedent owned 84.6 acres of land in Kern county which was used as range for cattle. Of this, 3.14 acres were taken for the highway, leaving 30.1 acres to the west and 51.36 acres to the east. The country is rolling and the highway was entirely constructed on fills and in cuts which prevented cattle from crossing it. No cattle crossing was provided.

The only water available for cattle in the district was a spring about two miles easterly from the land in question. Prior to the construction of the new highway, cattle ranging to the west reached the water by passing through a cattle crossing under the old highway which was not far from the location of the new one. As far as the record discloses neither the old cattle crossing nor the spring were on the property of the decedent.

[1, 2] The question of the right to award damages in proceedings of this kind, where the basis of the damages awarded was something done elsewhere than on the property of defendant, was settled in the case of County Sanitation District No. 2 of Los Angeles County v. Averill (Cal.App.) 47 P.(2d) 786, 788, decided after this appeal was taken. It was there said:

"Appellant advances, as one reason why the court should have received evidence of possible future damage by means of the winds and ocean currents, the rule that all damages sustained by the landowner by reason of the condemnation must be recovered in the action in which the land is taken. East Bay Municipal Utility Dist. v. Lodi, 120 Cal.App. 740, 748, 8 P.(2d) 532; Sternes v. Sutter Butte Canal Co., 61 Cal. App. 737, 216 P. 66; Lewis on Eminent Domain, 1313. While the soundness of the rule may not be questioned, and while the converse of this rule relied upon by respondent is also well established, to the effect that damages not necessarily included in the issues in the condemnation action may be recovered in a subsequent action, neither rule is helpful in determining what claims are barred and what are not barred by the judgment of condemnation. More pertinent to this question is the statement found in Lewis on Eminent Domain (3d Ed.) vol. 2, pp. 1451, 1452, in which it is said that 'damages to the remainder by what is done elsewhere than on the part taken are not to be considered. Thus, where parts of certain lots were taken for a railroad and damages assessed therefor, and the parts not taken were damaged by the railroad crossing and obstructing a street upon which the lots abutted at some distance from the lots, it was held that the latter damages were not included in the settlement and an action would lie to recover the same.' To the same effect are Atchison & N. R. Co. v. Boerner, 45 Neb. 453, 63 N.W. 787; Perrine v. Pennsylvania Ry. Co., 72 N.J.Law, 398, 61 A. 87; Eaton v. Boston, C. & M. R. R., 51 N.H. 504, 12 Am.Rep. 147.

"An owner, whose land is being condemned in part, may not recover damages in the condemnation action to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others. The detriment for which he may recover compensation is that which will result from the operation of the works upon his land alone. Keller v. Miller, 63 Colo. 304, 165 P. 774, and cases cited; Oregon-Washington R. & Nav. Co. v. Campbell, 34 Idaho, 601, 202 P. 1065; Walker v. Old Colony, etc., R. Co., 103 Mass. 10, 4 Am.Rep. 509; Campbell v. United States, 266 U.S. 368, 45 S.Ct. 115, 69 L.Ed. 328."

[3] Defendants urge an easement existed through the cattle crossing and suggest a lease on it and the spring. The evidence is insufficient to support an easement, and only vaguely hints at leases. If such easement or leases exist, they should be proved by competent evidence.

The portion of the judgment awarding defendants $37.68 damages for the property taken is affirmed. The portion of the judgment awarding them $270.90 severance damages is reversed, with instructions to the trial court to retry the issue of severance damages and award judgment in accordance with the views here expressed. Each party will pay his own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

STOCKWELL et al. v. McALVAY et al.*

Civ. 10856.

District Court of Appeal, Second District, Division 2, California.

May 14, 1936.

Hearing Granted by Supreme Court July 18, 1936.

1. Attorney and client ⇐72

In suit by judgment debtor and wife to set aside sheriff's sale of stock allegedly owned by them, evidence *held* to show that judgment debtor and judgment creditor were responsible for acts of their attorneys during negotiations preceding such sale, and hence parties were bound thereby.

2. Equity ⇐65(2)

Judgment debtor's fraudulent transfer of his home and corporation stock to his wife, verification of false statement of his assets to induce creditor to compromise judgment, and filing of petition in bankruptcy, although solvent, *held* to preclude court of equity from setting aside sheriff's sale of corporation stock allegedly owned by judgment debtor and wife, especially where some of stock had been transferred to innocent purchaser who was not made party to action.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Suit by B. C. Stockwell and husband against B. D. McAlvay and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

Joseph L. Lewinson and Morris E. Cohn, both of Los Angeles, for appellants.

Newby & Newby and Dee Holder, by Dee Holder, all of Los Angeles, for respondents.

WOOD, Justice.

This is an appeal by defendants from a judgment in favor of plaintiffs setting aside a sheriff's sale of stock of Consumers Salt Company.

A statement in some detail of the complicated affairs of the parties is necessary to an understanding of the problem before us. Plaintiffs V. E. Stockwell and B. C. Stockwell are husband and wife. Defendants Irwin and Rose are attorneys for defendant McAlvay. On June 19, 1925, McAlvay obtained a judgment against V. E. Stockwell in the sum of $16,000, based upon charges of fraud in the sale of real estate. After the accrual of the cause of action upon which the last-mentioned judgment was based, and after suit had been threatened, V. E. Stockwell transferred his residence property to his wife. In a separate action in the superior court a judgment was rendered on April 13, 1926, in which the court held that the deed was "executed by said V. E. Stockwell with intent to delay and defraud his said creditor, said B. D. McAlvay." In that action the court further ruled that title to the property was in the trustee in bankruptcy hereinafter referred to. Execution was issued on the judgment of June 19, 1925, and on October 1, 1925, the sheriff levied upon 225,000 shares of stock of the salt company, shown by the records of the company to be in the name of B. C. Stockwell. Defendant V. E. Stockwell had caused the stock to be transferred to his wife's name on July 9, 1925. The stock was sold by the sheriff to McAlvay on November 17, 1925, for the sum of $50. It is not charged that the sale was not made in accordance with law. Between October 1, 1925, and November 17, 1925, certain negotiations were conducted by and between Attorney Rose for McAlvay and Attorney Newby for V. E. Stockwell. On October 22, 1925, V. E. Stockwell verified a petition to be filed in bankruptcy proceedings, appending thereto a list of his property, but without including the 225,000 shares of stock levied upon or the residence property. This petition was exhibited by Newby to Rose on October 28, 1935, with the assertion that Stockwell had stated that the list included all of his property. Rose was informed that Stockwell did not wish to commence bankruptcy proceedings, but that he would do so unless McAlvay accepted the property mentioned in the list in satisfaction of the judgment. Rose undertook to investigate the properties listed, and not being satisfied with the value of the properties, he ordered the sale to proceed. On the day immediately after the sale V. E. Stockwell filed a petition in bankruptcy in which he scheduled the properties mentioned in the list which had been exhibited to Rose, not including the residence or the shares of stock sold by the sheriff. On November 19, 1925, V. E. Stockwell was adjudged bankrupt, and on December 17, 1925, Kyle Grainger was appointed trustee.

McAlvay commenced an action on November 27, 1925, under the provisions of

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 74 P.2d 504.

section 328 of the Civil Code, as it was then in force, to quiet title to the shares of stock. Compliance was made with the requirements of the statute. The salt company and Mrs. Stockwell were made defendants. V. E. Stockwell filed no pleading in the action, but he appeared as a witness for his wife and testified that he did not own or claim any interest in the stock. Upon the first trial of the quiet title action judgment was rendered against McAlvay, but his motion for new trial was granted and upon a second trial judgment was rendered, September 16, 1927, in which it was held that B. C. Stockwell had no interest in the stock and that it was the property of McAlvay. This judgment was affirmed on appeal. McAlvay v. Consumers' Salt Company, 112 Cal.App. 383, 297 P. 135, 139. The reviewing court, after discussing the charge of inadequacy of price in connection with the evidence in the case, said: "No fraud and no unfairness except as to the amount paid is urged against the plaintiff, and the testimony was not such as to compel the finding that the price paid rendered the transaction unconscionable. Such was not the view of the trial court, and no reason appears for disturbing its conclusion."

The trustee in bankruptcy took no action to recover the shares of stock. McAlvay filed with the trustee his claim based on the judgment of June 19, 1925, with a credit of the amount paid for the stock at the sheriff's sale. Mrs. Stockwell from her separate funds deposited with the trustee the sum of $25,000 and authorized the trustee to pay from this deposit all claims against the bankrupt estate including fees of the trustee. From this sum all claimants, including McAlvay, were paid in full. The sum deposited was more than sufficient to pay all claims and expenses. By agreement between Mr. and Mrs. Stockwell all of the assets were to become the property of Mrs. Stockwell.

Between the dates of the first and second trials of the quiet title action, plaintiffs commenced the present action, October 27, 1926, and prayed that the sale of November 17, 1925, "be set aside as fraudulent." Some of the stock had been transferred to Rose and Irwin and they were made parties defendant. In the original complaint it was alleged that the shares were the "sole and separate" property of Mrs. Stockwell. Upon the trial in June, 1932, the complaint was amended and the allegation made that the stock was the property of "plaintiffs." The allegations upon which plaintiffs obtained judgment are, in substance, that the attorney for McAlvay falsely pretended to be investigating the value of the properties listed in the bankruptcy petition which had been exhibited to him, that he thereby prevented V. E. Stockwell from taking steps to prevent the sale and from filing the bankruptcy petition before the sale of the stock, and that the sale was conducted without notice to plaintiffs. Counsel for both parties earnestly assert that their conduct was entirely proper. Some of the specific findings are favorable to defendants, but the general findings on the issue of fraud are in accord with plaintiff's allegations. The court also found that the stock at the time of the sale was of the value of not less than $60,000.

[1] The briefs contain much discussion concerning the conversations and negotiations prior to the sale and the findings made thereon, but we consider it inappropriate to set these matters forth at great length. The question is raised whether McAlvay was bound by the acts of his attorneys during the negotiations. Mr. Newby argues that McAlvay was bound by the acts of his attorneys but that V. E. Stockwell was not so bound. He states on one page of his brief that: "The transaction complained of in the instant case was the fraud of appellants Irwin and Rose and the responsibility of McAlvay for that fraud to the extent of the benefits which he received from it." On another page that: "The final and conclusive answer to the whole defense, based upon said equitable maxim, is that defendants were not in the transaction upon which the instant suit is based, dealing with Stockwell personally at all. On the contrary, they were dealing with an independent person, to-wit, Nathan Newby, who trusted them and relied upon their acts and was misled thereby." And on another page: "Of course the fraudulent execution sale had then taken place and Newby very keenly resented the fact that he had been overreached in that matter." The rule of responsibility applies alike to both of the litigants. Under the circumstances shown in evidence both parties were unquestionably responsible for the acts of their attorneys.

The main contentions of defendants are: That plaintiffs must be denied relief because they come to a court of equity with unclean hands; that the judgment in the quiet title action is res judicata, that said action was in rem, and that the two Stockwells having conspired and co-operated to-

gether V. E. Stockwell is bound by the judgment; that the trustee in bankruptcy alone had authority to sue to set aside the sheriff's sale; that the action is barred by the statute of limitations and by laches; and that the evidence does not support the findings which in turn are insufficient to sustain the judgment. Our determination of the first of these contentions disposes of the appeal and makes unnecessary a discussion of the other questions involved.

[2] An examination of the complicated facts of this litigation discloses the familiar case of a judgment debtor attempting to evade a court judgment by placing his property in the name of his wife. No other reasonable conclusion can be reached. By fraudulent methods Mr. Stockwell persistently attempted to prevent his judgment creditor from receiving that which the court had awarded. In so doing he brought himself to a position of financial loss, a position which resulted from his own unfair conduct and from which a court of equity is prevented from extricating him by the fundamental rule that he who applies to the court must do so with clean hands. He fraudulently transferred his residence property and corporation stock to his wife; he verified a false statement of his assets and caused it to be exhibited to counsel for his creditor with the threat that if the false list of property be not accepted he would file a petition in bankruptcy; although solvent at all times and possessed of ample means to pay his debts, he fraudulently filed a petition in bankruptcy and fraudulently omitted to list all of his property in the bankruptcy proceedings; all of which was done in an effort to defeat the McAlvay judgment. Mr. Stockwell failed in his effort to induce McAlvay by use of the fraudulent bankruptcy petition to accept a portion of his property in settlement and now asks the court to relieve him from the consequences of his own fraudulent conduct in causing the stock to be placed in his wife's name. This a court of equity will not do. As well stated in Allstead v. Laumeister, 16 Cal. App. 59, 116 P. 296, 298: "The harshness of such consequences falls upon one who would fraudulently conceal his property so as to escape the just demands of those having a claim upon it. * * * A court of conscience cannot consistently with the very principles which have occasioned its existence lend its aid to relieve a party from the results of his own fraud." See, also, Powell v. Bank of Lemoore, 125 Cal. 468, 58 P. 83; Clark v. Bell (1905) 40 Tex. Civ.App. 39, 89 S.W. 38; Dunne v. Cunningham, 234 Mass. 332, 125 N.E. 560.

Part of the stock sold at sheriff's sale was transferred by McAlvay to Irwin, who in turn pledged the stock as security with one Henry Merton. Mr. Merton has not been made a party to this action. Nevertheless the court adjudged that certificate No. 53 for 112,500 shares issued to and held by Henry Merton "be declared null and void" and Merton was commanded to deliver the certificate to the clerk of the court. This part of the judgment was manifestly erroneous. The rights of Merton as an innocent holder for value must be protected, and in any event the court was without jurisdiction to order him to deliver the certificate without his being made a party to the litigation.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

KEY NUMBER SYSTEM

GREENLEE v. GREENLEE.*

Civ. 10941.

District Court of Appeal, Second District, Division 2, California.

May 18, 1936.

Rehearing Denied June 5, 1936.

Hearing Granted by Supreme Court July 16, 1936.

Husband and wife ⇨298¾

In wife's separate maintenance action, awarding wife without time limitation use of husband's separate property on which wife had endeavored to declare homestead *held* error, since statute restricted court to granting wife such property for limited period only (Civ.Code, §§ 137, 146, subd. 4).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Separate maintenance action by Elizabeth Ada Greenlee against Warren Russell Greenlee, also known as Warren R. Greenlee, also known as W. R. Greenlee, wherein defendant filed a cross-complaint. From a portion of the judgment awarding to

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 61 P.2d 1157.

plaintiff without limitation the use of separate property of defendant, defendant appeals.

Reversed.

Henry G. Bodkin, of Los Angeles, for appellant.

Louis T. Fletcher, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

Defendant appeals from a portion of the judgment in a separate maintenance action, awarding to plaintiff without limitation the use of separate property of defendant, upon which plaintiff had endeavored to declare a homestead.

The conceded facts are:

Plaintiff filed an amended complaint seeking separate maintenance from the defendant on the grounds of (1) desertion and (2) willful neglect. Plaintiff had endeavored to declare a homestead upon a parcel of the separate property of her husband, the defendant. The trial court ordered judgment for plaintiff, and by its decree disposed of the parcel of land upon which plaintiff had endeavored to declare a homestead as follows:

"It is further ordered, adjudged and decreed that plaintiff have in addition to the said fifty ($50.00) dollars per month possession of the real property described as Parcel No. 1, paragraph 1 of this decree, together with all furniture, household goods, and personal effects therein, and any and all rents therefrom. * * *"

The only question necessary for us to determine is: *Has the court in a separate maintenance action the power to award the wife separate property of the husband upon which a homestead has been declared for an unlimited period of time?*

The law is well settled that the court in granting a wife permanent support and maintenance for herself may assign to her for a *limited period only* separate property of the husband upon which a homestead has been declared. Section 137 and section 146, subd. 4, Civ. Code.

Mr. Justice McFarland, in passing upon a similar question in Huellmantel v. Huellmantel, 117 Cal. 407, at page 409, 49 P. 574, 575, said: "'If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of said property, subject to the power of the court to assign it for a *limited period* to the innocent party.' * * * Therefore in the case at bar the court could assign the property to the respondent *only* for a *limited period,* which, as heretofore held by this court, cannot exceed the life of the party to whom it is assigned." (Italics ours.)

In the instant case the trial court by its decree erroneously awarded the separate property of the husband, upon which the wife had endeavored to declare a homestead, to her for an *unlimited period,* contrary to the limitation placed upon the court's power by subdivision 4 of section 146 of the Civil Code.

The portion of the judgment appealed from is reversed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 10

SMITH et al. v. BAKER et al.

Civ. 9821.

District Court of Appeal, First District, Division 2, California.

May 12, 1936.

1. Automobiles ⇐181(1)

"Intoxication" within automobile guest statute has meaning similar to that of phrase "under influence of intoxicating liquor," and person may be said to be intoxicated or in state of intoxication, within statute, if intoxicating liquor has so far affected his nervous system, brain, or muscles as to impair to appreciable degree his ability to operate automobile in manner that ordinarily prudent and cautious man, in full possession of faculties, using reasonable care, would operate or drive similar vehicle under like conditions (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Intoxicated; Intoxication" and "Under the Influence of Liquor," see Words & Phrases.]

2. Automobiles ⇐244(20, 36)
Death ⇐24

Evidence *held* to support judgment awarding parents damages for death of automobile guest on ground that host was in-

toxicated and that accident and death were proximately caused by such intoxication and that parents were not contributorily negligent in permitting guest to ride with defendant (St.1931, p. 1693, § 141¾).

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by Dolly L. Smith and another against Beverly Baker and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Archer Bowden, of San Jose, for appellants.

R. G. Wilkins and Chesley M. Douglas, both of San Jose (A. Dal Thomson, of San Francisco, of counsel), for respondents.

SPENCE, Justice.

Plaintiffs sued to recover damages resulting from the death of their daughter while riding as the guest of defendants. The cause was tried by the court sitting without a jury and from a judgment in favor of plaintiffs in the sum of $5,000, defendants have appealed.

It was charged in the complaint that the death of the daughter was proximately caused by the intoxication of defendant Beverly Baker who was driving the automobile. Defendants denied the allegations of the complaint and affirmatively alleged that plaintiffs were guilty of contributory negligence. The trial court found that the above-mentioned allegations of plaintiffs' complaint were true. It further found that the only liquor consumed by defendant Beverly Baker was served to him by plaintiff John F. Smith, but that said plaintiff had no knowledge of the intoxication of defendant Beverly Baker. It further found that there was no negligence on the part of plaintiffs, or either of them, in permitting their daughter to ride in the automobile driven by said defendant.

Appellants contend that the evidence is insufficient to sustain the finding that appellant Beverly Baker was intoxicated and the finding that the death was proximately caused by such intoxication. They further contend that "the fact that John F. Smith served Beverly Baker with the only alcoholic liquor consumed by him on the day of the accident," bars any recovery by plaintiffs. These contentions of appellants make it necessary to summarize the evidence presented on the trial.

Appellants planned to drive their automobile from their home in Gilroy to Morgan Hill and then return. Before leaving, the fiancé of the respondents' daughter asked appellants to bring respondents' daughter to Gilroy upon their return. Appellants agreed to do so. Respondents were then living separate and apart from one another. Appellants called at the place of respondent John F. Smith, near Morgan Hill, for the purpose of collecting some money which said respondent owed to appellant Beverly Baker. They remained there for about 20 minutes during which time respondent John F. Smith served appellant Beverly Baker with two glasses of port wine. Appellants told Mr. Smith that they were going to take his daughter to Gilroy with them. Appellants left and went to the Lopez place a few miles distant to find respondents' daughter. There they met respondent Dolly L. Smith and her daughter and remained only a very short time when they started on the return trip. The automobile was a Ford roadster and the top was down. Appellants were riding in the main seat while respondents' daughter and a relative of appellants were riding in the rumble seat. A large police dog was riding on the top between the main seat and the rumble seat. Appellant Beverly Baker drove the car south on the highway through Morgan Hill and the accident occurred about half a mile north of San Martin.

[1, 2] In our opinion, the evidence was sufficient to sustain the findings to the effect that appellant Beverly Baker was intoxicated and that the accident and death was proximately caused by such intoxication. The word "intoxication," as used in our guest statute (St.1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St.1931, p. 1693), has been held in Tomlinson v. Kiramidjian, 133 Cal.App. 418, 24 P.(2d) 559, to have a meaning similar to "under the influence of intoxicating liquor" as that term is defined in People v. Ekstromer, 71 Cal.App. 239, 235 P. 69, 71. A person may therefore be said to be intoxicated or in a state of intoxication within the meaning of the guest statute, if intoxicating liquor has so far affected his nervous system, brain, or muscles "as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinary prudent and cautious man, in

the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions." If there was any substantial evidence to show that appellant Beverly Baker was in such condition at the time that the accident happened, then such evidence was sufficient to sustain the finding of intoxication.

As above stated, it was admitted that said appellant had consumed two glasses of port wine about 45 minutes before the accident occurred. These glasses were described by him as "regular water glasses" and they were filled within about half an inch of the top. There was also testimony to show that the wine was "18 per cent. port wine." Said appellant was a young man of 23 years of age and he consumed said wine about 2½ hours after eating his breakfast. He testified, "Well, I could feel a warm feeling like all intoxicating liquors make me feel, but I was not drunk." Respondent Dolly L. Smith testified that she talked with said appellant during the short time he stopped at the Lopez place. She stated that, "He appeared very talkative, and held a continued conversation" and that his eyes "had a glassy appearance." She further testified that as he left the Lopez place, he "backed out very fast" and started down the dirt road at an excessive speed. There was other direct evidence of excessive speed between the Lopez place and the point where the accident occurred. Said appellant testified that he applied his brakes just before the accident and "it seemed to lock in some way, just jerked the car out of my hand, I had no control." He could not remember his speed before applying his brakes and when asked why he applied them, he said, "I don't know." At another point in his testimony, he was asked whether there was any object in front of him when he applied his brakes and he replied, "It seems as though there was, and then I was—I can't remember exactly whether there was or not; it seems as though a car ahead of me slowed down or speeded up. I can't recall exactly; it just seems like a dim recollection—I couldn't swear, I am not sure about it." He was further asked regarding his sensation after the brakes locked as claimed by said appellant and said, "I had no sense of feeling." The evidence showed that the nearest vehicle was about 1000 feet from said appellant at the time that he applied his brakes. The skid marks on the highway were about 250 feet in length running off to the right side and then back to the left side. The car then struck a fence and broke off six heavy fence posts before turning over. The speed of the car was estimated in excess of 60 miles per hour. There was a strong odor of alcohol on said appellant's breath when he was given aid by a traffic officer after the accident. A doctor testified that, from the facts presented in a hypothetical question, the person "would not be absolutely sober"; that a young man of 23 "is more susceptible to the influence of the wine than would be a man who was used to it over a period of years"; that the fact that a person's stomach is empty has some effect on the action of the drink; that it would affect his ability to drive a car as it would excite his nervous system and he would be exhilarated. While the evidence fails to show that said appellant had been on what may be termed a drunken orgy or that he was in a maudlin condition at the time, this was not necessary. The above-mentioned evidence and other evidence found in the record was ample to sustain the trial court's finding that he was in a state of "intoxication" as that term is above defined and that such intoxication was the proximate cause of the accident and death.

We now come to the issue of contributory negligence. Here, again, we believe the trial court's findings are sustained by the evidence. Respondent John F. Smith testified that said appellant appeared sober when he drove away after drinking the two glasses of wine. Respondent Dolly L. Smith was not present when said appellant was drinking and there is nothing to show that she even knew that he had been drinking. She might have suspected that he had been drinking by reason of his actions at the Lopez place, but it does not follow that she knew that he was intoxicated. While the wine was served to said appellant by respondent John F. Smith, we are nevertheless of the opinion that the issue of contributory negligence was, under the evidence presented by the record, a question of fact as to both respondents and that the findings of the trial court on that issue may not be disturbed upon the theory that respondents were guilty of contributory negligence as a matter of law. In the recent case of Lindemann v. San Joaquin Cotton Oil Company (Cal.Sup.) 55 P.(2d) 870, 882, the court said, "Petitioners zealously contend that the same evidence which impliedly established Ewing's intoxication also inextricably enmeshed

Lindemann in its skeins, and, notwithstanding the fact that the jury impliedly found that he was not guilty of contributory negligence, its implied finding is so entirely lacking in evidentiary support as to render such finding error as a matter of law. *The intoxication of Ewing and Lindemann's knowledge of that fact were two distinct issues submitted to the triers of the facts.*" (Italics ours.) The court there distinguished the cases of intoxication in which it has been held as a matter of law that recovery could not be had and we believe the present case may be distinguished upon the same grounds. We again point out that this was not a case in which the parties had participated in a drunken orgy or in which the driver was in a maudlin condition and, under the evidence, we find no inconsistency between the trial court's finding of intoxication of the driver *at the time of the accident* and its finding that respondents were not chargeable with contributory negligence.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



14 Cal.App.2d 1

EMMERT v. UNITED BANK & TRUST CO. OF CALIFORNIA et al.

Civ. 9825.

District Court of Appeal, First District, Division 1, California.

May 12, 1936.

1. Trover and conversion ⇐1

Neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.

2. Banks and banking ⇐179

Bank's negligent loss of an unindorsed stock certificate pledged to it as security and its consequent inability to deliver the certificate upon pledgor's demand did not constitute a conversion of such certificate by bank, and hence pledgor was not entitled to damages as for a conversion (Civ.Code, § 3336).

3. Banks and banking ⇐179

Measure of pledgor's damages where bank lost unindorsed certificate of stock pledged to it was not the value of shares represented by the unindorsed certificate but the cost of securing a new certificate (Civ.Code, § 328).

4. Appeal and error ⇐907(3)

Pledgor appealing on judgment record alone from allowance of damages for pledgee's loss of stock certificate was in no position to assert that damages should have been value of property at time of conversion with interest, where record failed to disclose real value of stock, since District Court of Appeal was limited to questions presented by judgment roll, and all presumptions were in favor of findings of trial court (Civ.Code, §§ 328, 3336).

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by M. T. Emmert against the United Bank & Trust Company of California and the Bank of America National Trust & Savings Association. From an unsatisfactory judgment, plaintiff appeals.

Affirmed.

A. C. Huston, of Woodland, John Ralph Wilson, of San Francisco, and Percy Napton, of Woodland, for appellant.

Cushing & Cushing, of San Francisco, for respondent.

TYLER, Presiding Justice.

Action for the value of certain shares of stock claimed to have been converted. The complaint, which is in two counts, alleges in substance that plaintiff and Mariah L. Emmert made and delivered to defendant United Bank & Trust Company of California their joint and several promissory note for the sum of $6,000 and as security for the payment of the same plaintiff transferred to the bank all his right, title, and interest in and to certain shares of stock the certificate for which, through the carelessness of the bank, was lost. The second cause of action alleges that defendants converted the stock to their own use. The value of the stock was alleged to be the sum of $6,250. The answer of defendants denied plaintiff's allegations.

The facts as reflected in the findings are undisputed and show that in November,

1922, the plaintiff M. T. Emmert subscribed for fifty shares of the common stock of A. Meister Sons Company, of the market value of $6,250. Plaintiff made a payment on said shares and contemporaneously therewith executed and delivered to Meister Sons Company his promissory note in the sum of $3,500 for the balance of the purchase price. During the month of December of the same year the note was delivered by the company to defendant United Bank & Trust Company as collateral security for the payment of an indebtedness of said company. When the note was delivered there was attached thereto a certificate representing the fifty shares of stock referred to. Plaintiff's note given for the payment of the stock matured while the same was in the possession of the bank and he made, executed, and delivered a renewal note payable to the bank for the same amount, and, upon plaintiff's making and delivering this note, the certificate evidencing the fifty shares of stock referred to was attached thereto and left on deposit with the bank as security for the payment of said promissory note. The certificate of stock was at no time indorsed by plaintiff. It was understood and agreed by plaintiff, the Meister Company and said bank that when plaintiff paid his $3,500 promissory note the bank would deliver to plaintiff said certificate of stock. In August, 1923, plaintiff paid his indebtedness of $3,500 to the bank and demanded his certificate of stock. The bank refused to deliver the same to him until such time as he paid another promissory note held by the bank on which plaintiff and Mariah L. Emmert were comakers. Plaintiff agreed to the retention of the certificate until this note was paid. On December 17, 1923, the last-mentioned note was paid in full and a few days later plaintiff demanded a delivery of his stock. The bank informed plaintiff that it had mislaid or lost the certificate and agreed to replace the same, but failed to do so. Plaintiff desired and intended, upon the delivery of his certificate of stock, to at once sell the same for the best obtainable price in the open market. The defendant United Bank & Trust Company was absolved by the defendant Bank of America, but neither bank has paid to plaintiff the value of his stock or procured for him a new certificate. Plaintiff thereupon brought this action against both banks upon the two causes of action as above recited.

[1-4] The action was tried by the court sitting without a jury. The court made findings of fact and conclusions of law upon which a money judgment was entered in favor of plaintiff and against defendant Bank of America for $250, the action against defendant United Bank & Trust Company having been dismissed. From the judgment so entered in his favor plaintiff appeals. The appeal is taken on the judgment roll alone. In rendering its judgment the court found, in response to the issues raised by the pleadings, that there had been no conversion of the stock but that defendant had negligently lost the unindorsed certificate and that plaintiff had in consequence been damaged in the sum of $250 and no more. The question here involved is: What is the amount of damage suffered by plaintiff by reason of the withholding from him, after demand made, of his unindorsed shares of stock? It is appellant's claim that the rule of damages set forth in one of the findings is contrary to the law in an action sounding in conversion. In finding 17 it is said by the trial court that it is not true that the United Bank & Trust Company converted the said stock, but by virtue of the absorption the Bank of America became liable to plaintiff in the sum of $250, which sum would compensate plaintiff for the expense incident and necessary to the obtaining of a new certificate, and that the cost of obtaining the same was the sum of $250. This finding, it is claimed, is contrary to finding 11, to the effect that the bank negligently lost the certificate, which is a finding of conversion and entitles plaintiff under section 3336 of the Civil Code to the value of the property at the time of the conversion, together with interest. It is the claim of respondent that the value of the unendorsed certificate, or the cost of obtaining a new one, is the proper measure of damage, and not the value of the shares represented by the certificate; that even in actions for conversion of unindorsed stock certificates, the measure of damages is the same. It has been universally held that the mere negligent loss of an unindorsed stock certificate does not constitute a conversion of such certificate or the shares represented thereby. Finding 17, to the effect that there was no conversion, is therefore supported and not in conflict with the further finding that "plaintiff has been damaged * * * in the sum of $250.00 * * *, and no more." The general rule is that neither

negligence, active or passive, nor a breach of contract, even though it result in injury, to or loss of, specific property, constitutes a conversion. See Restatement of the Law of Torts, vol. 1, American Law Institute, p. 572 et seq., § 223; 26 R.C.L. p. 1112. In Steele v. Marsicano, 102 Cal. 666, 36 P. 920, this principle is affirmed. Lund v. Keeler, 203 Wis. 458, 233 N.W. 769; Bolling v. Kirby, 90 Ala. 215, 7 So. 914, 24 Am.St.Rep. 789. None of the authorities cited by appellant in support of his contention that the facts here involved constitute a conversion in any manner qualify the rule announced by the above authorities. Thus in Poggi v. Scott, 167 Cal. 372, 139 P. 815, 51 L.R.A.(N.S.) 925, the conversion alleged consisted of the wrongful sale of certain personal property which did not belong to the defendant. Obviously, no question as to the mere negligent loss of the property was involved in the case. In all of the other cited cases the conversion consisted of some affirmative act, and in none of them was mere negligent conduct involved. As above stated, at the time of plaintiff's demand for the certificate, in December, 1923, the bank did not have the ability to deliver the certificate. There was, therefore, no conversion on its part. In Steele v. Marsicano, supra, it is held a refusal to deliver personal property is not a conversion unless the party has it in his power at the time to deliver the goods. Thomsen v. Culver City Motor Co., 4 Cal. App.(2d) 639, 41 P.(2d) 597; Hammond v. Du Bois, 131 Md. 116, 101 A. 612. There being no conversion, plaintiff is not entitled to the damages claimed. He is only entitled, as the trial court found, to a sum necessary to be expended in securing a new certificate by invoking the provisions of section 328 of the Civil Code or by giving the company a surety bond. Plaintiff did not suffer the loss of his stock, but merely the paper evidence thereof. The measure of damage in such a case is not the value of the shares represented by the unindorsed certificate, but, as stated, the cost of securing a new certificate. Moreover, plaintiff is in no position to question the amount of damages allowed. The appeal is on the judgment roll alone. There is nothing in the record to show the real value of the stock. For aught that appears it may have become practically valueless. The record, therefore, does not show plaintiff was damaged in excess of the amount awarded. This court is limited in its determination of this appeal to the questions presented by the judgment roll. All presumptions are in favor of the findings of the trial court. The findings support the judgment as entered.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



13 Cal.App.2d 693

BROWN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 10200.

District Court of Appeal, First District, Division 1, California.

May 8, 1936.

1. Judgment ⇐948(1), 951(1), 958(1)

Plea of res judicata must be affirmatively relied upon and shown in evidence, and in some cases must be pleaded, but in no case is plea in and of itself sufficient to oust trial court of jurisdiction.

2. Judgment ⇐958(1)

When res judicata is pleaded, such issues as identity of parties, validity of judgment as shown by judgment roll, and judgment's legal effect are primarily for determination of trial courts, and their determination constitutes exercise of jurisdiction, so that plea cannot be given effect of depriving court of jurisdiction to determine it with all other issues in case.

3. Judgment ⇐958(1)

Pleas of res judicata and estoppel are defensive matter, and superior court has jurisdiction to determine merits thereof when interposed properly by pleading or proof.

4. Prohibition ⇐3(3)

Where judgment for plaintiff on one count was reversed and plaintiff failed to appeal from judgment for defendant on others, alleged error in ruling on plea of res judicata did not entitle defendant to prohibition restraining superior court from proceeding with trial of case, since plea of res judicata did not oust trial court of jurisdiction, and error in ruling on plea was reviewable on appeal.

Original proceedings by Herbert Cutler Brown against the Superior Court of the State of California in and for the County of Los Angeles, for a writ of prohibition.

Peremptory writ denied.

Ivan G. McDaniel, of Los Angeles, for petitioner.

Carpenter, Babson & Fendler, Everett W. Mattoon, Co. Counsel, and Fred M. Gross, Deputy Co. Counsel, all of Los Angeles, for respondent.

TYLER, Presiding Justice.

Petition for writ of prohibition. It appears from the record that one Zoe Lowe Brown, as plaintiff, commenced an action in March, 1932, against her husband, Herbert Cutler Brown, petitioner herein, upon a certain property settlement agreement which was entered into between the parties in the year 1919 while they were husband and wife. Plaintiff set up and alleged in her complaint five distinct and separate causes of action. Judgment went for defendant and against plaintiff on the first four counts, and in favor of plaintiff under her fifth cause of action. Defendant appealed from that portion of the judgment in favor of plaintiff under her fifth cause of action, and no appeal was taken by plaintiff from the judgment relating to the first four causes of action. The appeal was heard by the District Court of Appeal, Second Appellate District. Said court was of the opinion that the contract upon which plaintiff's causes of action were based was void and illegal as being in contravention of good morals and public policy. The decision gave its mandate, "The judgment is reversed," without more. Brown v. Brown (Cal.App.) 47 P.(2d) 352. No rehearing was asked for and the judgment became final.

[1-4] Upon the filing of the remittitur plaintiff moved the superior court to set the said cause for trial upon the issues joined under all of the said five causes of action, and the court granted said motion. Prior to the date fixed for hearing, petitioner herein moved the court for an order dismissing the said cause as to the first four counts on the ground that, as plaintiff had not appealed from such portion of the judgment, the issues raised thereunder had become final and the court was without jurisdiction or authority to try the same or make any order relating to an amendment of the causes of action which plaintiff had moved the court to permit. The court made its order granting plaintiff leave to amend her several causes of action and ordered the complaint as so amended to be filed. Thereupon petitioner herein filed a petition in the District Court of Appeal, Second Appellate District, in all respects identical with the present petition except for the fact that such petition purported to be for a writ of mandate, but in the prayer the petitioner prayed for an injunction "restraining" the respondent here "from retrying said action upon any of the issues joined therein." This petition was denied, and no application for rehearing thereof or for transfer and hearing in the Supreme Court was ever made. The petition herein does not disclose the fact that this similar application had been made. Under the facts it is claimed by respondent that the plea of a prior judgment as res judicata does not oust the trial court of jurisdiction, but must be heard and determined concurrently with all the other issues in the case. We see no answer to this contention. The plea of res judicata must be affirmatively relied upon and shown in evidence, and in some cases must be pleaded, but in no case is the plea in and of itself sufficient to oust the court of jurisdiction. In its strongest form it is nothing more than conclusive evidence upon all or some of the issues involved. When a former judgment is pleaded, either in bar or as an estoppel on some issue, there immediately arise questions as to the identity of the parties, the validity of the judgment as shown by the judgment roll, the legal effect to be given it, and many other questions. Such matters are primarily for the determination of the trial court, and whether correctly or incorrectly determined it is nevertheless the exercise of jurisdiction over the subject-matter and the parties. This being so, the plea cannot be given the effect of depriving the court of its jurisdiction to hear and determine it with all the other issues in the case. Baird v. Superior Court, 204 Cal. 408, 268 P. 640. Pleas of res judicata and estoppel are defensive matter and the superior court has jurisdiction to determine the merits thereof when interposed properly by pleading or proof; and any alleged error in ruling upon such a plea being reversible on appeal, the pleader is not entitled to a writ of prohibition to restrain the superior court from proceeding with the trial of the case when the court has jurisdiction of the parties and the

subject-matter of the action. Vitimin Milling Corporation v. Superior Court, 1 Cal.(2d) 116, 33 P.(2d) 1016; City of Pasadena v. Superior Court, 92 Cal.App. 523, 268 P. 664; Boullester v. Superior Court, 137 Cal.App. 193, 30 P.(2d) 59. As stated, any error on the part of the court in its determination of the effect of the prior judgment may be reviewed on appeal.

The peremptory writ is denied.

We concur: KNIGHT, J.; CASHIN, J.



14 Cal.App.2d 458

HONAN et ux. v. NATIONAL THRIFT CORPORATION OF AMERICA et al.

Civ. 10824.

District Court of Appeal, Second District, Division 2, California.

May 14, 1936.

As Modified June 5, 1936.

1. Banks and banking ⇐315(2)

Knowledge of officer of escrow company as to fraud in escrow transactions *held* chargeable to trust company to which notes deposited in escrow were indorsed, of which escrow company officer was assistant trust officer.

2. Bills and notes ⇐171

Indorsement by indorsee of notes to trustee of private trust *held* "restrictive" so that trustee was not "holder in due course," but note was subject to attack for fraud practiced in escrow transaction with knowledge of manager of escrow holder who was officer of trustee, where trustee was only holding trustee for private trust created and controlled by indorsee (Civ.Code, §§ 3117, 3118).

[Ed. Note.—For other definitions of "Holder in Due Course" and "Restrictive Indorsement," see Words & Phrases.]

3. Appeal and error ⇐877(2)

In suit by the makers of notes for cancellation thereof on ground of fraud, part of judgment permitting makers to retain amount advanced in transaction until expiration date of loan and escape payment of interest thereon on ground that loan was usurious *held* to concern makers only, so that, where no appeal was taken by makers therefrom, judgment in such respect became final and trustee of private trust to which notes were transferred by restrictive indorsement was not entitled to complain thereof on appeal (St.1919, p. lxxxiii).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by William James Honan and wife against the National Thrift Corporation of America and Frank C. Mortimer, receiver of Private Trust No. 109, established by the National Thrift Corporation of America with the Metropolitan Trust Company of California and others, defendants. Judgment for plaintiff, and Frank C. Mortimer, receiver of Private Trust No. 109, established by the National Thrift Corporation of America with the Metropolitan Trust Company of California, appeals.

Cause remanded, with instructions that judgment be modified, and, as modified, affirmed.

Elvon Musick and Howard Burrell, both of Los Angeles, for appellant.

McGee & Robnett, Daly B. Robnett, and Robert Lee Collins, all of Los Angeles, for respondents.

GOULD, Justice pro tem.

There is no serious conflict as to the facts in this case. Plaintiffs, husband and wife, the latter acting through a duly authorized attorney in fact, executed their promissory note dated July 25, 1932, in the principal sum of $45,000, secured by deed of trust in favor of defendant Estelle Escallier. The latter was simply a "dummy," advancing no part of the money and having no interest whatever in the transaction. Her appearance in the matter was solely for the purpose of so concealing the facts as to permit defendant National Thrift Corporation, the real party in interest, to secure an unearned 15 per cent. upon the face of the loan as a "bonus" for the supposed purchase of the note from the nominal payee.

Oral negotiations between plaintiffs and the agent and general manager of National Thrift Corporation were to the effect, so the court upon substantial evidence found, that plaintiffs' $45,000 note and trust deed were to be placed in escrow, that the sum of $6,000 was to be advanced to plaintiffs upon

the signing of the note, and the remainder of the total of $38,250 (being the amount of the note after deduction of the 15 per cent "bonus") was to be paid by National Thrift Corporation in installments over a period of ten months, during which time the note was to remain in escrow.

An escrow was opened, but the written documents signed by plaintiffs and defendant Escallier authorized a very different course of procedure than that orally agreed upon, so that, pursuant to the written escrow instructions, the note for $45,000 was indorsed by defendant Escallier to defendant National Thrift Corporation, and by the latter indorsed and delivered, together with the trust deed, to defendant Metropolitan Trust Company, plaintiffs receiving only the initial payment of $6,000. Explaining the fact that the written escrow instructions and agreement differed so radically from the previous oral understanding as to the transaction, plaintiffs and defendant Escallier testified that they did not read the writings which they signed, because the agent and representative of Thrift Corporation told them it was unnecessary and a matter of form, and that the written documents simply embodied the matters contained in their oral agreement.

As part of its business activities, National Thrift Corporation sold to the public its bonds, "thrift certificates," and annuity contracts. To protect the purchasers of such paper, defendant Metropolitan Trust Company acted as holding trustee for Thrift Corporation under a trust agreement, "Private Trust No. 109," the terms of which provided for the deposit of cash or notes secured by trust deeds and mortgages with Metropolitan Trust Company as collateral, against which National Thrift might issue its bonus certificates and contracts. The ownership of this trust estate remained in National Thrift, which under the trust indenture reserved the right to withdraw any notes from the trust estate and substitute others in their stead. The trustee was also empowered to call upon National Thrift to replenish the funds of the trust estate so as to maintain it at the 110 per cent. collateral required by the trust indenture. At the very time of the Honan transaction, it was found by the court, National Thrift Corporation was in default in the sum of about $30,000 in its collateral security.

The Honan note was dated July 25, 1932; it was transmitted to Metropolitan Trust Company, to become one of the assets of Trust No. 109, July 27; a federal receiver in equity was appointed for National Thrift Corporation September 8; a federal receiver for Trust No. 109 of Metropolitan Trust Company was named November 19; and in January of 1933 a receiver in bankruptcy for National Thrift Corporation was appointed.

The within action was brought by plaintiffs for the cancellation of their note and trust deed upon the grounds of fraud, deceit, and misrepresentation, and to quiet their title to the land covered by the deed of trust. The federal receiver for Trust No. 109 of Metropolitan Trust Company offered the only active opposition to plaintiffs, who won in the trial court, and such receiver prosecutes this appeal.

[1] It is appellant's contention that the note in question is negotiable in form, came into the hands of Metropolitan Trust Company "in due course," and is therefore not subject to attack for fraud, failure of consideration, or any other defect in title. Respondents rest their case upon the trial court's findings of fraud and misrepresentation and upon the proposition that the note was rendered nonnegotiable by reason of the fact that it passed to the trust company, by reason of the peculiar facts shown in the case, with a restrictive indorsement.

The trial court found that fraud and deceit was practiced upon respondents in that agreements were made without intention of fullfilment that the note would be held in escrow by the Thrift Corporation until the full amount was paid thereon, and also that false representations were made in respect to the solvency of such corporation and its ability to make monthly payments upon said note. There also was testimony and a finding that the vice president and manager of the escrow company which handled the Honan escrow was at the same time assistant trust officer of the Metropolitan Trust Company, to which the Honan note was delivered out of escrow after only $6,000 had been paid upon it to the makers. As the person having supervision over escrows, this matter was brought to his knowledge, it was found by the court. The trust company of which he was likewise an officer was therefore charged with his knowledge of the transaction which the corporation was handling. McKenney v. Ellsworth, 165 Cal. 326, 132 P. 75.

No California authority has been cited by counsel covering a state of facts comparable to that here involved and construing the

law of restrictive indorsements. Civ.Code, §§ 3117, 3118. The Michigan Supreme Court, however, in the case of Union Trust Company v. Matthews, 258 Mich. 433, 242 N.W. 781, has had occasion to deal with the problem under a closely parallel factual situation and under provisions of the Uniform Negotiable Instruments Law identical with those here involved. In that case the court said: "It will appear from what has been said of the trust agreement that the indorsee, plaintiff, was, relative to the pledged notes, chiefly agent of the holders of the collateral trust notes, but it was also in some respects agent for the indorser. But it is clear that it held the pledged notes either in trust for the holders of the said trust notes or as agent of the indorser. Therefore the indorsement in fact falls within the second and third provisions of the section, and is restrictive. The effect of this is, under section 49, that the notes, after being thus restrictively indorsed, were no longer negotiable. Moreover, under section 39, plaintiff indorsee under restrictive indorsement may bring any action on the notes that the indorser could bring. The indorser could not recover against defendant because of the fraud. Plaintiff's rights, as indorsee, being so limited under section 39, and the note not being negotiable under section 49, it likewise may not recover." And on rehearing the court further stated: "The chief question in the case, the title of the payee, plaintiff's indorser, being defective, was whether plaintiff was a holder in due course. Evidence showing that plaintiff took the notes, as a mere agent of the payee, its indorser, and also as a mere trustee under the trust agreement, established under the sections of the Negotiable Instruments Law quoted in main opinion that plaintiff was not a holder in due course, and was clearly admissible."

[2] Based upon the reasoning and authority of the above-cited Michigan case, we hold with the trial court herein that the note involved passed to the trust company with a restrictive indorsement and subject to attack for fraud or other imperfection in title. Such holding in this case would not, as appellant contends, "prevent a trustee from ever becoming a holder in due course." The decision herein carries no such generalized implication, and goes no farther than to hold that under the peculiar facts of this case—the flagrant fraud practiced upon respondents, the knowledge of the escrow holder, whose manager was an officer of the trust company indorsee, the measure of control exercised by the National Thrift Corporation over the assets after their transfer to the trustee, the fact that the trust company acted only as holding trustee for the private trust created by the Thrift Corporation—the trust company was not a bona fide holder or a holder in due course, so as to render the note impervious to attack.

[3] Appellant also complains as to the disposition which the trial court made with reference to the $6,000 which it is admitted respondents received from National Thrift Corporation upon the execution of the note. Treating the note as usurious on account of the exaction from the makers of the 15 per cent. "bonus," the court decreed that, while respondents were indebted to National Thrift Corporation in the sum of $6,000, the money was not due until July 25, 1937, the expiration date of the usurious loan. Also, relying upon the provisions of the Usury Law (Stats. 1919, p. lxxxiii), the court refused any interest upon the $6,000 advancement.

Appellant is not in a position to object as to the court's action with relation to the $6,000. That matter concerns defendant National Thrift Corporation alone, and, no appeal having been taken by said defendant, the judgment of the trial court as to it and as to the disposition of the $6,000 is final. Appellant not being in any manner concerned as to the item in question, it may not be heard to complain thereof upon appeal. Lake v. Superior Court, 187 Cal. 116, 200 P. 1041.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

14 Cal.App.2d 42

MARTINEZ v. HUDSON.

Civ. 10398.

District Court of Appeal, Second District, Division 1, California.

May 14, 1936.

1. Appeal and error ⇐1011(1)

When there is appreciable conflict in evidence, trial court's findings will not be disturbed on appeal.

2. Husband and wife ⇐265
Wills ⇐6

Husband cannot give away more than his half of community property by will, insurance, or otherwise.

3. Appeal and error ⇐110

No appeal lies from order denying motion for new trial.

4. Husband and wife ⇐265

Judgment for plaintiff in action against woman, with whom plaintiff's husband lived after leaving plaintiff, for half of sum paid defendant after husband's death by insurance company under group life insurance policy, naming defendant as his beneficiary, must be affirmed, where trial court found on appreciably conflicting evidence that premiums were paid from community assets, that defendant's payments of insured's last illness and funeral expenses were voluntary, that consideration for naming her as beneficiary was immoral, and that proceeds of policy were community property.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Rosa Martinez against Letha Hudson. From a judgment for plaintiff and an order denying defendant's motion for a new trial, defendant appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

John R. Barta, of Los Angeles, for appellant.

Stoner & Gardner, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Plaintiff and respondent is the surviving wife of Willie Martinez, deceased, who on April 20, 1933, as an employee of the city of Los Angeles, and a member of the Los Angeles City Employees Association, had issued to him a group life policy in the amount of $2,500. The beneficiary named in the policy was Leatha Hudson Martinez, defendant and appellant herein, described as the wife of the insured; her actual name was Letha Hudson. The insured and Letha Hudson had been living together as husband and wife, although respondent, the actual wife of the insured, was alive and known to be living by both appellant and insured. The marriage of respondent and the insured had never been annulled or terminated. The insured had in fact contributed sporadically some small amounts to respondent's support during all the time he lived with appellant. The evidence shows without contradiction that respondent and insured were married in 1910, lived together until 1926, on which latter date insured left to assume his meretricious relationship with appellant. All premiums for the policy were deducted from the insured's salary, and it is conceded that his salary was community property. Appellant testified, however, that insured took out the policy for her benefit in consideration for board and lodging, and in return for her promise to assume funeral and last illness expenses, which the evidence shows she paid; further, that the insured demanded, and, pursuant to such demand, she reimbursed him monthly for the premiums on the policy, which were deducted from his salary. It was also developed that insured, during the time he lived with appellant, helped out with the rent. The insured died in 1934 and on March 22d of that year the insurance company, pursuant to the terms of the policy (said company never having notice of the actual wife), paid to appellant the face amount thereof, to wit, $2,500. Respondent instituted this action against appellant to recover one-half of the said sum with interest and recovered judgment. The appeal is from the judgment, and from the order denying motion for new trial.

The trial court found from the facts which have been outlined in substance, "that * * * the premiums * * * were all paid out of community assets"; and that the payments made by appellant during the last illness and for funeral expenses "were voluntary payments"; that any consideration to insured for naming appellant as his wife and beneficiary of the policy "was immoral and against pub-

lic policy, and that the proceeds of said insurance policy were community property, and * * * plaintiff is entitled to one-half of the proceeds of said policy * * * with interest. * * *"

[1, 2] It is settled that when there is an appreciable conflict in the evidence, the findings of the trial court will not be disturbed. It is also established that a spouse cannot give away more than his one-half of the community property by will, insurance, or otherwise. New York Life Ins. Co. v. Bank of Italy, 60 Cal.App. 602, 214 P. 61; Modern Woodmen of America v. Gray, 113 Cal.App. 729, 299 P. 754; Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431; Travelers' Insurance Company v. Fancher, 219 Cal. 351, 26 P.(2d) 482; 3 Cal.Jur.Supp. 509.

[3, 4] The appeal from the order denying motion for new trial is dismissed, since no appeal lies from such an order. The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



13 Cal.App.2d 696

ERGANIAN v. BRIGHTMAN.

Civ. 10488.

District Court of Appeal, Second District, Division 1, California.

May 8, 1936.

1. Judgment ⇐719

Final judgment upon order sustaining general demurrer constitutes res judicata as to matters pleaded in complaint demurred to.

2. Judgment ⇐572(2)

Judgment upon order sustaining general demurrer constitutes trial on merits when issue of law raised by demurrer is heard and ruled upon by court.

3. Judgment ⇐572(2)

Failure of plaintiff to amend, where leave is granted after sustaining of demurrer, places plaintiff in same position as to binding effect of judgment entered thereon as if demurrer had been sustained without leave to amend.

4. Pleading ⇐11

In action by mortgagor against purchaser of property on foreclosure who had ejected mortgagor and levied on his personal property under void judgment in unlawful detainer action, allegation that wrong was caused by, or arose out of, abuse of process in levying writ on a void judgment alleged a probative fact and added nothing to ultimate facts pleaded.

5. Judgment ⇐719

Final judgment on demurrer to complaint, in action by mortgagor against purchaser at foreclosure sale for ejection from property and levy of execution under void judgment in unlawful detainer action, barred subsequent action by mortgagor alleging, in addition to same facts as were alleged in first, that wrong was caused by, or arose out of, abuse of process in levying writ on void judgment, since such allegation was of an evidentiary fact necessary to be proven in both actions, adding nothing to ultimate facts pleaded.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Joe Erganian against Mary C. Brightman. Judgment for plaintiff, and defendant appeals.

Reversed, with direction that judgment be entered for defendant.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for appellant.

Newton M. Todd and Fred A. Watkins, both of Long Beach, for respondent.

ROTH, Justice pro tem.

Prior to the year 1932, plaintiff and respondent herein was the owner of a lot in Long Beach, improved with a one-story building. He had borrowed $16,000 from a bank, giving his promissory note therefor and executing a mortgage on said property in favor of the bank to secure the note. Erganian was unable to meet the note when it fell due in 1932, whereupon the bank instituted foreclosure proceedings, and, pursuant to a judgment obtained therein, did on April 15, 1932, cause the sheriff to sell said property under the decree of foreclosure to satisfy the indebtedness. The property was purchased at the foreclosure sale by Mary C. Brightman, defendant and appellant herein. Before and after the

sale, Erganian occupied one of the storerooms on the property in which he conducted a secondhand business. After the purchase of said property by appellant, Erganian remained in possession. Failing to collect rent from him, after repeated efforts to do so, appellant instituted an unlawful detainer action against Erganian, and upon his default in said action obtained judgment for the possession of the premises and $525 damages. Said judgment was entered on July 28, 1932. Execution was issued on said judgment within a few days thereafter, and a Ford automobile and certain other personal property belonging to Erganian were levied upon to satisfy the money feature of the judgment. On August 1, 1932, the sheriff placed appellant in the possession of the premises, theretofore occupied by Erganian, under a writ of assistance issued pursuant to the judgment in said unlawful detainer case. On May 22, 1933, a motion was made to vacate the judgment in the unlawful detainer case, Erganian contending that the judgment was void on its face, because the municipal court of the city of Long Beach had exclusive jurisdiction of the amount involved in the unlawful detainer suit, and that the superior court in which the unlawful detainer action was tried had no jurisdiction to try the same or enter a judgment therein. The default judgment was vacated pursuant to such motion. An appeal was taken by Mrs. Brightman from the order vacating said judgment, which appeal was dismissed on March 24, 1934.

Thereafter on April 18, 1934, Erganian instituted an action in the superior court, hereinafter referred to as "first" action. The complaint in this first action alleged that Erganian was the owner and in the possession of the premises described in the unlawful detainer action, and that the sheriff at the direction of Mrs. Brightman wrongfully trespassed and entered upon said premises and ejected Erganian therefrom and turned the possession of the same over to Mrs. Brightman; that, as a consequence thereof, Erganian had been unable to sell the property and preserve such equity as he may have had therein, and suffered mentally and physically, all to his damage. Further, that, by reason of the fact that Mrs. Brightman, pursuant to the writ of execution issued on the void judgment in the unlawful detainer action, had sold certain personal property located on the premises, he suffered further damage. Thereafter, on May 1, 1934, Mrs. Brightman filed a general demurrer to said complaint and each cause of action thereof, which demurrer was sustained. Erganian failed to amend within the time allowed, whereupon, on May 28, 1934, judgment was entered upon the order sustaining the demurrer, "that plaintiff take nothing by his action, and that said action be, and it is hereby dismissed." This judgment became, and is now, final. Thereafter, on July 21, 1934, plaintiff filed his complaint in the instant action (which will hereinafter be referred to as "present" action), in which complaint Erganian set up two causes of action, the first for malicious prosecution and the second, predicated upon the same facts as are set up in the first action, stating in addition that when Mrs. Brightman levied execution, pursuant to the void judgment in the unlawful detainer suit, she "knew that said judgment was void * * * and in securing said execution and causing plaintiff to be ejected from said premises and said property to be sold, as above set forth, defendant acted in bad faith and with malice and without probable cause or any cause and for the purpose of securing the possession of said premises and said personal property and preventing plaintiff from selling, refinancing or redeeming said real property."

Mrs. Brightman in answering this complaint set up as a second defense in her answer the proceedings in the first action and the final judgment entered therein, and at the trial of the present action, Mrs. Brightman argued that all of the matters contained in the present action had been adjudged and concluded against Erganian by the judgment in the first action, and placed in evidence the judgment roll in said first action. Upon the completion of Erganian's case in the present action, a motion for nonsuit was made and granted as to the first cause of action and denied as to the second, which second cause of action went to the jury. A verdict of $3,800 was returned, and this appeal is from the judgment entered upon said verdict.

The decisive question presented is: Was the judgment of dismissal in the first action a bar to the second cause of action in the present action? We think it was.

[1-3] That a final judgment upon an order sustaining a general demurrer constitutes res judicata as to the matters pleaded in the complaint demurred to is not open to debate. The rule and the limitations thereon are correctly stated in 15 Califor-

nia Jurisprudence, p. 126, as follows: "While a judgment upon demurrer is of course conclusive in subsequent actions between the parties as to those matters which it actually adjudicates, it may or may not operate as a bar, depending upon whether the subsequent action was upon the same cause of action or claim, and whether the circumstances of the first case were such as to make the judgment one on the merits of the claim. If either of those conditions is lacking, the judgment is not a bar. * * * And a judgment upon the sustaining of a demurrer to the complaint for failure to state a cause of action is a bar to a subsequent action setting up the same facts. But if the facts are materially varied in the second case, or if an essential fact missing in the first complaint is supplied in the second, the former judgment is not a bar."

A judgment upon an order sustaining a demurrer constitutes a trial on the merits when an issue of law raised by the demurrer is heard and ruled upon by the court. If leave to amend is granted, it must be taken advantage of, and if it is not, a plaintiff finds himself in the same position as if demurrer were sustained without leave to amend. City of Pasadena v. Superior Court, 212 Cal. 309, 314, 298 P. 968; Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091; Litch v. Kerns, 8 Cal.App. 747, 97 P. 897; Hardy v. Hardy, 97 Cal. 125, 31 P. 906; City of Los Angeles v. Mellus, 58 Cal. 16; Peterson v. Weissbein, 75 Cal. 174, 16 P. 769; McMickens v. McMickens, 220 Cal. 731, 32 P.(2d) 597.

[4, 5] The allegations of the first action are meticulously set forth, in comparison with those of the second cause of action in the present action, in appellant's brief, and the only distinction apparent is the pleaded evidentiary fact or conclusion which is excerpted in our statement of facts, to wit, that the wrong alleged in the second cause of action was caused by, or arose out of, the abuse of the process of the court in levying a writ of execution on a void judgment. It would have been impossible to prove a trespass on the facts alleged in the first action without proving the same thing. The allegation as to the means whereby the trespass was accomplished was a probative fact and added nothing to the ultimate facts pleaded, either in the first action or in the present action. Gomez v. Reed, 178 Cal. 759, 174 P. 658; Strohlburg v. Jones, 78 Cal. 381, 20 P. 705; Demartin v. Albert, 68 Cal. 277, 9 P. 157. In the case of Hardy v. Hardy, 97 Cal. 125, at page 131, 31 P. 906, 908, the court says: "The same evidence which the plaintiff would have introduced to establish the allegations of her complaint in the former action was essential to establish those of the present complaint."

The identic nature of the evidence which must be used is frequently employed as a test to determine the identicity of causes of action. It is apparent to us, from a scrutiny of the allegations of the first action and those of the present action, that the evidence used to establish either must be the same.

It follows, therefore, that the judgment must be, and it is, hereby reversed, and the trial court is directed to enter a judgment for defendant and appellant.

We concur: HOUSER, P. J.; DORAN, J.



14 Cal.App.2d 142

PEOPLE v. SAVAGE et al.

Cr. 2871.

District Court of Appeal, Second District, Division 2, California.

May 18, 1936.

Rehearing Denied May 26, 1936.

Hearing Denied by Supreme Court June 15, 1936.

1. Burglary ⇨41(4)

To warrant conviction of burglary, direct evidence that accused entered burglarized premises is not required, but such entry may be proved by circumstantial evidence.

2. Burglary ⇨31

Evidence of scratches and grooves about lock of warehouse door and fact that it could be opened with piece of celluloid fitted to grooves *held* admissible in trial for burglary by entering warehouse.

3. Burglary ⇨42(1)

Possession of stolen property by defendants in burglary trial was circumstance to be considered by court, though not conclusive of guilt.

4. Burglary ⇐42(3)

Failure of defendants in burglary trial to account satisfactorily for their possession of stolen property and false statements as to how they acquired goods *held* sufficient corroborating evidence to warrant conviction of such offense.

5. Criminal law ⇐517(4)

Prima facie showing of accused's commission of burglary as charged in indictment *held* sufficient to warrant admission in evidence of one defendant's extrajudicial statements after his arrest as against contention that they were inadmissible until corpus delicti was established.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Ralph V. Savage and Earl W. Ford were convicted of second-degree burglary, and they appeal.

Affirmed.

Samuel L. Rummel and Harry A. Kaplan, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Indicted by grand jury, defendants were found guilty of second-degree burglary after trial by the court, jury having been waived. From the court's judgment and order denying motion for new trial, they appeal.

At the time of the crime charged appellants were employed as radio police officers by the Los Angeles police department, working a "prowl car" on a night shift. Aluminum ware in considerable quantities disappeared from a warehouse in the district which they frequented. Appellant Savage had visited the warehouse and had inspected the stockroom with the proprietor, promising police protection. Suspicion was fastened upon Savage by his remarks as to the ease of obtaining aluminum ware; search of his home uncovered numerous items similar to articles missing from the warehouse, and other pieces were found concealed under burlap in the basement of appellant Ford's father's house, including one item especially manufactured for the warehouse owner and missing from a set of four such pieces. Conflicting stories were told by Ford as to how he came into possession of the goods, which he admitted he had transferred from his own to his father's house when he learned that his codefendant was in trouble over the matter. Scratches and grooves about the warehouse lock indicated that it had been tampered with, and a piece of celluloid fitted to the grooves by police opened the door.

Appellants raise two points: That the evidence is insufficient to sustain the conviction and that error was committed in admitting statements of appellant Ford after his arrest.

[1-4] Particularly is it urged that there was no evidence of entry of the building, a necessary element in the crime of burglary. Direct evidence that the accused entered the premises is not required, but that fact may be proved by circumstantial evidence. People v. Basuino, 118 Cal.App. 158, 4 P.(2d) 971; People v. Flynn, 73 Cal. 511, 15 P. 102. The condition of the door and the fact that it could be opened with a bit of celluloid were proper matters to be shown. People v. Howard, 72 Cal.App. 561, 237 P. 780. The possession of the stolen property by appellants, while not conclusive of guilt, was a circumstance to be considered by the court; and their failure to satisfactorily account for its honest possession, and the giving of false statements as to the manner of acquiring the goods, further point to culpability, supplying in fact a sufficient measure of corroborating evidence to warrant the conclusion that appellants were guilty. People v. Taylor, 4 Cal.App.(2d) 214, 40 P.(2d) 870; People v. Russell, 120 Cal.App. 622, 8 P.(2d) 209.

Reviewing the whole record in the case, we conclude that there was sufficient evidence before the trial court to sustain its implied finding that appellants had entered the building.

[5] As to the point that the court committed prejudicial error in admitting appellant Ford's extrajudicial statement, it is sufficient to refer to the case of People v. Selby, 198 Cal. 426, 245 P. 426, 429, to answer the contention that such statements were not admissible until the corpus delicti was established. "Concerning the admissibility of extrajudicial statements, admissions, or confessions," says the court in the Selby Case, "it has been correctly declared that: 'Proof of the corpus delicti of the conclusive and convincing character required to support a conviction of the crime charged was not a prerequisite to the reception in evidence of the extrajudicial statements of the defendant that he had killed the deceased. Prima

facie proof of the corpus delicti was sufficient for that purpose; and it was not essential to the proof and purpose to show that the crime charged was committed by the defendant.' People v. Wagner, 29 Cal.App. 363, 155 P. 649." In the instant case it is apparent that under the rule above stated a prima facie showing as to the commission of the crime of burglary as charged in the indictment was made, sufficient to admit in evidence appellant Ford's extrajudicial statements.

The judgment and order are affirmed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 701

PEOPLE v. RAY et al.

Cr. 2852.

District Court of Appeal, Second District, Division 1, California.

May 8, 1936.

1. Burglary ⇐41(1)

Evidence *held* to sustain conviction of burglary.

2. Criminal law ⇐1023(10)

No appeal lies from the sentence imposed upon accused.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

James Ray and others were charged with burglary, and from the sentence and judgment and order denying his motion for new trial, defendant Paul Parker appeals.

Judgment and order denying motion for new trial affirmed, and attempted appeal from sentence dismissed.

C. B. Conlin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

DORAN, Justice.

The appellant and his two codefendants were charged with the crime of burglary. Defendant Parker appeals from the sentence and judgment, and order denying his motion for a new trial.

[1] As proof of the offense alleged in the information, the evidence reveals that a dress shop in Los Angeles was burglarized and about 100 dresses and a fur coat were stolen. Entrance was gained by forcing open a window in the rear of the store. The burglary was committed between midnight and 1:50 a. m. of December 3d. On the afternoon of December 4th, appellant, together with his codefendants, were arrested in San Francisco. For twenty minutes preceding the arrest, police officers had been watching a sedan in which appellant was seated in the driver's seat. Appellant's codefendants, who had in their possession sixteen of the stolen dresses and a fur wrap, the product of the burglary, then appeared and were entering the sedan when the three were arrested. Appellant stated to the officers that he had left Los Angeles at 11 p. m. on December 2d, with his two codefendants, and had arrived in San Francisco at 9 a. m. the following morning. He disclaimed any knowledge of the dresses. It appears from the evidence, however, that appellant, before his arrest, went into a clothing store in San Francisco and obtained an empty carton in which, he stated to the salesman in the store, he wanted to pack a few things. The salesman afterward identified the carton as the one he had given appellant, and in this carton were contained the stolen clothes in the possession of appellant and his codefendants at the time they were arrested.

Evidence was also introduced of the attempted sale of other dresses by appellant's codefendants in San Francisco, to one Sloan, in connection with which Sloan met appellant and his codefendants, and in connection with which transaction two or three additional cartons of the stolen dresses were recovered.

Incidentally, a pinch bar which was found in the sedan, used by appellant and his codefendants, conformed to the depressions in the wood frame of the window through which entrance was gained in the dress shop, and which, as has been stated, had been pried open.

The evidence also showed that appellant and his codefendants left Los Angeles about the time of the burglary and drove to San Francisco together; further, that

appellant registered at a hotel in that city under an assumed name. Certain declaration were in evidence, as an explanation by the defendants of the possession thereof, that the dresses had been obtained from a man known as "The Whiz," but this mysterious character makes no other appearance in the record. It should be noted, too, that appellant had the privilege of testifying in his own behalf, but, for reasons undisclosed by the record, except inferentially, he did not avail himself of the privilege.

It is urged by appellant that the verdict is contrary to the evidence, in that there was no evidence connecting the appellant with the burglary. Misconduct of the district attorney, failure of the trial court to properly admonish the jury, failure to give certain instructions, refusal to grant the motion to dismiss, introduction of certain evidence, and, in particular, the receipt in evidence of certain exhibits, were also urged as prejudicial error. An examination of the entire record, however, reveals these objections to be without merit.

[2] Since no appeal lies from the sentence, the attempted appeal in that regard is dismissed.

Judgment and order denying motion for a new trial are affirmed.

We concur: HOUSER, P. J.; YORK, J.



13 Cal.App.2d 707

HUSTON et al. v. STATE PERSONNEL BOARD et al.

Civ. 5489.

District Court of Appeal, Third District, California.

May 8, 1936.

Officers ⊂⊃69

Holders of state positions, appointed by State Board of Equalization for administration or enforcement of Retail Sales Tax, State Liquor Control Act, and Motor Transportation License Tax Act, who held such positions prior to December 20, 1934, but for less than six months prior thereto, *held* not to have acquired permanent civil service status under constitutional amendment relating to state civil service system, so as not to be subject to dismissal except under provisions of Civil Service Act (St.1913, p. 1035, as amended; St.1933, pp. 928, 1697, 2599; Const. art. 24, § 5(d).

Original mandamus proceeding by Harriett Huston and others against the State Personnel Board and others.

Alternate writ of mandate discharged, and peremptory writ denied.

Devlin, Devlin & Diepenbrock, of Sacramento, for petitioners.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondents.

PER CURIAM.

This action is an original proceeding in mandamus, brought by ninety-three persons who had been appointed to state positions by and with the State Board of Equalization, and has for its purpose the reinstatement of petitioners to their positions and the recovery of unpaid salaries.

These appointments were made by the State Board of Equalization, which board also fixed the class and grade of position, duties to be performed, and salaries to be paid, and had to do with the administration or enforcement of the Retail Sales Tax Act (St.1933, p. 2599), State Liquor Control Act (St.1933, p. 1697), and the Motor Transportation License Tax Act (St.1933, p. 928), the administration of which had been delegated by the State Legislature to the State Board of Equalization. Each of these petitioners held such positions prior to December 20, 1934, but for less than six months prior thereto.

Petitioners contend that upon the enactment of article 24 of the Constitution they acquired a permanent civil service status under the provisions of subdivision (d) of section 5 of the article referred to, and as a consequence were not subject to dismissal except under the provisions of the Civil Service Act (St.1913, p. 1035, as amended), either for cause, after trial, or by reason of their positions being abolished, or for purposes of economy.

We believe this contention, as well as all other questions raised by petitioners, has been determined adversely to them in the case of Kennedy v. State Personnel Board,

etc., et al. (Cal.Sup.) 57 P.(2d) 486, filed May 1, 1936, and upon that authority the alternate writ of mandate heretofore issued is discharged and a peremptory writ is denied.



14 Cal.App.2d 120

WESTERN BROADCAST CO. v. TIMES-MIRROR CO.

Civ. 10829.

District Court of Appeal, Second District, Division 2, California.

May 18, 1936.

Hearing Denied by Supreme Court July 16, 1936.

1. Libel and slander ⊂=19

In determining whether newspaper article is libelous per se, court must give language of article natural and popular construction of average reader, and not critical analysis of mind trained in technicalities.

2. Libel and slander ⊂=9(1)

Article to be libelous of corporation must have tendency to directly affect credit or property of corporation or occasion it pecuniary injury, and mere fact that publication is unpleasant or hostile does not make it defamatory.

3. Libel and slander ⊂=9(1)

Newspaper article, argumentative in nature, attempting to justify newspaper's refusal to grant free newspaper listings for radio broadcasting station because station did not subscribe to press radio agreement for authenticated news broadcasts, which cited examples of unauthorized news reports not involving station, *held* not libelous per se.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and J. T. B. Warne, Judges.

Action by the Western Broadcast Company against the Times-Mirror Company. From an adverse judgment, the defendant appeals.

Reversed.

Cosgrove & O'Neil, T. B. Cosgrove, and Roscoe C. Andrews, all of Los Angeles, for appellant.

Newlin & Ashburn, Allen W. Ashburn, Laurence W. Beilenson, and George W. Tackabury, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment for damages for libel on the judgment roll alone. The sole question presented for our determination is whether plaintiff's complaint is good against a general demurrer. If it is, the judgment should be affirmed; if not, it should be reversed. Plaintiff is the owner of KNX, one of the largest and most popular radio stations, so powerful in its number of kilowatts that it covers the nine western states of our nation. The Times-Mirror Company is the owner of one of the largest and most influential newspapers in the same area. The occasion of the publication of the alleged libelous article was the controversy arising between said parties over the dropping of the listing of KNX from the metropolitan papers when the listings of other radio stations continued to be carried.

The plaintiff concedes that no special damages are alleged or prayed for and that the complaint is demurrable under such circumstances unless the article is libelous per se. In determining whether the article is libelous per se, we must consider it in its entirety, and for this reason we have felt obliged to set it forth in full. It is as follows:

"A Plain Statement

"During the past few days The Times has received numerous inquiries from radio listeners asking the reason for the omission of radio listings of Station KNX from the daily 'dials' of this and all other Los Angeles metropolitan newspapers. Inasmuch as many of those so inquiring have obviously been the victims of purposeful misinformation, it is proper and necessary that the facts be made public.

"KNX listings have been omitted from the radio news of the Los Angeles press because that station has consistently refused to cooperate with the newspapers of America, with the national press associations and with other broadcasting stations in the joint endeavor of these agencies to protect the public, themselves and the good name of radio itself through measures to insure that only authentic news from established and thoroughly reliable sources is allowed to go on the air. With this effort

Station KNX has not only refused to join; it has publicly ridiculed and attempted to discredit it and its sponsors and participants. It was not until every effort to secure this station's co-operation had been exhausted that the present course was formed upon the newspapers.

"The co-operative effort among all the principal news-broadcasting newspapers, commercial radio stations and national network and the four great press associations of America to see that only trustworthy and authenticated news is broadcast is directly in line with the expressed desires and policy of the Federal Radio Commission to protect the listening public from irresponsible and often highly damaging broadcasts of wild rumors, 'grapevine' reports and not infrequently purely imaginary 'news'. Prior to the launching of this joint undertaking on March 1 of this year the radio news situation of the country was one of chaos. Listeners, with no means of their own for distinguishing between reliable and unreliable broadcasts, were daily victimized by garbled, pirated and outright manufactured reports purporting to be truthful news upon the air. An outstanding example of such abuse was the 'exploit' of a Gary (Ind.) radio station, which staged and broadcast as authentic an imaginary battle between the police and a group of escaped convicts, station supernumeraries standing near the microphone and firing revolvers into the air to lend verisimilitude to the flights of the announcer's imagination. Many locally will recall the baseless and needlessly terrifying radio accounts from certain sources of a great tidal wave and other fanciful 'accompaniments' of the Long Beach earthquake, the recent baseless report of the death of Gov. Rolph and similar examples of the need for responsible and authoritative radio news sources.

"To supply that need and at the same time to end the abuse of established news-property rights by unscrupulous and wholesale pirating, the newspapers, press associations and radio broadcasting stations and chains entered into an agreement whereby these recognized news-gathering agencies should supply twice-daily budgets of accurate, authenticated and up-to-the-minute telegraph news to the broadcasting stations, the latter accepting and utilizing them as such.

"Subscribing to this agreement are the Associated Press, the United Press, the International News Service and the Universal Service, every important newspaper in the United States having radio affiliations, every major radio network and, with a very few and scattered exceptions, every major radio station in the entire country.

"Station KNX of Los Angeles is one of these few exceptions. It has been given every opportunity to join in an effort which is obviously in the public interest and in that of radio itself. It has not only refused to do so, but has gone far out of its way to attack and to misrepresent those which have.

"The space which newspapers give to the radio listings of commercial broadcasting stations is a gratis and, to the newspapers, costly contribution to the upbuilding of enterprises conducted for private profit and, from a news and advertising standpoint, in competition with the newspapers themselves. Such a contribution, thus at the newspapers' own triple expense, is justified in the majority of instances because it is also a service to the public. But no fair-minded person will maintain that the press is obligated to make that contribution where it is deliberately utilized to defeat efforts in the public interest and to malign and traduce the press itself."

[1, 2] The article is written in plain, nontechnical, and unambiguous language. Its language must be given the natural and popular construction of the average reader and not the critical analysis of the mind trained in technicalities; and it is the duty of the court to so construe the article in deciding whether it is libelous per se. Since a corporation has no character to be affected by libel and no feelings to be injured, an article to be libelous of the corporation must have a tendency to directly affect the credit or property of the corporation or occasion it pecuniary injury. The mere fact that a publication is unpleasant or hostile does not make it defamatory. It has been held in certain cases that it is not libelous per se to publish an answer challenging the correctness of an opponent's statements and charging such opponent with "telling falsehoods" or "falsely asserting." Leonard v. Roberge, 48 N.D. 638, 186 N.W. 252, 254; Walker v. Hawley, 56 Conn. 559, 16 A. 674, 675.

[3] The article begins with the caption: "A Plain Statement." And plaintiff says: "This would logically infer that what the writer said were statements of fact." On the contrary, the entire article shows that it is an argument in rebuttal justifying defendant's refusal to print the logs of KNX.

The opening paragraph shows that it is a reply to something that has gone on before, winding up with the conclusion of the defendant (not facts) that "no fair-minded person will maintain that the press is obligated to make that contribution where it is deliberately utilized to defeat efforts in the public interest and to malign and traduce the press itself."

The article is largely argumentative and would be so construed by the ordinary reader, and as we have already pointed out, it appears on its face to be a defense against something which has been said over KNX. The article does not charge KNX with giving out misinformation generally, nor with having been guilty of any of the acts cited therein as examples for the necessity of a co-operative agreement between the press and the radio stations. It limits its charges, where charges are made, to the particular controversy between the parties and gives its side of the argument in self-defense. The language, while argumentative, is fairly temperate and restrained.

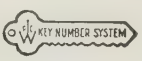
Space would not warrant us in analyzing the article in detail as the parties have done in their briefs, but we will take up the sentences which plaintiff considers the most damaging. The plaintiff says that two sentences "are among the most damaging in the whole article. * * * Certainly no charge could reflect more directly on KNX's business. * * *" The sentences are the following: "An outstanding example of such abuse was the 'exploit' of a Gary (Ind.) radio station, which staged and broadcast as authentic an imaginary battle between the police and a group of escaped convicts, station supernumeraries standing near the microphone and firing revolvers into the air to lend verisimilitude to the flights of the announcer's imagination. Many locally will recall the baseless and needlessly terrifying radio accounts from certain sources of a great tidal wave and other fanciful 'accompaniments' of the Long Beach earthquake, the recent baseless report of the death of Gov. Rolph and similar examples of the need for responsible and authoritative radio news sources." The plaintiff contends that these sentences charge KNX with broadcasting baseless and needlessly terrifying radio accounts of a great tidal wave and other fanciful accompaniments of the Long Beach earthquake and of broadcasting false reports of the death of Gov. Rolph. No such charges are contained in the language used. These terrifying and baseless reports were merely cited as illustrations for justification of the effort for the co-operative program referred to as the press radio agreement.

The concluding sentence of the article is worthy of some observation. But after all is said, this sentence presents the mere conclusion of the defendant with regard to the matter discussed. The defendant is attempting to justify the refusal of metropolitan newspapers to print the KNX listings because KNX has refused to subscribe to the press radio agreement. Obviously this conclusion is a summary based upon the preceding arguments of the publication. The readers of the article would realize that this conclusion, like every conclusion, is no sounder than the foundation upon which it is based.

The article is not libelous per se.

Judgment reversed.

We concur: WOOD, J.; GOULD, Justice pro tem.



FRASER v. CARMAN-RYLES et al.*

CARMAN-RYLES v. FRASER.

SCHACHTRUPP v. CARMAN-RYLES et al.

Civ. 10931.

District Court of Appeal, Second District, Division 2, California.

May 8, 1936.

Rehearing Denied June 1, 1936.

Hearing Granted by Supreme Court July 6, 1936.

1. Executors and administrators ⇐315(5)

Where will by apt language is incorporated in decree of distribution, decree should be considered in its entirety; and, where there is a conflict between part of decree which is expressed in will itself and another clause thereof, clause in will must govern.

2. Executors and administrators ⇐315(5)

Where decree of final distribution provided that pursuant to will income from residue of estate should be for use of trustee with exception of specified monthly income to beneficiary and will contained similar provision, will could be considered in construing decree of distribution.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 64 P.2d 397.

3. Wills ⊂⇒734(6)

Gift of specified portion of income from designated fund is not "annuity," and interest does not begin to run until one year from death of deceased.

[Ed. Note.—For other definitions of "Annuity," see Words & Phrases.]

4. Executors and administrators ⊂⇒315(5)

Declaration in decree of final distribution that bequest is an annuity is not conclusive in determining its character; determinative factor being whether entire decree, including will which was incorporated therein by apt language, made a distribution within statute defining annuity (Probate Code, § 161, subd. 3).

5. Wills ⊂⇒733(9)

Decree of final distribution which provided that, pursuant to will, income from residue of estate should be for use of trustee with exception of specified monthly income to beneficiary, which trustee should pay to beneficiary, did not create "annuity" within statute in favor of beneficiary, and hence, bequest of income from trust fund was not payable to beneficiary from date of testator's death but commenced upon receipt from trust fund of income by trustee (Probate Code, § 161, subd. 3).

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Lillian R. Fraser against Ethel Carman-Ryles, formerly Ethel Fraser Prentiss, individually and as trustee, and Hattie Lee Schachtrupp, both of whom filed cross-complaints, and others. From the judgment, Ethel Carman-Ryles and Lillian R. Fraser appeal.

Reversed in part, affirmed in part, and remanded, with directions.

Call & Murphey and Walter E. Bennett, all of Los Angeles, for appellants.

L. R. Brigham, of Los Angeles, for respondents.

McCOMB, Justice pro tem.

Defendant Ethel Carman-Ryles appeals from specific portions of a judgment in favor of plaintiff decreeing that monthly payments under a decree of distribution constitute an annuity and are payable from the date of testator's death.

The conceded facts are:

Earl A. Fraser, deceased, by his will bequeathed all of his property to defendant Ethel Carman-Ryles, née Ethel Fraser Prentiss, in trust. His will provided in part as follows: "And I further direct that in the administration of said trust my said sister Ethel Fraser Prentiss shall use the income from said property as her own, with the exception of Three Hundred Dollars ($300.00) monthly therof, which said Three Hundred Dollars ($300.00) monthly thereof she shall pay to my now wife, Lillian R. Fraser, until the said Lillian R. Fraser remarries or dies."

The final decree of distribution appropriately provided for the creation of the trust designated by the testator and contained, among others these, clauses:

"It is further ordered, adjudged and decreed that in pursuance of and according to the provisions of the Last Will and Testament of decedent, the said property, and all other property belonging to said estate, whether described herein or not, is distributed as follows, to wit: * * *

"* * * in the administration of said trust, said Ethel Fraser Prentiss to use the income of said property as her own with the exception of $300.00 monthly thereof, which said $300.00 monthly thereof said trustee to pay to decedent's wife, Lillian R. Fraser until the said Lillian R. Fraser remarries or dies, or said trust terminates, * * *

"* * * that said bequest to said Lillian R. Fraser of $300.00 per month is an annuity * * *."

The only questions necessary for us to determine are these:

First: Under the above circumstances may the will be considered in construing the decree of distribution?

Second: Did the decree of distribution in legal contemplation create an annuity of which plaintiff was the beneficiary?

The first question must be answered in the affirmative, since the decree of distribution contained the following language: "It is further ordered, adjudged and decreed that in pursuance of and according to the provisions of the Last Will and Testament of decedent * * *."

[1, 2] In construing a decree of distribution, where, as in this case, the will by apt language is incorporated, the decree should be considered in its entirety and not one

phrase at a time. Where, as here, there is a conflict between a part of the decree which is expressed in the will itself and another clause thereof, the decisions hold that the clause in the will must govern.

Our Supreme Court in the case of In re Ewer's Will, 177 Cal. 660, 171 P. 683, had this identical question for decision and held in considering similar wording in a decree of distribution that the will might properly be examined in construing ambiguities in the decree of distribution. Mr. Justice Shaw says (177 Cal. 660, at page 662, 171 P. 683):

"The respondent claims that by virtue of the reference in the decree to the last will of Warren B. Ewer the court may look to said will to determine the nature of the trust upon which Naylor was to hold the money distributed to him.

"We are of the opinion that the contention of the respondent is correct. * * * The finding that the residue remaining in the hands of the executor should be distributed 'in accordance with the provisions of the last will and testament of said deceased,' together with the other references in the decree, sufficiently incorporated the provisions of the will into the decree for the purposes of reference to aid the decree and ascertain the nature of the trust. * * * The rule that the decree of distribution prevails over the provisions of the will where the two are in conflict is one of necessity. It should not be applied in cases where the necessity does not exist, and if reasonably possible the decree should be construed so as to be consistent with the will, and so as to incorporate the will into it as a part of its directions, rather than to give it a meaning which conflicts with the provisions of the will. There was no controversy as to the meaning of the will, and we cannot ascribe to the court any purpose or intent to dispose of the estate contrary to its terms."

Mr. Justice Lorigan, in Horton v. Winbigler, 175 Cal. 149, 158, 165 P. 423, 427, says:

"In the decree of distribution it is recited 'that in pursuance of, and according to the last will of said deceased, the agreements of the heirs and legatees, and deeds and conveyances on file herein, the said property is distributed as follows, to wit,' followed by the distributive clause in favor of Lucy J. Brown of one half of the money of the estate in the terms relied on by appellant and the other half of the money to plaintiff, together with certain real estate.

"In making a decree of distribution a court may incorporate the provisions of the will therein or a contract or agreement entered into between the heirs and which is called to the attention of the court with a view of having it incorporated in the decree; and the court may, by express terms or by apt reference thereto, incorporate said will or contract in the decree so as to constitute it a portion of its distributive terms. This is what was done in the decree of distribution under consideration. The court incorporated the will and the contract between plaintiff and Mrs. Brown as to the respective interests which each should take on distribution, and pursuant thereto made distribution accordingly. When a necessity arose thereafter to construe said decree, the court was not limited to a consideration of the particular provision of it, as claimed by appellant, but it was the duty of the court to look to the will and the contract which were made a part of the decree, together with the other terms, in order to ascertain just what the terms of the distribution were, because the distribution as declared by the court was in accordance with the provisions of the will and the agreement of the heirs. This declaration and reference to the will and agreement made them a part of the decree as effectually as though set forth in it. The court was not, as appellant asserts, allowing the admission of the will and contract as matters extraneous to the terms of the decree for the purpose of modifying or changing the decree of distribution. The court was admitting these instruments, which were in effect part of the decree of distribution because referred to therein and declared to be the basis of the decree itself, not to modify it or change it in any particular, but for the purpose of construing it in its entirety and determining just what was meant by all its distributive provisions. The right of the court to incorporate provisions of a will or agreement by express reference in a decree of distribution and thereafter in an action involving a consideration of the decree to resort to said will and agreement as part of the decree in construing its terms, as was done in this case, is well settled in this state."

[3] As to the second question, the gift of a specified portion of the income of a trust fund does not constitute an annuity. 3 Cor. Jur. 201; In re Estate of Brown, 143 Cal. 450, 455, 77 P. 160.

Mr. Justice Shaw in the case last cited (143 Cal. 450, at page 455, 77 P. 160, 162)

states the rule thus: "A gift of an income from a certain fund is not an annuity, and interest does not begin thereon until one year from the death of the deceased."

[4, 5] The declaration in the final decree of distribution that the bequest was an annuity is not conclusive in determining its character. The determinative factor is whether the entire decree, including the will which was incorporated therein by apt language, made a distribution in such manner as to meet the requirements of section 161, subd. 3, of the Probate Code, defining an annuity. In the instant case it did not, in view of the decisions of our Supreme Court, supra. Therefore, since the decree of distribution did not create an annuity, the bequest to plaintiff of income from the trust fund was not payable from the date of testator's death but commenced upon receipt from the trust fund of income by defendant Ethel Carman-Ryles.

The portions of the judgment appealed from are reversed, and the lower court is ordered to enter a modified judgment in accord with this opinion.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 97

CHASTAIN et al. v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Civ. 5623.

District Court of Appeal, Third District, California.

May 15, 1936.

Hearing Denied by Supreme Court July 13, 1936.

1. Prohibition ⇐25

For the purpose of passing on demurrer to petition for writ of prohibition, District Court of Appeal must assume that all facts related therein are true.

2. Judges ⇐47(2), 49(2)

Trial judge, who has charged party litigant with having committed perjury in testifying at trial with respect to material issue and concedes that he still retains that same opinion of the litigant's veracity, is disqualified from again trying the same cause (Code Civ.Proc. § 170).

3. Judges ⇐47(2), 49(2)

Trial judge *held* disqualified from trying for third time case for damages for negligence in operation of automobile when, upon granting new trials therein, he declared that one of the defendants and some witnesses had committed perjury regarding material issue of contributory negligence, and judge conceded that he was still of opinion that perjury had been committed (Code Civ. Proc. § 170).

4. Judges ⇐51(4)

Where facts are undisputed, disqualification of judge to hear case becomes question of law.

5. Prohibition ⇐5(3)

Prohibition *held* proper remedy to restrain judge from trying case on ground he was disqualified after question of judge's bias was passed upon by another judge as provided by statute, since such proceeding is final and an appeal therefrom does not lie (Code Civ.Proc. § 170).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Petition for writ of prohibition by John Alexander Chastain and others against the Superior Court of the State of California in and for the County of Sacramento, and Malcolm C. Glenn, Judge thereof, to restrain respondent judge from trying a damage case on the ground that he is disqualified.

Writ of prohibition granted restraining respondent from again trying the cause and discharged with respect to its application to superior court of Sacramento County.

Hearing denied by Supreme Court; SEAWELL and CURTIS, JJ., dissenting.

Butler, Van Dyke & Harris, of Sacramento, for petitioners.

Albert E. Sheets, of Sacramento, for respondent.

PER CURIAM.

This is a petition for a writ of prohibition to restrain the respondent judge from trying a damage case on the ground that he is disqualified, under the provisions of section 170 of the Code of Civil Procedure, having previously expressed his opinion to the effect that one of the petitioners and

his witnesses had committed perjury in testifying at a former trial of the same cause regarding a material issue which was involved therein. By means of a demurrer it is charged the petition fails to state facts sufficient to warrant the issuing of a writ. No answer has been filed.

The petition alleges that Robert N. Hicks brought suit against the petitioners in the superior court of Sacramento county for damages resulting from injuries received in an automobile collision; that the material allegations of the complaint were denied, and it was affirmatively alleged in the answer that the accident occurred as a result of the contributory negligence of the plaintiff; that the cause was twice tried by the respondent Malcolm C. Glenn, as judge of said court, sitting with a jury; that both juries rendered verdicts in favor of the defendants; that upon motions therefor new trials were granted by said judge from the judgments which were rendered pursuant to those verdicts; that in passing on the first motion for new trial the judge said, in effect, that evidence was received at the trial which would support the implied finding of the jury that the plaintiff was guilty of negligence which contributed to the accident, but that the defendant John A. Chastain and other witnesses had deliberately perjured themselves in testifying upon that subject, and that he (the judge) had seriously considered presenting to the grand jury for indictment a charge of perjury against them; that he had further said he would not permit any judgment to stand in his court which was based on perjury, and that "upon that ground alone" he was granting a new trial; that the cause was thereupon again set for trial before the same judge, but that, prior to the second trial, counsel for the defendants personally interviewed the judge in his chambers, calling attention to his statements regarding the veracity and credibility of one of his clients and of their witnesses, and requesting him to voluntarily disqualify himself from again trying the cause as provided by section 170 of the Code of Civil Procedure, which the judge declined to do; that the case was again tried by the same judge sitting with a jury, which once more rendered a verdict in favor of the defendants; that on motion for a new trial the judge again granted a new trial on the same ground; that the cause was then set for trial before the same judge for the third time; that prior to the time set for the last-mentioned trial the defendants formally objected in writing to the judge again trying the cause on the ground that he was disqualified for bias as evidenced by his previous charge that one of the defendants and his witnesses had committed perjury as heretofore related at the former trials of the case; that the judge filed a written answer to that charge of bias conceding that he had used substantially that language with regard to one of the defendants and some of his witnesses, and that "the views of the undersigned are the same as heretofore," but that his opinion regarding the veracity of those witnesses was obtained solely from the evidence adduced at the former trials and not otherwise, and asserted that he was not biased against the defendants or unable to give them a fair and impartial trial; that the question regarding the alleged bias and prejudice of the judge was thereupon heard by another judge of the same superior court, who determined that Judge Glenn was neither biased against the defendants or any of them nor disqualified from again trying the same case; that the respondent judge will proceed to try the cause for a third time unless he is restrained from doing so by this court.

[1] For the purpose of passing on the demurrer to the petition for a writ of prohibition, we must assume that all of the facts related therein are true. Indeed, the respondent judge has frankly admitted the allegations of the charge of perjury which he made against one of the defendants and his witnesses. There is substantially no controversy regarding the facts of the case. The question of the existence of bias or prejudice in the mind of the trial judge which will disqualify him from again trying the cause is therefore a problem of law to be determined.

The question to be decided is whether a judge is disqualified from trying for a third time a case for damages for negligence in the operation of an automobile when upon granting new trials therein he declared that one of the defendants and some of his witnesses had committed perjury in testifying at the former trials regarding the material issue of contributory negligence; that he would not permit any judgment to stand in his court which was based on perjury; that he was still of the same opinion regarding their commission of perjury; and that a new trial was twice granted by him on the sole ground that he

believed those witnesses were guilty of perjury.

[2] The California authorities have definitely declared the rule of law to be that a trial judge who has charged a party litigant with having committed perjury in testifying at the trial with respect to a material issue when the judge of the case concedes that he still retains that same opinion of the litigant's veracity is disqualified under the provisions of section 170 of the Code of Civil Procedure from again trying the same cause. Evans v. Superior Court of Los Angeles County, 107 Cal. App. 372, 290 P. 662, 666; Briggs v. Superior Court of Los Angeles County, 215 Cal. 336, 10 P.(2d) 1003, 1007. These cases are determined on the theory that a judge who possesses a fixed opinion that a party to a suit which is pending before him has deliberately perjured himself by testifying falsely regarding a material issue in the case, must necessarily believe the litigant is unworthy of belief, and that his testimony at a subsequent trial of the same case is likely to be discredited. "Perjury" is the willful testimony of a person under oath, before a competent tribunal, of material facts known by him to be false. Section 118, Pen.Code. It must be true that a judge who believes that a litigant has willfully sworn falsely regarding a material issue in a case pending before him is likely to discredit his testimony on that issue in a subsequent trial of the same case if there is a conflict of evidence in that regard, and that the judge then necessarily entertains bias which disqualifies him, under the provisions of section 170 of the Code of Civil Procedure, from presiding at another trial of the same case whether he sits with or without a jury. Entertaining such a conviction regarding the veracity and integrity of a defendant and his witnesses upon a material issue in a damage suit affecting the question of contributory negligence, the convictions of the judge may result in depriving the litigant of a valid defense. As the Supreme Court said in the Briggs Case, supra: "Where the trial judge acts as the trier of both the facts and the law, his qualifications, so far as bias and prejudice are concerned, are somewhat the same as the qualifications of a juror. No one would doubt that if a juror stated that he was of the opinion that one of the parties to the action was not only capable of being but had, to his knowledge, been guilty of making false statements under oath, such juror would and should be disqualified, even if that juror stated that he could give the parties a fair trial. Quill v. Southern Pac. Co., 140 Cal. 268, 73 P. 991."

[3] In both of the California cases above cited, the facts were very similar to those of the present case. We are therefore of the opinion those authorities are determinative of this proceeding. In the Evans Case the trial judge, in reviewing the evidence, stated in effect that one of the parties to the suit in testifying as a witness therein "had made wilful misstatement of facts." Like the trial judge in the present case, that judge affirmatively denied that he entertained bias or prejudice against the party, and asserted that the opinion which he had expressed and which he still retained regarding the veracity of the litigant was derived solely from the evidence adduced at the trial. Yet the court there said:

"The remarks in the decision were, no doubt, prompted by the respondent judge's sense of justice and because of his firm belief that perjury had been committed by the petitioners in his court. * * * We must assume that the decision and opinion of Judge Tappaan, and every part thereof, is amply sustained by the evidence. On the other hand, is it fair and just to allow a judge who has such a definite, positive, fixed, and firm belief, justifiable though it may be, * * * to again pass upon the issues of fact in a case where the defendants will undoubtedly be material witnesses? * * * Can the judge ignore his opinion and belief, though honest it may be, that these petitioners have willfully testified falsely? We think not. * * * It would be unfair to ask a judge, under these circumstances, to again try issues of fact involving the honor, integrity, and veracity of men whom he had so recently condemned and denounced.

"Assuming that the trial judge was correct, * * * they [the petitioners] nevertheless are entitled to go before a judge of another department of the court, one who will assume that they are telling the truth until the contrary has been shown and where no attaint of perjury will follow them. There they may present their defense, if any they have, to a judge who has not a fixed or settled opinion of their integrity or veracity."

In the Briggs Case, supra, which presented a very similar situation, the Supreme Court has approved the preceding

language of the Evans Case. It is there said:

"The District Court of Appeal has recently decided a case closely in point with the instant case. * * *

"We are in accord with the theory of the above [Evans] case, and are of the opinion that the principles therein stated are conclusive in the case at bar."

In holding that the judge who tried the present case is disqualified from again trying the same cause, we would not be understood as criticizing his conduct. We are of the opinion he should be commended for his fearless and conscientious declarations. It is not only the privilege of a trial judge, who is not in accord with the verdict of a jury because he believes that it is not supported by the evidence, or for the reason that he thinks it was procured by perjured testimony, to set the judgment aside, but it is also his sworn duty to do so. We commend that judge who, honestly entertaining such conviction, fearlessly declares his views, even though the admission of that opinion may disqualify him, rather than to proceed to try the cause again while he secretly entertains that opinion. The opinion may be founded on facts that warrant the conclusion of the judge. But while it is the duty of the trial judge to set aside a judgment which he has reason to disapprove, it is equally the right of a litigant to have his cause tried by one who has no preconceived opinion against his veracity which may preclude a full and a fair consideration of the facts and the law which are involved therein.

[4] When there is uncontradicted evidence that the trial judge entertains a fixed opinion that a party to an action has deliberately perjured himself upon a material issue or that he is unworthy of belief, and frankly admits he possesses that frame of mind, the law entitles the litigant to the privilege of a trial before some other judge. Under such circumstances the question regarding the existence of bias or disqualifications becomes one of law. Evans v. Superior Court of Los Angeles County, supra.

[5] The writ of prohibition is the proper remedy to restrain a judge from trying a case on the ground that he is disqualified after the question of his bias has been passed upon by another judge as provided by the terms of section 170 of the Code of Civil Procedure, for the reason that such a proceeding is final and conclusive and an appeal therefrom does not lie. Briggs v. Superior Court of Los Angeles County, supra.

We are of the opinion the petition states a good cause of action, and that the demurrer should be overruled. It is so ordered. The facts of this case are conceded, and there is no request to file an answer. The writ of prohibition is therefore granted restraining the respondent, Malcolm C. Glenn, from again trying the cause. The writ is discharged with respect to its application to the superior court of Sacramento county.

KEY NUMBER SYSTEM

BYER v. CANADIAN BANK OF COMMERCE.*

Civ. 9954.

District Court of Appeal, Second District, Division 1, California.

May 13, 1936.

Hearing Granted by Supreme Court July 10, 1936.

1. Principal and agent ⇐147(3)

Where agency, if it existed, was only a special agency, it was incumbent upon one justifying dealings as being with the agent to inquire as to the extent of the agent's authority (Civ.Code, § 2297).

2. Principal and agent ⇐151(3)

Bank being sued for conversion of bonds intrusted to it by depositor could not rely on defense that third person whom bank permitted to obtain possession of bonds had power of attorney to act for depositor in respect to bonds, which had been revoked without bank's knowledge, where bank had no knowledge of such power of attorney until after third person obtained bonds (Civ. Code, § 2297).

3. Principal and agent ⇐190(2)

In action for conversion of bonds which bank to which they had been entrusted negligently permitted third person to obtain possession of, power of attorney authorizing third person to act for owner in respect to bonds *held* admissible as logically relevant

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

 *For subsequent opinion see 65 P.2d 67.

to issue whether such power of attorney was available to bank as defense.

4. Banks and banking ⇐153

Negligence of bank in mailing bonds intrusted to it, in response to telegram from third person which purported to be from owner requesting that bonds be sent to owner's address, without insuring them or requiring identification from recipient or instructing that they be delivered only to owner, whereby such third person obtained possession of bonds, was not excused by fact that owner had given bank the address of such third person as owner's address.

5. Banks and banking ⇐153

Bank to which depositor intrusted bonds for safekeeping had duty to use every available precaution, without suffering detriment or loss to itself, to see that bonds got into hands of depositor if transmitted, and when bank sent bonds through mails it should have availed itself of all safeguards which mail service offered.

6. Banks and banking ⇐153

Bank to which depositor with safety-deposit box intrusted bonds for safekeeping *held* "bailee for hire," notwithstanding that bank may have received no hire for act of keeping bonds, in view of compensation received by bank on deposit and safety-deposit box, as respects liability of bank for permitting bonds to get into hands of third person.

[Ed. Note.—For other definitions of "Bailee for Hire," see Words & Phrases.]

7. Banks and banking ⇐153

Bank which acted as bailee for hire of bonds intrusted to it for safekeeping *held* grossly negligent in transmitting bonds through mails in response to telegram which purported to be from owner, without demanding that bonds be delivered to owner only, rendering bank liable to owner when bonds were delivered to third person, notwithstanding that owner may also have been negligent.

8. Banks and banking ⇐154(1)

Depositor who intrusted bonds to bank as bailee for hire could maintain action for conversion when bank permitted third person to obtain possession of bonds.

Appeal from Superior Court, Los Angeles; Thomas P. White, Judge.

Action by Jacob Byer against the Canadian Bank of Commerce, a corporation. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (William Larrabee, of Los Angeles, of counsel), for appellant.

Guy Richards Crump, Roy W. Colegate, and Mark S. Feiler, all of Los Angeles, for respondent.

HAAS, Justice pro tem.

Defendant appeals from a judgment of the trial court entered against it and in favor of plaintiff for $2,010 and interest, for the alleged conversion of three bonds of the Province of Alberta, Dominion of Canada. The evidence discloses facts as hereinafter stated.

The bonds carried a face value of $1,000 each and their combined market value was $2,010, at the date of the alleged conversion, January 4, 1932. These bonds were originally, along with others belonging to plaintiff, in the possession of a firm of brokers named Buchan & Company, in Calgary, Alberta, Canada.

On December 30, 1931, as indicated by letters on file as Plaintiff's Exhibit No. 2 herein, Harold E. Crowle, attorney for plaintiff at Calgary, Canada, having procured the bonds from Buchan & Co., forwarded the bonds to the defendant bank at Granum, Canada, for safekeeping and requested that the bank hold the same to the order of Jacob Byer, the plaintiff, of 604 California Bank building, Beverly Hills, Cal., the address given being that of one Mr. R. T. O'Brien, which was some time prior thereto the address of the plaintiff as well.

On December 31, 1931, the defendant bank acknowledged the receipt of the bonds "to be held for safekeeping on account of Jacob Byer," the plaintiff. On January 2, 1932, Mr. Crowle, at the request of Mr. Byer, wrote defendant bank stating that these bonds were to be considered as being in the custody of Walter Byer, son of Jacob Byer, in care of defendant bank. On January 4, 1932, a telegram, which was received at Granum at 11:40 a. m. Granum time, was sent to defendant bank by O'Brien over the name of Jacob Byer, in words as follows: "Please forward immediately to this address the bonds and stock forwarded to you

by Harold E. Crowle, Barrister, Calgary, namely three thousand Alberta bonds * * *." These are the bonds in question. On March 2, 1932, Mr. Crowle directed a letter to the defendant bank stating that he had been informed that the bonds had been sent to Mr. O'Brien, requesting to know if this was a fact and if so he wished to be informed by what authority the bank had sent the bonds to O'Brien. On March 3, 1932, the defendant bank wrote Mr. Crowle stating that on January 4, 1932, the defendant bank had sent the bonds by registered mail to Jacob Byer, addressed to 604 California building, Beverly Hills, Cal., in response to the above said telegram purporting to be from Mr. Byer, requesting the bank so to do.

On July 27, 1932, Mr. Crowle, in behalf of plaintiff, made a demand by letter on the defendant bank for the bonds or others of the same value, or the cash equivalent therefor. On August 6, 1932, the defendant bank wrote Mr. Crowle disclaiming all responsibility and liability in the matter.

It may be deducted from stipulations of counsel that the letter hereinbefore mentioned, from Crowle to the defendant bank, dated January 2, 1932, should have been received January 4, 1932, as it was stipulated that it was received "in the usual course of mails"; it being further stipulated that January 2d was a Saturday, January 3d a Sunday, and January 4th a Monday, and that defendant bank was closed on Sunday, January 3d. Evidence discloses that the bonds were sent on January 4th by registered mail, not insured, without requiring identification from the recipient, and that they were receipted for by someone in O'Brien's office without plaintiff's consent. O'Brien received the bonds and kept them, and plaintiff never received the bonds nor their equivalent, nor their value.

The plaintiff executed and delivered a power of attorney to O'Brien in his personal capacity on the 18th day of December, 1931, to act for the plaintiff, referring "especially to that particular transaction involving the collection of certain securities belonging to" him "and which said securities" were then "in the possession of Buchan Company, Brokers," and which power of attorney further granted to Robert T. O'Brien full power of attorney to act for him, to accept, receipt for in his name "any and all documents pertaining to the collection of the securities above mentioned and to do all that may be necessary in the premises," referring, as securities, to the bonds in question. This power of attorney was revoked by oral revocation on December 31, 1931. On January 18, 1932, plaintiff delivered to O'Brien, at Beverly Hills, Cal., a written notice of revocation and cancellation of his power of attorney, and on the same date plaintiff wrote the defendant bank to that effect. However, pursuant to the telegram received January 4th, purporting to be from plaintiff, the bank had already sent the bonds to O'Brien's office directed to plaintiff.

[1] The question arose whether the power of attorney constitutes O'Brien an agent of the plaintiff to the end that it relieved the bank from any liability for negligence, in that the defendant bank neither insured the bonds, nor requested, in registering them in the mail, that they be delivered to the addressee, the plaintiff *only*, nor demanded identification of addressee. The evidence does not reveal that the defendant at the time of the transmission of the bonds knew that the power of attorney had been executed and delivered, or in fact, knew anything of such purported agency. If there existed any agency at all, O'Brien was a special agent to receive the bonds. "An agent for a particular act or transaction is called a special agent. All others are general agents." Section 2297, Civ.Code. As stated in Ernst v. Searle, 218 Cal. 233, at page 238, 22 P.(2d) 715, 717, "It was therefore incumbent on the defendant to inquire as to the extent of his authority."

The bonds were forwarded to the defendant bank by the plaintiff's attorney, Mr. Crowle, on December 30, 1931, with the instructions that the defendant bank hold them to the order of defendant "Jacob Byer of 604 California Bank Building, Beverly Hills, California." The defendant received them and acknowledged receipt on December 31st, and on January 4th following, at 11:40 a. m., the defendant received a telegram at Granum, Alberta, Canada, over the name of the plaintiff, sent by O'Brien, who was holding the power of attorney, to forward the bonds to plaintiff, giving O'Brien's address.

The evidence does not reveal that the fact that O'Brien held such a power of attorney was known to the defendant bank at the time it sent the bonds to O'Brien's address, but does reveal that it only learned of this fact later.

[2] Is the defense that O'Brien held a power of attorney, given by plaintiff, available to the defendant bank *as* a defense, without a showing that the defendant knew

of the existence of such agency, if it existed? We think not. The case of Rodgers v. Peckham, 120 Cal. 238, 52 P. 483, 484, cites the case of Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758, to the effect that a "party maintaining that an ostensible authority existed *must prove* that he *knew* of the facts giving color of authority to the supposed agent." (Italics ours.) So, also, the Case of Luft v. Arakelian, 33 Cal.App. 463, 165 P. 712, 713, lays down the rule: "It is well settled that he who seeks to charge a supposed principal with the obligations resulting from the acts and conduct of an alleged ostensible agent must show that he himself was cognizant of the facts which gave color to the alleged ostensible agency, and caused him to believe that the person he dealt with was acting in the capacity of an agent rather than as a principal." We are of the opinion that the defendant cannot avail itself of the defense that inasmuch as O'Brien held a power of attorney, it (the bank) was acting with the plaintiff through plaintiff's agent O'Brien, as the evidence does not disclose that defendant bank was cognizant of the power of attorney at the time the bonds were sent.

[3] The power of attorney was properly admitted in evidence. The matter therein contained was logically relevant to the issue (22 Cor.Jur. 158, 192), and its probative force was brought into question by the examination of the witness Jacob Byer as to his relations with Mr. O'Brien.

[4] It cannot be maintained that Jacob Byer, by his admitted words to O'Brien, "Whatever you are doing, you are doing on your own hook," consented that O'Brien should act for him as an agent in procuring the bonds from the defendant bank. On the contrary, it shows his emphatic disapproval of O'Brien's proposal to get the bonds, and denies agency to O'Brien. Nor was it known to the bank that such a conversation had taken place. So, also, the fact that Byer had furnished the bank with the very address of O'Brien as his address to which the bonds were to be sent cannot excuse the bank for its carelessness in not demanding an identification by the mail carrier of the recipient of the bonds, nor its failure to insure them, nor its failure to request that they be delivered to the plaintiff only.

The issue is also before the court to determine whether the defendant had exercised the ordinary care required of it as a bank that accepts bonds for safekeeping from its depositors and rents safety-deposit boxes to its clients; and also, whether such negligence, if any, of defendant contributed to the loss of plaintiff's property. It must be conceded that the utmost faith is shown by depositors in entrusting valuable documents to banks for safekeeping as well as in the transactions of business.

We need first to determine, however, the question of negligence before considering whether an action for conversion lies.

[5, 6] "The true measure of liability is that the bailee is bound to that degree of diligence which the manner and the nature of his employment make it reasonable to expect of him, and that anything less than this is culpable in him." 6 Cor.Jur. § 57, p. 1119, and cases cited. What was "reasonable to expect" of defendant bank? The bonds represented a considerable sum, $2,010. They were admittedly not its own. The defendant bank was intrusted with them. We are of the opinion that it was "reasonable to expect" of the bank that it use every available precaution without suffering a detriment or loss to itself. That the defendant used the mail service is not objected to. But having used it, the defendant bank should have availed itself of all the safeguards the service offered. This it did not do. The question whether the defendant bank was a bailee for hire is broached here. We are of the opinion that it was such a bailee. It was undisputed in the evidence that plaintiff at the time the bonds were transmitted had a safety-deposit box at the bank and was carrying a deposit there. While the bank as far as the evidence discloses may have received no "hire" for the very act of keeping the bonds on deposit, yet leaving the bonds on deposit in the bank was a privilege granted the plaintiff as one of its depositors, and that on plaintiff's deposits and the safety-deposit box the defendant bank did receive a compensation must be conceded, and to that extent the defendant bank must be held to have been a compensation bailee, a depositary for hire, and the bailment a benefit for both parties. While the act of the defendant bank, in mailing the bonds without demanding identification, was an unintentional failure to act according to law, and no doubt was done in good faith, yet great care was exacted of the defendant to see that the deposit, the bonds, got into the hands of their owner, if transmitted. But aside from this, at all events the evidence discloses that the bailee, even though we hold the bailment to have been gratuitous, did not exercise the same care with

reference to the bailment, the bonds, that an ordinarily prudent and careful person in its situation would have bestowed upon his own property of the same character. 6 Cor. Jur. § 65, p. 1127, and cases there cited.

In the case of Greer v. Los Angeles Athletic Club, 84 Cal.App. 272, 258 P. 155, the defendant kept a fireproof safe in the clerk's office for the safekeeping of packages deposited therein by lodgers or other members of the club for which no special charge was made. While this case deals with an innkeeper's liability under Civil Code, § 1860, at the bottom of page 282 of 84 Cal.App., of page 159 of 258 P., of the case just cited, the court does answer the query as to whether the defendant bank herein received compensation when it classes the bailment as one for hire, stating: "Manifestly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, or eo nomine, for the safekeeping of his effects, the dealer receives his recompense in the *profits of the trade* of which the bailment is a necessary incident." (Italics are ours.) And referring, on page 283 of 84 Cal.App., on page 160 of 258 P., to cases cited, the court further states: "These cases are clear expressions of the law applicable to the situation developed in the instant case where any depositary accepts property as *incidental to services rendered* by the depositary, holding that the relationship between the parties *is one of mutual benefit*, and the depositary is a bailee for hire." (Italics are ours.)

[7] We must conclude that the defendant bank was a depositary for hire and that it was grossly negligent in not demanding, as it could have, that the bonds be delivered to plaintiff only, and that the recipient be identified.

It is asserted that the plaintiff, himself, was negligent. The evidence does not sustain such an assertion and if so it does not excuse the negligence of the defendant. It is not material here whether the plaintiff acted negligently. We are dealing with the acts of the bailee.

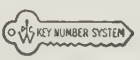
[8] This brings us to the question as to whether an action for conversion lies here. The case of Hall v. Boston & Worcester R. Corp., 14 Allen (Mass.) 439, 92 Am.Dec. 783, specifically holds: "A misdelivery of property by any bailee to a person unauthorized by the true owner is of itself a conversion, rendering the bailee liable in trover, without regard to the question of due care or degree of negligence. This is a well-established legal principle, applicable to every description of bailment." It is not disputed that plaintiff had the right of possession of the bonds in question. The previous demand was made here as disclosed by the evidence. 5 Cal.Jur. § 8, p. 168. Value was alleged and proven, and the complaint contains an averment for general damage. 5 Cal.Jur. § 24, p. 189.

We are of the opinion that an action for conversion lies under the circumstances alleged and proven.

The judgment is affirmed.

I concur: DORAN, J.

I concur in the judgment: YORK, Acting P. J.



14 Cal.App.2d 16

INGRAM v. WESSENDORF et al.

(two cases).

Civ. 10500, 10512.

District Court of Appeal, Second District, Division 1, California.

May 12, 1936.

Hearing Denied by Supreme Court July 10, 1936.

1. New trial ⇐163(1)

Trial court, on denying motion for new trial, could of its own motion vacate original findings and judgment and enter new findings supplying deficiencies in original findings (Code Civ.Proc. § 662, as added by St.1929, p. 843).

2. New trial ⇐163(1)

Where court, of its own motion, modified findings and conclusions, vacated judgment for plaintiff, and ordered new judgment for plaintiff on modified findings, order granting defendants new trial on ground that plaintiff failed to comply with statutes providing for vacation of judgment on motion of party aggrieved and placing on such party burden of complying with specified procedural requirements *held* beyond trial court's jurisdiction, since plaintiff was not the aggrieved or moving party (Code Civ.Proc. §§ 663, 663a).

3. Appeal and error ⇐1008(1)

Contributory negligence of motorist making left-hand turn, as regards intersectional collision with defendant's on-coming automobile, in allegedly violating provisions of Motor Vehicle Act *held* for trial court sitting without jury (St.1923, p. 517, as amended).

4. Automobiles ⇐226(2)

Motorist's violation of traffic regulations does not preclude his recovery for injuries sustained in collision unless violation directly or proximately contributed to collision and resulting injuries.

5. Negligence ⇐136(8)

Negligence or contributory negligence is question of law only when facts are clear and undisputed and admit of but one inference.

6. Damages ⇐132(3)

$7,500 *held* not excessive for injuries including concussion of brain, wound on head, and comminuted fracture of femur of leg resulting in shortening of leg causing permanent lameness and requiring use of crutches for year or two.

7. Automobiles ⇐249

Automobile owner's liability for her husband's negligence in driving automobile with her knowledge and consent *held* limited to $5,000 (Civ.Code, § 1714¼; St.1935, p. 153, § 402).

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by John B. Ingram against H. W. Wessendorf and Margaret C. Wessendorf. From a judgment entered against them, defendants appeal, and from an order granting defendants' motion for a new trial, plaintiff appeals.

Judgment against H. W. Wessendorf affirmed, judgment against Margaret C. Wessendorf modified, and order granting motion for new trial reversed.

Dempster & Dempster and J. H. Creighton, all of Los Angeles, for John B. Ingram.

W. I. Gilbert, of Los Angeles, for H. W. and Margaret C. Wessendorf.

DESMOND, Justice pro tem.

Case No. 10500 is an appeal by defendants H. W. Wessendorf and Margaret C. Wessendorf from a judgment entered against them in the sum of $7,500. Case No. 10512 involves the same parties, and is an appeal by plaintiff from an order granting a new trial entered after notice given of the first appeal.

[1, 2] It will be necessary to dispose of plaintiff's appeal first. The record shows that two judgments in the same amount were entered in this action against the same defendants, the first on February 7, 1935; the second on June 3, 1935. This later judgment was actually signed on April 23, 1935, when the trial judge, on his own motion, signed and filed an order vacating the original findings of fact, conclusions of law, and judgment, in the same order entering amended findings and conclusions, prepared "to conform to the proof." The original "findings" had failed to include findings that the plaintiff was not guilty of contributory negligence that proximately contributed to his injuries; that the accident was not unavoidable; that the allegations of the answer were untrue. All these deficiencies were supplied in the new findings which the court had ordered entered on March 18, 1935, when defendants' motion for a new trial was denied, but which, as stated, were not filed until more than a month later on April 23d. Under the new section 662, Code of Civil Procedure, added to the Code in 1929 (St. 1929, p. 843), the trial court was empowered to make this order, as declared in the recent case of Spier v. Lang, 53 P.(2d) 138, 140, the Supreme Court also holding that the fact that changed findings and conclusions and a modified judgment were not filed until a date subsequent to the 60-day period provided by section 660, Code of Civil Procedure, on motion for a new trial, "would not destroy the power theretofore exercised within due time." But the defendants in this case on the day when the amended findings and conclusions were placed on file namely, April 23, 1935, filed another notice of motion for a new trial setting up as grounds most of those mentioned in section 657, Code of Civil Procedure. An order granting a new trial was made on May 10th, not on any of the grounds mentioned in the motion, but, as stated in the minute order of that day, "upon the grounds that plaintiff failed to comply with sections 633 and 633a Code of Civil Procedure." This was an erroneous reference, corrected a week later by minutes ordered entered by the

court showing the appropriate sections as 663 and 663a. A reference to section 663, Code of Civil Procedure, will show that it contemplates the court's vacating a judgment upon motion of the party aggrieved, and that section 663a places upon the same party the burden of complying with certain procedural requirements prior to the hearing of such motion. Therefore, the order in this case granting motion for a new trial "upon the grounds that plaintiff failed to comply with sections 663 and 663a" cannot be sustained, because the plaintiff was not the aggrieved or moving party and was under no obligation and in no position to comply with the provisions of those sections. The plaintiff had a right to rely upon the previous action taken by the court ordering amended findings and conclusions and later, of its own motion, filing them and at the same time ordering a new judgment based thereon in nowise differing from the original judgment. As to this order granting a new trial solely on the ground mentioned which, as we have indicated, was no sufficient ground, the action of the trial court must be reversed since it was without jurisdiction to enter such an order. Laumann v. Conner (Cal. App.) 55 P.(2d) 1225.

We pass now to consideration of the appeal of the defendants. It appears from the transcript that plaintiff, returning home from his work, was driving his Chevrolet automobile, an inclosed car, westerly on Sunset boulevard in Los Angeles, between 2:30 and 3 a. m., March 18, 1934. As he approached the point where Hyperion avenue enters Sunset boulevard from the south, he prepared to make a left-hand turn, necessitating his crossing two sets of car tracks. He testified, "I held out my hand about a half a block before I made my entrance to the car track." He also testified that before turning he saw an automobile coming east on Sunset boulevard in the neighborhood of Sanborn avenue, which enters Sunset a block west of Hyperion. He looked backward also to observe the traffic, dropped his outstretched arm for a moment as he was going into the turn about 6 feet east of the intersection center; then held it out again, traveling 10 to 15 miles per hour, and knew nothing more until he regained consciousness at the General Hospital five or six hours later. His car was struck by a Cadillac belonging to Margaret C. Wessendorf which was being driven by her husband, with her knowledge and consent. Mr. Wessendorf had no passenger with him. He was traveling east on Sunset, having taken some friends home to Hollywood from the Jonathan Club and at the time of the accident was returning to the club. He testified that he did not see the Chevrolet until it was about 25 feet away from him; that he then swung over to the right side of the street and struck plaintiff's car. There was evidence that before the collision he applied his brakes, skidded, and that he stopped about 100 feet away from plaintiff's car. Mr. and Mrs. Bear were also driving easterly on Sunset boulevard at that time, and testified that Mr. Wessendorf passed them on the left in the neighborhood of Sanborn and Sunset. Mr. Bear testified that he was driving his own car at 40 to 45 miles per hour; Mrs. Bear, that Wessendorf was traveling 60 to 70 miles per hour when he passed them. Bear also testified that the Wessendorf car continued on the extreme northerly track until striking the other car, "swerving in then toward the curbing." He stated that Ingram's car rolled clear over, "I believe twice. Mr. Ingram was thrown out of the car * * * forward * * * through the front of the car, possibly 15 or 20 feet clear of the car."

In this accident, plaintiff sustained serious injuries, including concussion of the brain, a wound upon the head, and a comminuted fracture of the femur of one of his legs. As a result, this leg was shortened causing permanent lameness and at the time of trial, almost a year later, plaintiff was walking on crutches. There was testimony that he would probably require the use of crutches for another year.

[3, 4] Defendants in their appeal contend that the evidence adduced at the trial was insufficient to sustain the decision of the court against them, specifying also certain errors, claimed to have been committed by the court in ruling upon points of evidence and in having filed the findings, conclusions, and judgment. As to the last item, we may say that if any error occurred in the original documents, it was cured by the court's filing amended orders; as to the exceptions on controverted points of evidence, we find from an examination of the record that none of them can be sustained, for the reason that in each instance the trial court ruled correctly. As to the other and chief ground of appeal, namely, insufficiency of the evidence, we note the claim that plaintiff was guilty of negligence

as a matter of law, these appellants contending that he violated various and sundry provisions of the California Vehicle Act (St.1923, p. 517, as amended), in that he did not drive to and pass to the right of the center of the intersection before making his left-hand turn; in that he failed, before turning, to observe whether the Cadillac was approaching at such a speed and so closely to the intersection as to threaten his safety; in that he did not stop in approaching and turning into the intersection to see if the turn could be made in safety; in that he failed to comply completely with the rule requiring an outstretched arm when making a turn; in that he drove an automobile so covered and obstructed as to obscure his vision to the rear.

In Mast v. Claxton, 107 Cal.App. 59, at page 64, 290 P. 48, 49, we find the following: "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that inference points unerringly to the negligence of the plaintiff contributing to his injury. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500; Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369." In the instant case the court was sitting without a jury and, being familiar with all the circumstances, decided that plaintiff was not chargeable with contributory negligence. The fact that, in the instant case, respondent may have violated one or more traffic regulations does not necessarily mean that he was chargeable with contributory negligence; to bar recovery on that ground it would be necessary to show that such violation directly or proximately contributed to the accident and resulting injuries. In Skaggs v. Wiley, 108 Cal.App. 429, at page 433, 292 P. 132, an automobile collision case tried by the court, we find the rule stated thus: "A failure to observe the statutory requirement * * * will, if the same proximately causes or contributes to the injury complained of, constitute negligence as a matter of law; the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury. (Mathes v. Aggeler & Musser, etc., Co., 179 Cal. 697, 178 P. 713; Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Williams v. Southern Pac. Co., 173 Cal. 525, 160 P. 660; Thomas v. German, etc., Society, 168 Cal. 183, 141 P. 1186)." See, also, Inouye v. Gilboy Co., 115 Cal. App. 25, at page 28, 300 P. 835.

[5] The trial court in the instant case, with all the facts and circumstances before it, decided that respondent did not contribute by his own negligence, if any existed, to the injuries which he received. We cannot say from our examination of the record that he was guilty of contributory negligence as a matter of law. "When the facts are clear and undisputed, and when no other inference than that of negligence or contributory negligence can be drawn from such facts, then, and only then, is the question of negligence or contributory negligence one of law." Hanson v. Cordoza, 106 Cal.App. 500, 290 P. 62.

[6, 7] Appellants claim that excessive damages were awarded respondent by the court. In view of the injuries sustained, we hold that as to appellant H. W. Wessendorf, the claim is not well founded, and as to him the judgment is affirmed. As to appellant Margaret C. Wessendorf, the judgment must be modified because of the $5,000 recovery limitation which was fixed in a case of this sort by section 1714¼ of the Civil Code, in effect at the time plaintiff's injuries were received; since superseded by section 402 of the Vehicle Code. Stats. 1935, p. 93, at page 153.

The orders of May 10, 1935, and May 17, 1935, granting motion for new trial, reversed. Judgment against H. W. Wessendorf affirmed; judgment against Margaret C. Wessendorf modified by reducing it in amount from $7,500 to $5,000.

We concur: YORK, Acting P. J.; DORAN, J.

13 Cal.App.2d 704

VITALE v. CITY OF LOS ANGELES.

Civ. 10799.

District Court of Appeal, Second District, Division 2, California.

May 8, 1936.

1. Appeal and error ⊜171(1)

Court of Appeals *held* required to adhere to same theory on which case was tried on appeal where parties stipulated at trial as to scope of hearing and issue involved.

2. Intoxicating liquors ⊜96

Written protest accompanying payment to city for liquor license stamp, after adoption of constitutional amendment vesting exclusive power to regulate liquor traffic in state, *held* not conclusive that payments were involuntarily made, but available only as evidence of facts of compulsion (Const. art. 20, § 22, adopted Nov. 8, 1932).

3. Intoxicating liquors ⊜96

Voluntary or involuntary character of payment for liquor license stamps after adoption of constitutional amendment vesting exclusive power to regulate liquor traffic in state is to be determined from terms of statute, ordinance, or regulation under which tax or license was imposed, circumstances attendant on payment, and consideration of consequences which follow nonpayment.

4. Intoxicating liquors ⊜96

Payment to city for liquor license stamps after adoption of constitutional amendment vesting exclusive power to regulate liquor traffic in state which was accompanied by written protest *held* "involuntary," so as to authorize recovery thereof, where ordinance pursuant to which payments were exacted imposed severe criminal and civil penalties for violation of its terms (Const. art. 20, § 22, adopted Nov. 8, 1932).

[Ed. Note.—For other definitions of "Involuntary Payment," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by Frank Vitale against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ray L. Chesebro, Frederick Von Schrader, and Arthur Loveland, all of Los Angeles, for appellant.

Hanna & Morton, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Under an ordinance of the city of Los Angeles plaintiff and his assignors paid to that municipality under protest various sums of money for liquor license stamps, both before and after December 5, 1933, the effective date of section 22, article 20, of the Constitution of the state of California (adopted Nov. 8, 1932), which vested in the state the exclusive right and power, subject only to United States internal revenue laws, to control, license, and regulate the liquor traffic. Decisions of this court prior to the commencement of this action had declared that as to dates before December 5, 1933, the Los Angeles city ordinance here in question imposing a license tax on liquor businesses within that city, was valid, and enforceable [Los Angeles Brewing Co. v. City of Los Angeles (Cal. App.) 48 P.(2d) 65], but that as to dates subsequent thereto said ordinance was rendered void and unconstitutional by reason of section 22 of article 20 of the State Constitution becoming effective on that date by the repeal of the Eighteenth Amendment to the Constitution of the United States.

Although the within action sought in nine counts to recover a total of more than $10,000 for license stamps purchased both before and after December 5, 1933, upon trial it was stipulated that, in view of the decisions above adverted to, the scope of the hearing should be limited to payments made by plaintiff and his assignors on or subsequent to that date. By further stipulation it was agreed "that the only issue to be determined by the court is whether the payments made to the city of Los Angeles * * * were made voluntarily or involuntarily." As to this sole issue the trial court found that the payments were involuntary, and gave plaintiff judgment in the sum of $3,464.65, as representing the aggregate of amounts paid for license stamps during the time when it is conceded the ordinance was void, to wit, on and after December 5, 1933. Defendant municipality appeals.

[1] In view of the stipulations of fact entered into in the lower court and the stip-

ulation as to the sole and only issue of law under which the trial was had, we must adhere upon this appeal to the same theory upon which the case was tried, and no new or different theory may be injected into the case. Ernst v. Searle, 218 Cal. 233, 22 P.(2d) 715. Argument as to other points will therefore be disregarded, and the matter determined wholly upon the single issue presented to the trial court, viz.: Were the payments voluntary or involuntary?

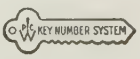
[2] Each payment was accompanied by a written protest. The making of such protests does not determine that the payments were involuntarily made, but is "only available as evidence of the fact of compulsion." McMillan v. Richards, 9 Cal. 365, 70 Am.Dec. 655. In other words, the protests are simply indicative of the fact that in making the payments there was no acquiescence in the asserted right of the city to impose and collect the license tax.

[3, 4] The character of the payments, whether voluntary or involuntary, is to be determined from the terms of the statute, ordinance, or regulation under the tax or license is imposed, the circumstances attendant upon payment and a consideration of the consequences which might follow upon nonpayment. In the case before us the ordinance imposed severe penalties for violation of its terms—a fine of $500 or imprisonment for a term of six months, or both such fine and imprisonment—with the proviso that each day's violation of the ordinance should be deemed a separate offense. Appellant and his assignors by protest exhibited their reluctance to comply with the legislative enactment, and did what was within their power to demonstrate that they were paying under compulsion. Perusal of the terms of the ordinance indicates that they were faced not only by possible civil, but also by criminal prosecution if they did not comply. Such a situation has been characterized as constituting an involuntary payment, and the admitted facts afford satisfactory support for the finding and determination of the trial court herein that the moneys ordered repaid to respondent and his assignors were involuntarily paid to appellant.

Legal support for the lower court's decision is found in such cases as City of Chicago v. Waukesha Brewing Co., 97 Ill. App. 583; Simmons Hardware Co. v. St. Louis (Mo.Sup.) 192 S.W. 394, and in our own state in Wheeler v. Plumas County, 149 Cal. 782, 87 P. 802, and Home Telephone & Telegraph Co. v. City of Los Angeles, 40 Cal.App. 492, 181 P. 100, in which latter case, similar in many respects to that at bar, the court holds that the protested payment of a license tax under an ordinance imposing criminal penalties for nonpayment is an involuntary payment and may be recovered in an appropriate action, even if there has been no threat of actual imprisonment or deprivation of business rights. The course followed by respondent herein, to wit, the payment of the tax under protest and suit for recovery of the involuntary payment, has been commended as "orderly" in Underwood Typewriter Co. v. Chamberlain, 92 Conn. 199, 102 A. 600, which aptly characterizes such tax payments as made "under pressure of the law's duress."

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 129

In re MULLER'S ESTATE.

KRAMER et al. v. BODIN et al. (KRAMER, Intervener).

Civ. 10079.

District Court of Appeal, Second District, Division 2, California.

May 18, 1936.

Hearing Denied by Supreme Court July 16, 1936.

1. Wills ⇐166(2)

Intimacy of association is not proof of domination and no inference of undue influence in execution of will is to be drawn from mere existence of confidential or intimate relationship.

2. Wills ⇐163(8)

Opportunity to exert undue influence does not warrant inference that will was not free act of testator.

3. Wills ⇐163(1)

Proponent of will devising and bequeathing property to son of person through whose undue influence will was alleged to have been executed *held* not to have burden

to show that will was not induced by coercion or fraud where no benefit followed to beneficiary's father from testamentary act.

4. Wills ⇐82

Unnatural provisions of will do not of themselves afford ground for setting will aside.

5. Wills ⇐166(1)

Evidence *held* insufficient to support judgment denying probate of holographic will of which beneficiary was son of person with whom testatrix committed suicide following execution of will, on ground of fraud or undue influence, where testatrix' heirs at law were two aunts, except for pretermitted illegitimate daughter whose rights would be assured by her appearance to claim them (Probate Code, § 90).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceeding in the matter of the estate of Barbara Muller, deceased, wherein Norma D. Bodin, petitioner for letters of administration with will annexed, applied for the probate of the will of Barbara Muller, deceased, which was contested by Elizabeth Kramer and another, and wherein Elizabeth Kramer, guardian ad litem of Audrey Louise Bowdin, also known as Audrey Louise Muller Bowdin, intervened. From a decree in favor of the contestants, the proponents appeal.

Reversed.

Hearing denied by Supreme Court; SEAWELL and LANGDON, JJ., dissenting.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellants.

Hugh E. Macbeth and Raphael Dechter, both of Los Angeles, for respondents.

GOULD, Justice pro tem.

When the purser of a coastwise passenger vessel checked off his "berthing sheet" upon arrival at Wilmington, Cal., April 3, 1933, two passengers, "Mr. and Mrs. Snardon," did not disembark. Search of their cabin revealed no occupants, but two notes. One, addressed to the purser, read: "You have two individuals as your guests traveling under a nom de plume of Snardon. The true names are J. R. Bodin and Barbara Muller." The other, addressed "To Whom it May Concern," was couched in this language: "We are leaving this world knowing fully what we are doing, and for reasons of our own, which will eventually mean eternal love and happiness." Each note was signed with the two names J. R. Bodin and Barbara Muller. Suspicion of suicide was confirmed as to Bodin when his body was washed ashore on the Orange county coastline a few days later. The woman's body has never been recovered.

On April 4, the day after the pair's disappearance, an employee of the Bank of America in Los Angeles received through the mail an envelope postmarked April 3, 1933, Wilmington, Cal., and containing the following document: "Bank of America, Trust Dept. 7th & Spring, Los Angeles. March 28, 1933. Attention Mr. L. C. Hall: In the event of my death I do hereby request that all my rights and equity of my estate and the estate of Bessie Handschiegl and Max Handschiegl be assigned to Jack Bodin, Jr., 452 N. Western Ave., Los Angeles. I also assign to the above all real and personal property. The above is subject to my rescission. Yours truly, Barbara Muller." The Handschiegls mentioned in the above document were the deceased parents of Barbara Muller, who was their sole heir and devisee; Jack Bodin, Jr., is the minor son of the J. R. Bodin who was her companion on the steamship.

When the above document was offered for probate in the superior court of Los Angeles county as Barbara Muller's holographic will, written opposition was filed by two aunts as the heirs at law of said deceased, and a petition in intervention was presented in behalf of one Audrey Louise Bowdin, illegitimate daughter of deceased and her companion, J. R. Bodin (otherwise known as Jack Bodin, Sr.), born August 1, 1932. No mention of this illegitimate child is made in the will, she was not produced at the hearing, and so far as the record in this case is concerned it is purely a matter of conjecture whether or not she is alive.

Contest against the admission of the purported will was based upon three grounds, viz.: That Barbara Muller was not of sound and disposing mind at the time the document was executed; that the instrument was not properly executed and was not wholly in decedent's handwriting; and that it was not the free and voluntary act of decedent, but was the result of the undue influence of Jack Bodin, Sr. In behalf of the illegitimate child, the additional point was made that the will omitted to provide for her or to mention her at all. Upon trial

without jury the court found specifically that the will was duly executed, that it was wholly written, dated, and signed by the testatrix, and that she was sane and of sound mind at the time. However, probate was denied upon the ground that the document was procured by the undue influence of Jack Bodin, Sr. Appeal is taken in behalf of the minor legatee and devisee by his mother, proponent of the will.

The testatrix was twenty-one years old at the time of her death. She had been intimately associated for about three years with her companion at the time of her disappearance, a married man twice her age, and who had served a term in the penitentiary in 1913 for embezzlement and forgery. Testimony was to the effect that the latter was dominant in the life of Barbara Muller, that he handled many of her business transactions, that she commonly deferred to his wishes, that she was at times physically ill and mentally distraught, that he quarreled with her at times, and that on at least one occasion he struck her.

[1-3] It may be admitted that due to the relationship and constant association between the pair the opportunity was afforded Bodin to influence his companion in her testamentary act. But intimacy of association is not proof of domination; and no inference of undue influence in the matter of the execution of a will is to be drawn from the mere existence of a confidential or intimate relationship. In re Estate of Morcel, 162 Cal. 188, 121 P. 733. Nor does opportunity to exert undue influence warrant the inference that the will was not the free act of the testator. In re Estate of Knight (Cal. App.) 50 P.(2d) 475, 476. "In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." Estate of Langford, 108 Cal. 608, 41 P. 701, 705. It is significant in the case here under consideration that there was no proof whatsoever as to what may have transpired at the time the will was executed, six days before the double suicide. It is not shown that the testatrix and Bodin were together upon that day or that the matter of the testamentary disposition of property was ever discussed by them. Neither is the situation present here where the person who is alleged to have wrongfully exerted the undue influence profits by the act of the testator. No benefit followed to Jack Bodin, Sr., from Barbara Muller's testamentary act. Consequently no burden is cast upon the proponent of her will to show that it was not induced by coercion or fraud. In re Estate of Shay, 196 Cal. 355, 237 P. 1079.

[4, 5] Respondents contend in defense of the judgment that the will was so unnatural as to indicate subversion of decedent's testamentary freedom. Unnatural provisions of a will do not of themselves afford ground for setting it aside. In re Estate of Martin, 170 Cal. 657, 151 P. 138. Moreover, it does not appear that the Barbara Muller will was so unnatural in its provisions as to indicate doubt either as to her freedom or competency in its execution. Except for the pretermitted illegitimate daughter, decedent's heirs at law were her aunts, with whom she had little if any contact for a period of years before her death. As to the daughter, as indicated above, her present existence is in doubt, and all her rights in her mother's estate would be completely assured to her by her appearance to claim them, inasmuch as she would then take her full share as a pretermitted child. Probate Code, § 90. Conceding that no single circumstance in this case, standing alone, may be said to be sufficient to deny probate to the will, respondents argue that the combination of circumstances is sufficient to warrant the fact-finder's conclusion that the will was not the voluntary act of the testatrix, relying upon such cases as In re Estate of Snowball, 157 Cal. 301, 107 P. 598, and In re Estate of Little, 64 Cal.App. 695, 223 P. 416. We cannot agree with this contention. Aside from the close association of testatrix and Bodin and the consequent opportunity afforded him to guide her in her testamentary act, together with his dominance in business matters and her weakened physical condition, there is nothing in the case to fortify respondents' position. These facts are insufficient to justify a finding of undue influence. Even if the relations between decedent and the alleged wrongdoer afforded the latter an opportunity to exert undue influence, it is apparent that to hold that he did anything that could be classified as an act of that nature would be, adopting the language of In re Estate of Knight, supra, "to enter upon the field of conjecture."

Judgment reversed.

We concur: WOOD, J.; CRAIL, P. J.

14 Cal.App.2d 126

PACIFIC STATES SAVINGS & LOAN CO. v. WAGNER et al.

WAGNER v. PACIFIC STATES SAVINGS & LOAN CO.

COLEMAN & NEAL, Limited, v. SAME.

Civ. 10924.

District Court of Appeal, Second District, Division 2, California.

May 18, 1936.

1. Evidence ⇐20(1)

It is a matter of common knowledge that hotels ordinarily maintain dining rooms as part of hotel business and ordinarily public may obtain meals at hotel dining room without obtaining lodgings or registering as guests, and, in determining whether statute requiring notice of intent to mortgage cafe or restaurant fixtures is applicable to fixtures of hotel dining room, court must presume that Legislature was aware of such conditions (Civ.Code, § 3440).

2. Fraudulent conveyances ⇐47

Hotel owner is not required to file notice of intention to mortgage fixtures of hotel (Civ.Code, § 3440).

3. Fraudulent conveyances ⇐47

Failure to file notice of intent to mortgage fixtures of hotel dining room did not invalidate mortgage, where hotel dining room was conducted under same management and with same books of account as rest of hotel and at least 75 per cent. of business came from registered guests, so that business of dining room was "hotel business" and not "restaurant business" within statute requiring such notice in cases of mortgages by restaurant owners (Civ.Code, § 3440).

[Ed. Note.—For other definitions of "Hotel" and "Restaurant," see Words & Phrases.]

Appeals from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by the Pacific States Savings & Loan Company, a corporation, against Daniel R. Wagner, doing business as the Wagner Lumber & Mill Company, and Coleman & Neal, Limited, a corporation, wherein defendants filed a cross-complaint. Judgment for defendants, and plaintiff appeals.

Reversed, with directions that judgment be entered in favor of plaintiff.

Griffith & Thornburgh, of Santa Barbara, and John L. Mace and Roy D. Reese, both of Los Angeles, for appellant.

Leland Crawford and Maxwell Nichols, both of Santa Barbara, for respondents.

WOOD Justice.

Plaintiff commenced this action to quiet title to the furniture and fixtures of the Vista Mar Monte Hotel at Santa Barbara. The case was tried on an agreed statement of facts which has been incorporated in the findings. Plaintiff appeals on the judgment roll from a judgment in favor of defendants.

A chattel mortgage was executed by the owner of the hotel on July 28, 1931, in favor of plaintiff covering all the furniture, fixtures, and equipment situated in the hotel to secure an indebtedness of $210,000. A portion of the property described in the chattel mortgage was used in connection with the dining room and kitchen operated in the hotel. This mortgage was foreclosed by court action and plaintiff became the purchaser at a sale conducted in the foreclosure proceeding. Defendants are the holders of liens subsequent to that of plaintiff's chattel mortgage if plaintiff is correct in its contention that it was not necessary to record the notice provided by section 3440 of the Civil Code.

The hotel was operated on both the American and European plans, and at the time of the execution of the mortgage it was not located near a business district and there was not a restaurant within approximately a mile of the hotel. The only entrance to the dining room, referred to in the findings as "dining room or restaurant," opened onto the hotel lobby. The dining room was conducted under the same management as the rest of the hotel and with the same books of account. Most of the employees working in the dining room received rooms in the hotel as part of their compensation. At least 75 per cent. of the business of the dining room came from the registered guests of the hotel and the remaining part from those not registered. The hotel management placed advertisements in the newspapers calling attention to the fact that the public could obtain meals in "the dining room of the hotel."

Defendants contend that the chattel mortgage is void as to them for the reason that plaintiff did not file with the county recorder the notice required by section 3440

of the Civil Code, which provides in part as follows: "Provided, also, that the sale, transfer, or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor, or mortgagor, or the intended vendee, transferee, assignee, or mortgagee, shall record in the office of the county recorded in the county or counties in which the said stock in trade, fixtures or equipment are situated a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendor."

[1-3] The case has been well briefed, but the decisions cited are not determinative of the question involved. It is a matter of common knowledge that hotels ordinarily maintain dining rooms as part of the hotel business and that ordinarily the public may obtain meals at hotel dining rooms without obtaining lodgings and without registering as guests. It must be presumed that the members of the Legislature were aware of these conditions and that the section of the Code under discussion was enacted in the light of such knowledge. The Legislature enumerated certain businesses the owners of which were required to file the notice prescribed in order to make a valid mortgage, but the Legislature did not include in this list a number of other businesses, among them that of a hotel owner. Therefore a hotel owner was not required to file the notice referred to. It is not necessary to define the words "restaurant" and "hotel" to demonstrate that the business conducted by plaintiff in its dining room should be classified as that of hotel business rather than restaurant business. If the Legislature had meant to require a hotel owner to file the notice referred to in section 3440 in order to execute a mortgage on that part of the hotel fixtures used in the dining room, it would have been a simple matter to so specify in the statute. It follows that plaintiff is entitled to a judgment quieting his title to the property in dispute.

The judgment is reversed, with directions to the superior court to enter judgment in favor of plaintiff in accordance with the prayer of the complaint.

We concur: CRAIL, P. J., GOULD, Justice pro tem.



13 Cal.App.2d 743

W. J. WALLACE & CO. v. GROWERS SEC. BANK et al.

Civ. 1781.

District Court of Appeal, Fourth District, California.

May 11, 1936.

Hearing Denied by Supreme Court July 10, 1936.

Judgment ⇐138(2)

Where conservator of bank after service mailed copies of complaint and summons to his attorneys without informing them of date of service and was absent from his office until time to answer had expired, so that attorneys could not ascertain date of service, and subsequently did not inform his attorneys of tacit offer of plaintiff's attorney to vacate default, denial of motion to vacate *held* not abuse of discretion (Code Civ.Proc. § 473, as amended by St.1933, p. 1851; Gen.Laws Supp.1933, Act 652, § 135c).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the W. J. Wallace & Co., a corporation, against the Growers Security Bank and G. A. Dike, as conservator of Growers Security Bank. From an order denying defendants' motion to vacate their default and a judgment against them, defendants appeal.

Affirmed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellants.

Melville G. Brittan, of Bakersfield, and David R. Faries and McIntyre Faries, both of Los Angeles, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

MARKS, Justice.

This is an appeal from an order denying defendants' motion to vacate their defaults and a judgment rendered against them. The motion was made under the provisions of section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851.

They thus briefly set forth in their opening brief many of the material facts of the case: "On March 15, 1933, the Superintendent of Banks, acting under the then recent addition, section 135c, to the Bank Act (Deering's General Laws Supp.1933, Act 652), appointed a conservator for Growers Security Bank. Such conservator thereupon took possession of the property and assets of such bank as provided in the statute. Subsequently appellant succeeded the original appointee and at the time the complaint in this action was filed appellant was in charge of the affairs of the bank as the conservator thereof.

"Plaintiff filed its complaint on June 29, 1934. On the same day service of the summons and complaint was made upon appellant and upon E. A. Roberts as cashier of the banking corporation. On July 11, 1934, the twelfth day after such service, the defaults of appellant and of the said bank were entered and thereafter the default judgment from which relief is sought was rendered.

"On September 12, 1934, appellant served and on September 14, 1934, filed the notice of motion for an order vacating the said defaults and judgment. With the notice were affidavits reciting the facts relied upon on the motion and a proposed answer. Counter-affidavits were served and filed the day the motion came on for hearing and before the matter was submitted and by leave of the court, a supplemental affidavit on behalf of the moving party was served and filed. On October 15, 1934, the lower court by its order denied appellant's motion and from such order this appeal is prosecuted."

We call attention to additional facts which we believe pertinent: Judgment was rendered on August 9, 1934. The motion was heard on numerous affidavits for both parties. E. A. Roberts was cashier of the defendant bank and set forth in his affidavit that the summons and complaint were served on the bank by delivery of the copies to him on June 29, 1934; that as Dike, as conservator, was in charge of the bank and its assets, he delivered the documents to him on that day and "took no further action in the matter." Dike averred that an attorney in Bakersfield was a director of the bank "and had taken care of its legal business"; that either on June 30 or July 2, 1934, he consulted this attorney about the case and was informed he was disqualified and could not represent the defendants; that on Tuesday, July 2, 1934 (evidently an incorrect date), he mailed the summons and complaint to the Los Angeles offices of his present attorneys; that he left his office in Delano on July 6th and did not return until July 11th, when he found an unopened letter from his attorneys requesting that he give them the date of service upon him; that he telephoned one of the attorneys for plaintiff in Bakersfield and was informed that the default of defendants had been entered on that day and he so advised his attorneys in Los Angeles. As a sole excuse for his neglect in the important matter of answering the complaint, he gave the following reason: That "prior to July 11th, 1934, I had had no experience with legal procedure and was uninformed concerning the time allowed a defendant in a civil action for an appearance following the service of summons and complaint."

The following appears in the affidavit of the Bakersfield attorney for plaintiff: "Affiant alleges that on July 11th, 1934, this affiant personally informed the said G. A. Dike that his default had been entered. That from the period elapsing from June 29th, 1934, to July 11th, 1934, this affiant nor none of the attorneys with whom this affiant is associated, had been asked nor had entered into any stipulation extending the time for answer. That on July 11th, 1934, affiant informed the said G. A. Dike that if it was his wish that said default be set aside, that undoubtedly Mr. McIntyre Faries, the chief counsel for the said plaintiff corporation would consent to such an arrangement. Following this date, namely, July 11th, 1934, and on August 9th, 1934, approximately a month thereafter, there had been no action taken by either of the defendants to set aside said default, and on said last named date this affiant, with the collaboration of plaintiff's other attorneys, secured a decree quieting title to the property set forth in said complaint. That nevertheless, after securing said judgment no action was taken by said defendants for the purpose of setting aside said default."

In the affidavit of another attorney for plaintiff the following appears: "That on

or about the 31st day of May, 1934, at and in the city of Delano, Kern county, California, affiant, together with Walter J. Wallace and C. O. LaRue, did discuss the subject matter of said action with the said G. A. Dike in his office at the Growers Security Bank, and did state to the said G. A. Dike that Walter J. Wallace was the owner of the property therein mentioned and requested the return thereof. That the said G. A. Dike then and there stated that he would not return the same. He stated further that said property was received prior to his becoming the conservator, and that while he knew of no ground of defense, he felt that for his own protection a decree should be obtained."

Neither of the foregoing statements in the affidavits were denied.

Defendants rely upon the case of Brill v. Fox, 211 Cal. 739, 297 P. 25, 26, where it is said: "The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles.

" 'It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' Bailey v. Taaffe, 29 Cal. 422, 424, quoted with approval in Waite v. Southern Pac. Co., 192 Cal. 467, 470, 221 P. 204, 206. It is also well settled that it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426; Waite v. Southern Pac. Co., supra. Although it is true that courts of appeal have shown great reluctance in cases of this kind to disturb the order of the trial court, it is equally true that denials of such relief by the trial court are scanned more carefully than cases where the trial court has granted the relief, to the end that wherever possible cases may be heard on their merits. See California Nat. Bank v. El Dorado L. & M. Co., 200 Cal. 452, 253 P. 704; Waite v. Southern Pac. Co., supra; Mitchell v. California, etc., S. S. Co., 156 Cal. 576, 105 P. 590; Roehl v. Texas Co., 107 Cal. App. 708, 291 P. 262; Toon v. Pickwick Stages, 66 Cal.App. 450, 226 P. 628."

When we apply these rules to the facts of the instant case, we cannot conclude that the trial court abused its discretion in refusing to set aside the judgment and vacate the default. See Wattson v. Dillon, (Cal.Sup.) 56 P.(2d) 220; Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863; Redding, etc., Co. v. National Surety Co., 18 Cal.App. 488, 123 P. 544; Gill v. Peppin, 41 Cal.App. 487, 182 P. 815; Essig v. Seaman, 89 Cal.App. 295, 264 P. 552.

No serious consideration need be given to Dike's excuse that he was not familiar with judicial procedure. He was a man of considerable business experience. He received two copies of the summons and complaint. The summons was in the usual form and notified him to appear and answer within ten days. If he were unfamiliar with judicial proceedings, he should have at least read the summons and informed himself on the time given him to appear. When he mailed the summons and complaint to his attorneys, he did not inform them of the time of service. He left his office before a reply could have been expected from his attorneys owing to an intervening holiday and did not return until after the time to answer had expired. Though he had others in his office, he gave no one authority to open his mail or to attend to this most important matter during his absence. When he received a tacit offer from an attorney for plaintiff to vacate the defaults, he did not communicate it to his attorneys so that they might act upon it. A study of the record leaves the conclusion that Dike was inexcusably careless with no reasonable excuse being shown for his negligence. His attorneys were in no manner to blame as they acted within a reasonable time after being informed of the carelessness of their client.

Order affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

KAKU v. GIFFEN et al.

Civ. 1737.

District Court of Appeal, Fourth District, California.

May 7, 1936.

Hearing Denied by Supreme Court July 6, 1936.

1. Estoppel ⇐75

Makers of note *held* not liable to payee after compromise of debt represented thereby with holder of note to whom it had been indorsed without recourse by whom suit on note had been commenced, as against contention that payee had assigned note for collection only, where maker had no knowledge that indorsement was not what it appeared to be.

2. Estoppel ⇐75

Payee indorsing note and delivering possession thereof to another so as to enable such person to hold himself out as owner of note *held* bound by acts of indorsee whether such acts were in excess of authority given or amounted to fraud as against payee.

3. Principal and agent ⇐137(1)

Payee assigning note for collection *held* estopped to attack settlement made between makers and indorsee, where payee with knowledge of settlement agreement permitted maker to pay three notes executed pursuant thereto, notwithstanding that note was assigned to indorsee for collection only and indorsee exceeded his authority as agent in making settlement.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by George Kaku against Wylie M. Giffen and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

J. A. Chase, of Visalia, for appellant.

H. A. Savage and V. D. Manville, both of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action on a promissory note for $5,141.18, executed by the defendants and delivered to the plaintiff. From a judgment in favor of the defendants, the plaintiff has appealed on a bill of exceptions.

After the note became due the appellant delivered the same to one Geo. C. Wells with an indorsement reading: "Pay to the order of Geo. C. Wells, without recourse. George Kaku." Wells exhibited the note and indorsement to Giffen, who had executed the note on behalf of both defendants, and demanded payment, stating that he had purchased the note and was then the owner thereof. Mr. Giffen explained to him that his affairs were all in the hands of a "creditors' committee" and that he had no funds with which to make payment without the consent of this committee. A month or so later Wells brought suit on the note, alleging that he "is now the true and lawful owner and holder thereof." This suit was dismissed without prejudice on November 18, 1932.

On April 10, 1933, Wells came to Giffen and offered to compromise the debt represented by the note. As the result of an agreement then entered into, which was approved by the creditors' committee, Mr. Giffen made a cash payment to Wells and gave him five notes coming due on various dates during the next ten months, and Wells agreed to return the original note, which he did not have with him when the agreement was made. Mr. Giffen paid three of the five notes as they came due and then offered to pay the other two on condition that the original note be surrendered. Thereafter this action was brought by the appellant, although there is no evidence that the note in question had been retransferred to him by Wells.

It is appellant's contention that he assigned the note to Wells for collection only, that he was the owner thereof at all times, that Wells had no authority to compromise the debt, that since he was in possession of the note when this suit was brought the burden was upon the respondents to show that he did not have title thereto, and that the settlement made is not binding upon him both because Wells had no authority to compromise the matter and because Wells did not exhibit the note at the time the settlement agreement was made.

[1, 2] It fully appears that Mr. Giffen had no knowledge of any agency arrangement between the appellant and Wells or of the fact that the appellant retained any interest in the note. He dealt with Wells as the owner of the note and, leaving out of consideration anything said to him by Wells, he was shown the note with its indorsement, and later Wells filed suit alleging ownership in himself; this suit having been filed by the same attorney who repre-

sented the appellant throughout the present action. The essential question here is not who was in fact the owner of the note or whether Wells exceeded the authority given him by the appellant. The real question is whether the respondents were justified in dealing with Wells as the owner of the note, and this must be answered in their favor. The appellant had clothed Wells with the apparent ownership of the note and power to dispose of the same; the apparent ownership was confirmed by the filing of a suit; the respondents had dealt with Wells in getting the suit dismissed; and they had no knowledge that the indorsement was not what it appeared to be.

Although Wells did not exhibit the note at the time the final agreement was made, the circumstances were such that the respondents had a right to rely on his apparent ownership of the note. The appellant had enabled Wells to hold himself out as the owner of the note, and he is bound by the acts of his agent whether these were in excess of the authority given or amounted to fraud as against him. In Conklin v. Benson, 159 Cal. 785, 116 P. 34, 38, 36 L.R.A.(N.S.) 537, the court said: "As originally said in McNeil v. Tenth Nat. Bank, 46 N.Y. 325, 7 Am.Rep. 341, and approvingly quoted in Woodsum v. Cole, 69 Cal. 142, 10 P. 331, and Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P. 405: 'Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance.' The same general doctrine was applied in Schultz v. McLean, 93 Cal. 329, 356, 28 P. 1053, where the fraud occasioning injury was practiced by the plaintiffs' own agent in the matter of the delivery of a deed, the vendee being one in good faith and for value. This court there said: '"Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss." This principle is recognized by section 3543 of the Civil Code, which reads: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." * * * In this case, plaintiffs and defendant were both innocent. Neither knew that the fraud was being practiced; but if that fraud was productive of injury, the injury must result to the plaintiffs, for they placed it in the power of the wrongdoer to perpetrate the fraud.'"

[3] It may be further noted that the court found that the appellant knew of the settlement agreement that had been made between Wells and the respondents, and that he had knowledge of all facts in connection therewith. This finding is not attacked and nothing to the contrary appears in the bill of exceptions. Notwithstanding such knowledge the appellant permitted the respondents to pay three of the notes to Wells, after having made the original payment to him. Aside from any other consideration the appellant is now estopped from attacking the settlement made even if it be assumed that Wells exceeded his authority as his agent.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



14 Cal.App.2d 89

VENTURI v. ZURICH GENERAL ACCIDENT & LIABILITY CO., LIMITED, OF ZURICH, SWITZERLAND.

Civ. 9924.

District Court of Appeal, First District, Division 2, California.

May 15, 1936.

Rehearing Denied June 13, 1936.

Hearing Denied by Supreme Court July 13, 1936.

1. Pleading ⇐428(4)

Motion that no evidence be received on ground that complaint failed to state cause of action is in nature of a general demurrer to complaint.

2. Insurance ⇐237

In action for breach of contract of automobile liability insurance, complaint alleging that judgments were obtained against insured for damages caused by insured automobile,

that insurer defended actions but refused to satisfy judgments or to appeal therefrom, and that judgment creditors levied execution on insured's business forcing insured into bankruptcy *held* to state cause of action (Civ.Code, § 3300).

3. Appeal and error ⇐173(10)

On appeal from judgment for insurer in action by insured for breach of contract of automobile liability policy, insurer could not contend that action was barred by lapse of time within provisions of policy purporting to regulate bringing of actions thereunder, where none of such provisions was pleaded in bar of action.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Louis Venturi against the Zurich General Accident & Liability Company, Limited, of Zurich, Switzerland. From a judgment for defendant, plaintiff appeals.

Reversed.

Long & Levit and Alfred E. Frazier, all of San Francisco, for appellant.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

[1] The plaintiff appeals from a judgment for defendant following an order sustaining a motion that no evidence be received upon the ground that the complaint failed to state a cause of action. Such a motion is in the nature of a general demurrer to the complaint and, for that reason, we disregard all the extraneous matter inserted in the briefs of both parties.

The action is one for damages for a breach of a contract of liability insurance. The plaintiff was the owner of an automobile upon which he placed the ordinary liability insurance under which the defendant contracted "To Indemnify the Assured against loss from the liability imposed by law upon the Assured for damages." The plaintiff was engaged in the business of a butcher from which he had an income of about $300 a month. Four judgments were obtained against him for damages resulting from a collision with the automobile covered by defendant's policy, all of which were within the life of and subject to the terms of the policy. The insurer had defended these actions in accordance with the terms of the policy, but, when judgments were entered against the insured, the company refused to pay them, to appeal, or to furnish supersedeas bonds, and the judgment creditors levied execution upon plaintiff's business forcing him into bankruptcy. For the loss of his property through forced sale and for the loss of his business and the injury to his credit, the plaintiff claims damages resulting directly from defendant's breach of its contract.

The cause of action rests on section 3300 of the Civil Code which declares that the measure of damages for the breach of an obligation arising from a contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby. Plaintiff's cause of action is not controlled by section 3302 of the Code, as that section applies to contracts to pay money only to parties to the contract. Here the insurer contracted not only to reimburse the plaintiff for money actually paid out by the latter, but to protect and hold him harmless against loss arising out of his legal liability as owner of the automobile. This includes so many factors aside from the direct payment of money that a breach cannot be compensated by the payment of the amount due with interest.

[2] The complaint plainly alleges the sequence of events resulting in plaintiff's bankruptcy and loss due to the breach of these several obligations, and comes under the rule of Miholevich v. Mid-West Mut. Auto Ins. Co., 261 Mich. 495, 246 N.W. 202, 86 A.L.R. 633. In that case the assured suffered a civil arrest and imprisonment because of a judgment in damages arising out of an automobile collision which the insurer had refused to satisfy. It was held that he was entitled to damages notwithstanding the subsequent payment of the judgment by the insurer, and that his cause of action was not limited to one for the payment of money and interest as in section 3302 of our Code. In accord with the principles followed in that case are 8 R.C.L. p. 451; 3 Williston on Contracts, pp. 2502, 2503; Roth v. General Cas. & Surety Co., 106 N.J.Law, 516, 146 A. 202; 8 Cal.Jur. 762, 763; Overstreet v. Merritt, 186 Cal. 494, 503, 200 P. 11; Hunt v. United Bank & Trust Co., 210 Cal. 108, 116, 291 P. 184.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[3] The respondent argues further that the action is barred by the lapse of time and cites provisions of the policy purporting to regulate the bringing of actions under it. None of these was pleaded in bar of the action, and, for that reason, none is available at this time. But the action was commenced within two years of the first judgment against this plaintiff, and, being an action based on the first agreement found in the policy, it was commenced within the time specified in the policy.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



PEOPLE, by DEPARTMENT OF PUBLIC WORKS OF CALIFORNIA, v. SOUTHERN PAC. R. CO. et al.*

Civ. 10597.

District Court of Appeal, Second District, Division 1, California.

May 15, 1936.

Rehearing Granted June 12, 1936.

1. Dismissal and nonsuit ⇐57

Statute providing for dismissal of action on motion of court or of any party interested, unless summons shall have been issued within one year, and summons, served and returned thereon, made within three years after commencement of action, *held* mandatory (Code Civ.Proc. §§ 581a, 583).

2. Dismissal and nonsuit ⇐50

Consent on which action may proceed after lapse of three years without summons having been served or return made thereon must be joint consent of parties (Code Civ. Proc. §§ 581a, 583).

3. Eminent domain ⇐197

Condemnation proceeding *held* required to be dismissed on motion of plaintiff, where action was filed in 1922 and defendants appearing and filing answers on August 13, 1934, and May 27, 1935, had not appeared in case prior to that time, where plaintiff objected that cause should be heard after answers were filed (Code Civ.Proc. §§ 581a, 583).

Appeal from Superior Court, Los Angeles County; Charles E. Haas and Charles L. Bogue, Judges.

Proceeding by the State of California, by the Department of Public Works of the State of California, against the Southern Pacific Railroad Company and others. From an adverse judgment, plaintiff appeals.

Remanded, with instructions.

U. S. Webb, Atty. Gen., John O. Palstine, Deputy Atty. Gen., and C. C. Carleton and C. R. Montgomery, both of Sacramento, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This is an appeal by the state of California, acting through its Department of Public Works, from a judgment rendered in favor of the heirs of Marquez, awarding damages for land or interests taken for highway purposes, at the point where Santa Monica Canyon comes down to the Pacific Ocean. Appellant also asks us, in considering this appeal, to review the action of the trial court in denying its motion to dismiss the case as to these heirs. This matter we shall discuss first.

The motion to dismiss was grounded upon section 583, Code of Civil Procedure (which to us seems inapplicable to the facts of this case), and upon section 581a, Code of Civil Procedure, which, so far as is pertinent, reads as follows: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must [shall]* be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have [been]* issued within one year, and all such actions must [shall]* be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided," etc. (Note: Quotation where

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 61 P.2d 1184.

marked with asterisk [*] refers to alternative language used in earlier statutes.)

This action was filed in 1922, joining as defendants various railroads and other corporations, together with R. C. Gillis, Maria Antonia Oliverez de Marquez, as executor of the estate of Bonafacio Marquez, deceased, John Doe, as executor of the estate of Pascual Marquez, deceased, and several fictitiously named individuals. So far as the record discloses, no return was made of any summons, nor was any summons ever issued. However, shortly after the suit was brought, an answer was filed in behalf of all the corporations, except Santa Monica Land & Water Company, and that corporation and R. C. Gillis joined in a stipulation entered into by the state and the answering defendants settling their interests. By this stipulation, the defendants, who answered, agreed that condemnation of the land desired for a highway might be made conditioned upon the state's meeting the cost of moving a railway, then located on the condemned strip, to land immediately adjoining; also, upon the establishment and recognition of certain excepted and reserved rights and easements for railroad purposes. It does not appear in the stipulation that any moneys were to be paid to any of these stipulating defendants for the condemnation, but we note in the brief of respondents the statement, unchallenged in appellant's reply brief, that a sum exceeding $13,000 was paid the Southern Pacific Company. The matters covered by the stipulation were embodied in an interlocutory judgment of condemnation entered in 1923, final judgment following in 1925.

Although, as has been noted, certain members of the Marquez family were named as defendants in this proceeding, neither those named nor any other members of that family were parties to the stipulation, nor do we find any mention of their rights or interests there or in the judgments, except by way of description of land formerly belonging to their ancestor. It may be remarked, too, that no motion to dismiss the action as to any defendant was made when condemnation took place, the first motion of that character being directed against these respondents after they voluntarily appeared and filed their answers on August 13, 1934, except respondent Slert, who filed his answer May 27, 1935. These answers alleged that, although summons was issued in the action, it was never served on any of the respondents or their ancestors, and set up ownership in the various respondents of undivided interests in a 100-foot strip of land, of which 60 feet had been condemned and dedicated to use as a public highway by the decree and judgment of 1925. This 100-foot strip, we learn from an examination of the transcript, had been conveyed by deed dated October 27, 1892, to the Pacific Improvement Company (whose interests were later acquired by the early answering defendants) by Maria Antonia Oliverez de Marquez, administratrix of the estate of Bonafacio Marquez, deceased. It contains the following provision: "This deed is made upon the express condition that the land hereby conveyed shall be used by the party of the second part, its successors or assigns, for railroad purposes, and in the event that said party of the second part, its successors or assigns, shall fail so to use said land for railroad purposes then and thereupon said land shall revert to and become vested in the heirs of said Bonafacio Marquez, deceased." A railroad was constructed on the land so conveyed at or about the time the deed issued, and trains or cars were operated continuously thereon from December 31, 1892, until November 22, 1933, when its use as a railway was discontinued under authority of the railroad commission. During the period following condemnation of the 60-foot strip for highway purposes, the railroad was operated on the remaining 40 feet of the land originally conveyed by the deed of Marquez's administratrix. The respondents claimed to be entitled to compensation in this case as part owners of the reversionary right created by that deed, a claim which was recognized by the judgment entered in their favor, from which this appeal has been taken.

[1-3] We return now to our inquiry as to whether error arose in the denial of the motion to dismiss under section 581a, Code of Civil Procedure. If so, the judgment thereafter entered must be vacated as being void for lack of jurisdiction, and the case dismissed.

The groundwork of section 581a was subdivision 7 of section 581, added to the Code of Civil Procedure in 1889. (St.1889, p. 398.) In 1897, subdivision 7 was amplified in its terms (see St.1897, p. 98) to read, so far as here pertinent, like the present section 581a, Code of Civil Procedure, except that, following the language of 1889, the word "shall" appeared in the 1897 sec-

tion, where now "must" is written, indicated by our parenthetical entries in section 581a, above quoted. However, this change from "shall" to "must" appeared earlier than 1907, when the present section 581a was adopted. St.1907, p. 712. It was first made when section 582 was added to the Code of Civil Procedure by the Legislature in 1901 (St.1901, p. 144), that section 582 becoming section 581a six years later. Although prior to 1901 the important word in this section was "shall" and not "must," the provisions even then were considered mandatory, for in 1896 we find Mr. Justice Temple saying in Vrooman v. Li Po Tai, 113 Cal. 302, at page 305, 45 P. 470, 471: "This provision is very sweeping, and is expressly made applicable to pending suits. It is mandatory; otherwise it would have no force at all. The courts were already authorized and required to dismiss suits upon motion when there had been culpable failure to prosecute. To hold this statute directory would, therefore, be to repeal it. Then the language could hardly indicate more plainly the intent that it shall be mandatory. Besides being absolute in form, it contains a prohibitory clause—'and no further proceedings shall be had therein.' Such a negative cannot be, and never has been, considered as directory merely."

It is true that in a decision rendered three years later, Cooper v. Gordon (1899) 125 Cal. 296, 57 P. 1006, where, within the three-year period, a stipulation for judgment had been entered into, this same judge expressed the opinion that, notwithstanding the limitations imposed by the statute, it would be proper to proceed in a cause where voluntary appearance was made subsequent to a three-year period dating from the institution of the action, but it will be noted that to make such a course possible, the consent of all parties would be required, in the opinion of the learned justice. He says, 125 Cal. 296, at page 300, 57 P. 1006, 1007: "Could the court then properly dismiss the action, *against the protest of all parties?*" And again, 125 Cal. 296, at page 301, 57 P. 1006, 1007: "But, if the *parties* consent, it is a case pending of which the court has jurisdiction, and there is no excuse for not trying it." (Italics ours.) So, also, we note in Harrington v. Superior Court, 194 Cal. 185, at page 188, 228 P. 15, 16, the court relies upon the following rule: "'where the jurisdiction of the court as to the *subject-matter* has been limited by the constitution or the statute, the consent of parties cannot confer jurisdiction. But, when the limit regards *certain persons, they* may, if competent, waive their privilege, and this will give the court jurisdiction.' Gray v. Hawes, 8 Cal. [562] 568. See Bates v. Gage, 40 Cal. 183." But, in the instant case, the parties did not consent that the cause should be heard; on the contrary, plaintiff objected and still objects. The consent upon which action may proceed, after the lapse of three years, necessarily must be joint consent of the parties, as stated in Cooper v. Gordon, supra, because of the language of the section, dictating, as it does a dismissal "on motion of any party interested therein." We cannot escape the force and effect of this definite language, even though we realize that the court has said that its purpose is "to relieve defendants from the assertion of stale demands" (Cooper v. Gordon, supra), and "to insure proper diligence in the prosecution of asserted claims" (Pacific Paving Co. v. Vizelich, 141 Cal. 4, at page 9, 74 P. 352, 354). While those may have been the main purposes, it does not seem improbable, since the plaintiff, as well as the defendant, is given power to move for dismissal, that other purposes also have actuated the various Legislatures which have kept this section in our code in practically unchanged form for almost fifty years.

Respondents here, prior to their appearance by answers filed in this case, and shortly after the discontinuance of railroad operation in 1933, filed a suit to quiet title against the successors in interest of the Pacific Improvement Company, and against the state of California, "which action," they say in their brief, "is still pending, although it is understood that, as to the state, the rights of the heirs of Bonafacio Marquez shall be adjudicated in this action where really they should be adjudicated." The only understanding, that could make such a course possible, calls, in our opinion, for joint consent of the parties. Such consent was never given within the three-year period, nor since, so far as we know, and, if given, has been so definitely withdrawn by proceedings noted, that it is apparent now that any rights of these heirs against the State must be adjudicated in the other pending case.

In this case, on the facts before us, we see no course open except to order the cause remanded to the lower court, with

instructions to vacate the judgment heretofore entered, to quash any execution that may have issued thereon, and to dismiss the case.

Accordingly, it is so ordered.

We concur: YORK, Acting P. J.; DORAN, J.



14 Cal.App.2d 145

RAMSEY et al. v. FURLOTT et al.

Civ. 1780.

District Court of Appeal, Fourth District, California.

May 18, 1936.

1. Pleading ⇐403(3)

Defect, if any, in allegation of complaint in action to foreclose chattel mortgage that debt was secured both by chattel mortgage and realty and that realty had been sold and proceeds thereof applied to indebtedness, *held* cured by answer alleging that real property had been sold under trust deed through order of plaintiffs (Code Civ.Proc. § 726).

2. Appeal and error ⇐907(2)

Where evidence is not before reviewing court, all presumptions are in favor of findings and judgment.

3. Mortgages ⇐375

Sale of mortgaged realty under power given by deed of trust does not bar subsequent action to recover remainder of indebtedness (Code Civ.Proc. § 726).

4. Chattel mortgages ⇐32

Execution of second note in belief that separate note should accompany chattel mortgage executed to secure original indebtedness *held* to constitute renewal of indebtedness and implied extension of time, so that no further or new consideration was required for new note, although giving thereof may have suspended remedy on old note.

5. Chattel mortgages ⇐47

Judgment foreclosing chattel mortgage *held* not void for failure to sufficiently describe personal property, where articles enumerated were all described as located on certain described realty owned by defendant at time mortgage was given, although some of articles were merely named in general.

6. Chattel mortgages ⇐290

Allowance of attorney's fees to chattel mortgagee on foreclosure of chattel mortgage *held* not error although note secured by mortgage contained no such provision, where complaint set out copy of chattel mortgage providing for attorney's fees.

7. Chattel mortgages ⇐281

Appointment of "receiver and commissioner" to recover and gather property together and make sale thereof in judgment foreclosing chattel mortgage *held* not reversible error, the word "receiver" adding nothing to legal effect of order which, in fact, appointed commissioner, as against contention that court went outside issues of case in appointing receiver.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Fred A. Ramsey and another against Harry P. Furlott, sometimes known as Patrick H. Furlott, and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

F. E. Davis, of Hollywood, for appellants.

Siemon, Claflin & Maas, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action to foreclose a chattel mortgage. The answer set up as a defense that there was no consideration for the debt and that the plaintiffs had waived the lien of the mortgage by selling certain real estate under a deed of trust. The answer alleged that the defendant was indebted to the plaintiffs in the sum of $3,500, evidenced by a note secured by a deed of trust on real estate; that subsequently another note and this chattel mortgage were given as security for this same indebtedness; that there was but one debt and this note and chattel mortgage were given only as additional security for the original obligation; that the plaintiffs had held a "pretended sale" and had sold the real estate under the deed of trust; that the proceeds from such pretended sale of property was sufficient to extinguish the entire indebtedness; and that the obligation represented by the chat-

tel mortgage was therefore fully paid. The court found on all issues in favor of the plaintiffs and judgment was entered, from which this appeal is taken on the judgment roll alone.

[1-3] The main point relied upon for reversal is that the respondents must be taken to have lost their right to foreclose this chattel mortgage because they had previously foreclosed a mortgage on the real property, securing the same indebtedness, and there can be but one action for the recovery of any debt secured by a mortgage upon real or personal property. Code Civ. Proc., § 726. It is not contended that, in fact, there had been another foreclosure action in connection with the real property which was also given as security for this debt. It is argued that a violation of section 726 appears upon the face of the complaint since it was there alleged that the debt was secured both by the chattel mortgage and by the real estate and that the real estate had been sold and the proceeds thereof applied upon the indebtedness. It is therefore argued that it must be presumed that the sale of the real property referred to was had as a result of a decree of foreclosure in a former court proceeding, and that the complaint is therefore insufficient. Without conceding that the complaint is subject to such a construction it is sufficient to say that any possible deficiency therein was cured by the allegations of the answer, from which it appears that the real property had been sold under the trust deed through the order of the plaintiffs, and the court found to the same effect. The evidence is not before us and all presumptions are in favor of the findings and judgment. It is well settled that such a sale, under the powers given by a deed of trust, will not bar a subsequent action to recover the remainder of the indebtedness.

[4] There is no merit in the contention that there was no consideration for the last note and the chattel mortgage. It was alleged in the answer that these were given as additional security for the original obligation. The court found that the second note was executed for the sake of convenience and in the belief that a separate note should accompany the chattel mortgage. This amounted to a renewal of the indebtedness and an implied extension of time. First National Bank v. Golden, 19 Cal.App. 501, 126 P. 498. While the giving of such a new note may have suspended the remedy upon the old note (Tolman v. Smith, 85 Cal. 280, 24 P. 743), no further or new consideration was required for the new note (Smitton v. McCullough, 182 Cal. 530, 189 P. 686).

An ingenious argument is presented to the effect that certain of the findings are contradictory. No real contradiction appears and the findings, as a whole, are entirely sufficient to support the judgment. American National Bank v. Donnellan, 170 Cal. 9, 148 P. 188, Ann.Cas.1917C, 744.

[5] It is next urged that the judgment is void because the personal property is not sufficiently described in the chattel mortgage and in the judgment to enable it to be found and taken. Numerous articles are enumerated which might be found upon any farm. While some of these are very definitely described others are merely named in general. However, they are all described as located upon certain described real property which was owned by the appellant at the time the mortgage was given. This description was sufficient even under the rules laid down in the cases cited by the appellant.

[6] A further contention is made that the court erred in allowing attorney's fees since the note set forth in the complaint contained no such provision. The complaint also set forth a copy of the chattel mortgage which provided for attorney's fees. This was sufficient to support that part of the judgment. Hellier v. Russell, 136 Cal. 143, 68 P. 581.

[7] Some contention is made that the court went outside the issues of the case in appointing a receiver. The court found that the plaintiffs were entitled to have a "receiver and commissioner" appointed for the purpose of recovering and gathering the property together, and making a sale thereof. In the judgment a certain person was appointed receiver and commissioner for that purpose. The use of the word "receiver" added nothing to the legal effect of the order which, in fact, was one appointing a commissioner. No such irregularity appears as would justify a reversal.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

14 Cal.App.2d 32

CIKUTH et ux. v. LOERO et al.

Civ. 10057.

District Court of Appeal, First District, Division 2, California.

May 13, 1936.

Rehearing Denied June 12, 1936.

Hearing Denied by Supreme Court July 10, 1936.

1. Infants ⇐87

Failure to appoint guardian ad litem for minor defendant is mere irregularity not affecting jurisdiction of court.

2. Judgment ⇐336, 386(1)

Motion to vacate judgment not void on its face must be made within six months after its entry and must be based on statutory grounds to authorize vacation of judgment (Code Civ.Proc. § 473).

3. Judgment ⇐386(1)

Unless power to modify or vacate is reserved, such power is lost when judgment becomes final (Code Civ.Proc. § 473).

4. Infants ⇐110

Court *held* without jurisdiction to vacate judgment not void on its face, entered against minor defendant for whom no guardian ad litem had been appointed, where motion to vacate was not made until a year after judgment became final and was not based on statutory grounds (Code Civ.Proc. § 473).

Appeal from Superior Court, Santa Cruz; James L. Atteridge, Judge.

Action by Edward B. Cikuth and wife against John Loero and others. From an order vacating a judgment for plaintiffs, plaintiffs appeal.

Reversed.

John A. Foley and Thomas C. Ryan, both of San Francisco, for appellants.

James W. Hughes, of Los Angeles, and Wyckoff, Gardner & Parker, of Watsonville, for respondents.

NOURSE, Presiding Justice.

The plaintiff appeals from an order vacating a judgment. A trial was had commencing March 7, 1934, and resulting in a judgment for plaintiff entered March 22, 1934. On April 26, 1934, after having filed a notice of intention to move for a new trial, the defendant Alfred Medeiros filed a disaffirmance of the judgment on the grounds of his minority during the course of the trial and because no guardian ad litem or general guardian had been appointed to represent him. After this judgment had become final, and on May 18, 1935, this defendant through a guardian ad litem, who had been appointed for the purpose, moved to vacate and set aside the judgment on the same grounds. In its order vacating the judgment the trial court found that the defendant Medeiros had been properly represented by counsel throughout the course of the trial and that his substantial rights were protected at all stages of the proceedings. The undisputed evidence is that this action, which was one for damages for an injury resulting from an automobile collision, was in truth and fact tried and defended by the insurance carrier of defendant Medeiros, and after an adverse judgment was entered, the insurance carrier persuaded him to raise the point of minority and to follow with a motion to vacate the judgment.

The burden of appellant's attack upon the order rests upon the principle that where the substantial rights of a minor have been fully and adequately protected during the course of a trial, he should not be permitted to disaffirm a judgment regularly entered against him. Respectable authorities are cited in support of this principle and others could be cited in opposition to it. A decision on the point is not necessary because the judgment herein is controlled by considerations which go beyond that of the discretion of the trial judge.

[1] The order must be reversed because the court was without jurisdiction to make it. It is the accepted rule that the failure to appoint a guardian for a minor ad litem is a mere irregularity or judicial error which does not affect the jurisdiction of the court. Johnston v. Southern Pacific Co., 150 Cal. 535, 539, 89 P. 348, 11 Ann.Cas. 841; King v. Wilson, 116 Cal.App. 191, 193, 2 P.(2d) 833.

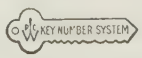
[2, 3] A motion to vacate a judgment not void on its face must be made within six months of its entry and must be based on grounds authorized by the code. Lankton v. Superior Court (Cal.Sup.) 55 P.(2d) 1170. In that case the Supreme Court held the trial court was without jurisdiction to modify a judgment for "judicial error" after the time for appeal had passed and, by the same reasoning, it would deny ju-

risdiction to vacate a judgment except under the same conditions. This follows from the well-settled rule that, unless the power to modify or vacate is reserved, that power is lost when the judgment becomes final. 15 R.C.L. p. 691; Grannis v. Superior Court, 146 Cal. 245, 79 P. 891, 106 Am.St.Rep. 23; Baird v. Smith, 216 Cal. 408, 410, 14 P.(2d)749; 14 Cal.Jur. 1022.

[4] Here the motion to vacate was made about a year after the judgment became final. It was not based on any grounds mentioned in section 473, Code of Civil Procedure, and the judgment was not void upon its face. As soon as that judgment became final all the proceedings therein or the "litem" became dead and there was no jurisdiction in the trial court at that time to appoint a guardian ad litem to appear for the minor in that proceeding. The order appointing the guardian ad litem could confer upon him no greater power or privileges than those which could have been exercised by the real party to the action. Hence, if the defendant had any remedy, it was by an independent action in equity.

The order is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



14 Cal.App.2d 64

COLUMBIA CASUALTY CO. v. LEWIS et al.

Civ. 10565.

District Court of Appeal, Second District, Division 1, California.

May 14, 1936.

Rehearing Denied June 5, 1936.

Hearing Denied by Supreme Court July 13, 1936.

1. Novation ⇐12

Evidence *held* insufficient to show that parties to written contract effected novation where it was not shown that all parties to contract reached any agreement, that there was mutual agreement to extinguish old contract, or that new contract was made (Civ. Code, § 1530; § 1531, subd. 1).

2. Contracts ⇐247

Courts will not set aside binding written contracts and substitute therefor oral agreements, unless proof of oral agreements is clear and convincing (Civ.Code, §§ 1530, 1698; § 1531, subd. 1).

3. Contracts ⇐238(2)
Novation ⇐1

Alleged oral agreement between parties to written contract, whether modification of written contract or novation, *held* unenforceable by party who had proceeded to fulfill requirements of written contract (Civ. Code, §§ 1530, 1698; § 1531, subd. 1).

4. Evidence ⇐397(1)

In suit involving written contract where evidence was insufficient to establish alleged novation, parol evidence tending to vary terms of written contract *held* properly rejected (Civ.Code, §§ 1639, 1698; Code Civ. Proc. § 1856).

5. Evidence ⇐413

In suit for breach of written contract for construction of concrete work on levee, testimony that contractor was not provided with sufficient levee on which to operate *held* properly rejected as tending to vary terms of written contract, notwithstanding that levee was being constructed by another contractor under independent contract, where same plans and specifications controlled both contracts, both executed in carrying out single flood control project (Civ. Code, §§ 1639, 1698; Code Civ.Proc. § 1856).

6. Contracts ⇐322(2)

In suit for breach of written contract for construction of concrete work, parol testimony *held* unnecessary on issue as to alleged violation of contract in not making available certain equipment where such matter was explained in letter to contractor admitted at trial (Civ.Code, §§ 1639, 1698; Code Civ.Proc. § 1856).

7. Evidence ⇐397(1)

In suit for breach of written contract, testimony tending to vary its terms *held* properly rejected where no mistake or imperfection of written contract was put in issue by pleadings, validity of contract was not in dispute, and no fraud or illegality was asserted (Civ.Code, §§ 1639, 1698; Code Civ.Proc. § 1856).

8. Trial ⇐139(1)

Direction of verdict for plaintiff *held* proper, where a verdict for defendant would of necessity have been set aside by review-

ing court because of insufficiency of evidence to support it.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by the Columbia Casualty Company against Raymond Lewis and another, wherein named defendant filed counterclaims. Judgment for plaintiff, and named defendant appeals.

Affirmed.

George A. Work, of San Francisco, for appellant.

Redman, Alexander & Bacon, of San Francisco, and George H. Moore, of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an appeal by the defendant Raymond Lewis from a judgment rendered against him upon a promissory note, after the trial court had directed the jury to disregard his defenses and counterclaims, and had further directed the jury to find a verdict for the plaintiff upon all issues except the amount of the attorney's fee to be allowed the plaintiff. Upon rendition of the verdict as directed by the trial court, judgment was entered accordingly in favor of plaintiff.

The plaintiff brought this action against the defendant Raymond Lewis upon a promissory note dated June 1, 1932, in the amount of $16,187.39, payable on demand, with interest, the payment of which was secured by an assignment executed by the defendant Lewis to the plaintiff at the time the note was given, assigning $16,187.39 of moneys which might thereafter accrue to defendant Lewis out of dividends or profits from Macco-Lewis, Inc., one of the defendants herein, in which corporation the defendant Lewis owned one-third of the stock. Macco-Lewis, Inc., is a nominal defendant herein, and has no interest in this controversy, nor does any one involved in the litigation claim any right against this company in so far as this appeal is concerned. The plaintiff had moneys in its hands belonging to Macco-Lewis, Inc. On November 13, 1934, the sum of $20,000 of such moneys became the property of defendant Lewis by way of a dividend, and this $20,000 is now in the hands of plaintiff, and constitutes the $20,000 referred to in the judgment as security for the payment of the promissory note, and which amount plaintiff claims the right to hold under the assignment.

The execution of the note and the assignment were admitted by defendant Lewis, and at the trial it was stipulated by counsel for both sides "that said note had not been paid otherwise than in so far as payment thereof might be deemed to have taken place by reason of the matters set forth in the answer and counterclaim of the defendant Raymond Lewis, and that unless the proof of the matters therein contained should show payment or setoff, the said note had not been paid."

Prior to a recital of defendant's claims in his answer and counterclaim we deem it advisable to epitomize the facts in so far as they appear material and relevant to a consideration of the points raised on this appeal. On or about October 19, 1931, the C. Anili Company entered into a written agreement with the Los Angeles County Flood Control District for the performance of certain work described in said agreement; the said C. Anili Company as principal, and the respondent herein, Columbia Casualty Company, as surety, executed to said district as obligee thereunder the statutory labor and material bond and statutory faithful performance bond, as required by law. Under the terms of said faithful performance bond the respondent herein, as surety, was obliged to perform all the terms and conditions agreed to be performed by the said C. Anili Company under said agreement, in the event the said C. Anili Company should not perform the same. Said C. Anili Company entered upon the performance of said agreement with the flood control district on or about November 12, 1931, and continued with the performance thereof until on or about December 12 of the same year, on which last-named date said C. Anili Company defaulted in the performance thereof, and the Los Angeles County Flood Control District thereupon tendered the completion of the contract to the respondent casualty company, upon the latter's statutory faithful performance bond. The respondent thereupon accepted said tender of completion and undertook to complete and did complete the work in question.

On December 30, 1931, respondent herein entered into an agreement with appellant, the recitals of which set forth the award of the contract hereinbefore referred to; the default of C. Anili Company thereunder; the tender of the completion of the contract to respondent, and the latter's desire to sub-

let the completion of said contract to appellant herein. The appellant, as subcontractor, agreed to accept as full compensation certain stipulated unit prices for the balance of the uncompleted work, which payments were to be made by respondent to appellant when and as received from the flood control district. The agreement further provided that respondent was to turn over to appellant for his free use on the contract the equipment owned by the C. Anili Company, and which equipment was described in the contract. The appellant herein, as such subcontractor, agreed to undertake the work and perform the same in accordance with the plans and specifications under which the original contract was let.

Appellant in his answer set up the defense, in substance, that the note was without consideration, for the reason that he had completed the Anili work as agent for the respondent casualty company. Appellant further claimed that the amount represented by the note was for bills contracted on the work while he was completing it as agent for respondent, and that said money was paid by respondent casualty company direct to claimants in payment of its own bills, for which appellant was not responsible; he being simply the agent of respondent. Appellant further claimed that respondent had agreed with him at the time the note was given that the same would be held by respondent until a final accounting should take place between the parties with respect to the completion of the Anili Company work, and that there had never been any accounting between them. Appellant further contended in his answer that it would appear upon an accounting that respondent was not entitled to recover or receive any sum whatsoever by reason of the execution of the promissory note, but that on the contrary such accounting would develop that respondent was indebted to appellant herein in an amount exceeding $10,000.

Appellant contends that the agreement of December 30, 1931, was abandoned; that a novation was effected between himself and respondent, under the terms of which he completed the contract as the agent of respondent casualty company, pursuant to the terms of this novation. He also pleaded a second defense inconsistent with the first, in which he claims that should it be decided that the agreement of December 30, 1931, between himself and respondent had not been abandoned, and that a new contract had not been entered into by novation, then in that event that respondent had breached and violated the agreement of December 30, 1931, between it and appellant.

In support of his claim that the agreement of December 30, 1931, was abandoned, and that a novation was effected, appellant testified that after the signing of the contract he commenced work thereunder, but encountered difficulties not of his own making, some of which he asserted grew out of misrepresentations of respondent casualty company unintentionally made; and that shortly before the middle of January, 1932, in a conversation with Griffith R. Williams, the general attorney for the respondent casualty company, Lewis claims that the contract of December 30, 1931, was abandoned, and a new agreement entered into, under the terms of which he was to proceed to complete the work as agent of respondent casualty company. After reciting the difficulties he encountered, appellant states that he repeated this situation to Mr. Williams, saying to the latter that as far as appellant was concerned he was "finished with the contract that was entered into on December 30, 1931, * * * that the job was 'sour'; that every major thing that had been promised (appellant) on the job turned out to be otherwise, and that the job was running into a rotten situation"; and that appellant would not continue with the contract. Appellant in his testimony claimed that Mr. Williams tried to talk him into continuing with the contract, and finally said: "Go ahead—things will get better. Well, go ahead and finish the job. It is our baby. Now the job is sour—it is a lemon. We have got to finish it. You go ahead and finish it and we will see that the job is taken care of; the expenses are taken care of—and see you don't lose any money, and get a fair profit on the job."

The only other evidence with reference to the alleged abandonment of the contract of December 30, 1931, was offered by the witness Griffith R. Williams, general attorney for respondent casualty company, whose testimony might be summarized in the following language used by him on the stand: "I still refer to my statement to him in January when he was about to throw up his hands, that I would take care of him, the company would take care of him. I entered into no conditions with reference to the new contract, as to profits or anything like that. I just wanted him to continue with that contract and not throw up his hands, but to continue with it, and we would see that he would come out in the clear on it. That was my intention at the time because the man

was suffering a lot and had suffered a lot at that time, and when you are referring to the taking of this note and assignment, I didn't know how the thing could be adjusted; I had no idea how we were going to deal with Mr. Lewis until every transaction was in and the thing could be equitably looked upon. Well, that is the substance, * * * that he would be taken care of, that he wouldn't sustain a loss in continuing the contract for us on moneys, when he was starting with a loss staring him in the face, when he wanted to throw it up. * * * I had made no recommendation to my superiors in my office. I didn't know how they would look upon it. I hadn't done any of those things, * * * I had no new contract with him in the sense of terms written out, and I was working on the theory of the terms of the old contract, with the promise I had made to him at the time he was about to throw it up. * * * I wanted Mr. Lewis to continue with the work and at the very end after the thing was completed and all the moneys were in hand, we were to sit down and adjust the whole thing amicably between us, according to my original promise to him two or three weeks after he entered into this contract with us, where I promised him that we would see that he wouldn't be hurt in continuing with the job."

Appellant also testified that he had received some $33,787.87 in payments made direct to him, and that the Columbia Casualty Company had issued checks direct to employees in a sum exceeding $5,000, while creditors and materialmen were paid in excess of $21,000 directly by respondent casualty company.

[1-3] Section 1530 of the Civil Code defines a "novation" as "the substitution of a new obligation for an existing one"; while the succeeding section, in subdivision 1 thereof, declares that a novation may be made "by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." In our opinion, the evidence does not support appellant's claim that a novation took place, because three essential elements of novation are missing: First, the agreement of all parties to the contract was not present, as it is readily seen that conceding the authority of Mr. Williams, the general attorney for respondent, to bind the latter, he at no time consented to the proposal of appellant, if such proposal was offered, to substitute a new agreement for the one of December 30, 1931, but on the contrary, respondent's general attorney contended throughout his testimony that he had no new contract with appellant and was at all times working on the theory of the terms of the old contract, with the promise that if appellant would go ahead and complete the work, that "when the moneys were all in the parties would sit down and amicably adjust their differences." Secondly, the evidence fails to disclose any mutual agreement between the parties to extinguish the old contract; and, thirdly, there is an utter absence of proof to sustain appellant's contention that a new and valid contract was made by the parties. Before courts will set aside solemn binding written contracts and substitute therefor oral agreements, proof of the latter as to every element thereof, as well as execution, must be clear and convincing. Houghton v. Lawton, 63 Cal.App. 218, 223, 218 P. 475. And whether we consider the alleged oral agreement between the parties here as a mere modification of the written contract, or a novation, it lacks the requirements of the statute to make it enforceable, because, obviously, the executed oral agreement which may be proved for the purpose of altering a previous written contract, must consist in the doing or suffering of something not required to be done or suffered by the terms of the writing; and in the instant case it appears that appellant proceeded to fulfill the requirements of the written contract, completed the work provided for therein, and accepted payments thereunder. Harbor Const. Co. v. Walters, 101 Cal.App. 470, 478, 281 P. 1062.

[4] From the foregoing it is evident that the trial court was correct in sustaining objections to proffered questions tending to vary the terms of the written contract by parol. "A written instrument would afford but slight protection to the parties in such cases, if it could be varied in this manner. A bailment could be converted into a sale, or a sale into a bailment, according as the interests of either party, after delivery of the goods, might lead him to the belief, real or feigned, that the delivery had not been pursuant to the original writing, but under a subsequent oral arrangement." Mackenzie v. Hodgkin, 126 Cal. 591, 598, 599, 59 P. 36, 38, 77 Am.St.Rep. 209.

Much of what we have said concerning the alleged abrogation of the contract of December 30, 1931, applies to appellant's second cause of counterclaim, wherein it

is contended that should the jury find adversely to appellant's claimed novation, then appellant was entitled to damages by reason of respondent casualty company's breach of the agreement of December 30, 1931, and by reason of alleged misrepresentations in connection therewith.

[5] It appears from the evidence that another contractor named Rowland agreed with the flood control district to construct a levee, upon which appellant herein was to do concrete and gunite work. At the trial appellant offered to prove that the respondent casualty company did not provide him with, and did not see that he was provided with, sufficient levee so as to enable appellant, in conformity with his contract of December 30, 1931, with respondent, to operate two cement guns two eight-hour shifts per day. The trial court sustained objections to this line of testimony on the ground that the same was incompetent and tended to vary the terms of a written contract. In this we think the court was correct, because, while the so-called Rowland contract for construction of the levee was an independent agreement with the flood control district, still the plans and specifications which controlled the Rowland contract were part and parcel of the plans and specifications governing the Anili contract, the completion of which latter contract was taken over by appellant under the agreement of December 30, 1931, with respondent casualty company. In fact, the last-mentioned contract with the Anili Company specifically adopted as a part thereof the plans and specifications in question. Therefore all of the duties and obligations of the Rowland contract were specifically made a part of appellant's contract and he had knowledge of them. Not being ambiguous or uncertain in their terms, there was no basis for the introduction of oral testimony in explanation thereof.

[6] The matters complained of in appellant's first defense and counterclaim, which includes the allegations that the respondent casualty company violated paragraph 3 of the agreement of December 30, 1931, in that it did not make available to appellant certain cement guniting machines and other equipment, did not require any parol testimony, because the same was taken care of in the letter of January 8, 1932, marked "Plaintiff's Exhibit 25" at the trial, in which respondent casualty company wrote appellant that the letter in question was written to supplement and clarify certain details of the written contract, and which letter provided that appellant was to be relieved of responsibility for defective work done by his predecessor, C. Anili Company; and with reference to the equipment agreed to be furnished in the written contract, the aforesaid letter advised appellant of certain difficulties that had arisen in connection with such equipment by reason of the fact that it had been rented by the C. Anili Company from equipment houses, and authorized appellant to make use of any of this equipment by taking up the Anili contracts with the equipment houses, and agreed that the respondent casualty company would assume the rental under such contracts for the period "from the beginning of the job to January 6, and you are to assume the remainder of it; the amount of your rental would be from January 5th on at a pro rated price. Any rented equipment that you do not care to use you are to return to the parties from whom rented and render bill to the Columbia Casualty Company for the expense of such return." In the face of this record, we are of the opinion that no parol testimony was required to explain or perfect any ambiguities or imperfections in the written contract and the supplemental letter.

With reference to the claim of appellant that the respondent casualty company violated the terms of its contract in not compelling the contractor Rowland to provide for appellant levee sufficient to enable appellant to operate two cement guns for two eight-hour shifts per day, for the purpose of placing gunite facing upon said levee, as required by paragraph 6 of the agreement of December 30, 1931, it might be observed that the contractor Rowland had a separate and independent contract with the flood control district, which contract was based upon the same plans and specifications that governed the work undertaken by appellant as subcontractor. Respondent casualty company had no control over the contractor Rowland. It could not direct him what to do, nor how much levee to construct; and in our opinion, therefore, respondent casualty company should not be held responsible for a failure to compel the contractor Rowland to do something over which the respondent casualty company had no control. The flood control engineer, representing the flood control district, alone had the right to order both Rowland and appellant how to proceed and how rapidly to prosecute their work. In our opinion, therefore, the contracts, and the exhibits at-

tached thereto and made a part thereof, speak for themselves, and the trial court was right in holding that the relative rights, duties and responsibilities of the parties thereunder, including appellant, were to be determined from the language of the written instruments themselves.

Section 1639 of the Civil Code provides: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." While section 1856 of the Code of Civil Procedure provides:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

As was said in Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 595, 596, 96 P. 319, 323: "To hold parties to diligence and care in reducing their negotiations to writing, and to hold the writing to be subject to attack only by specific allegations of fraud or mistake, appears to be the better rule, and is now supported by the weight of authority. Like the statute of frauds, this rule is founded upon long and convincing experience that written evidence is more certain and accurate than 'slippery memory.' So long as the rule is applied, the actual contract made can be preserved without fear of its being affected in its terms by the frailties of an interested human recollection. That sometimes the written contract does not include all the terms intended by reason of neglect or oversight, and injustice is thereby done in particular cases, does not justify the abandonment of the rule. To construe it away is to destroy one of the greatest barriers against fraud and perjury."

See, also, Standard Box Co. v. Mutual Biscuit Co., 10 Cal.App. 746, 754, 755, 103 P. 938; Nimmo v. Fitzgerald, 202 Cal. 565, 568, 261 P. 1015; Calpetro P. Syndicate v. Chas. M. Woods Co., 206 Cal. 246, 251, 252, 274 P. 65.

[7] In the instant case no mistake or imperfection of the written agreement was put in issue by the pleadings, nor was the validity of the agreement the fact in dispute, nor was illegality or fraud asserted. The objections to appellant's proffered testimony in connection with his second cause of counter claim were properly sustained.

What we have said with reference to the contract and appellant's second cause of counterclaim applies with equal force to the attempt to vary the terms and conditions of the written note and assignment given therewith by oral testimony. That clear and convincing evidence of an executed oral agreement varying the terms of a written one should be required, is the policy of the law, is evidenced by section 1698 of the Civil Code, laying down the valuable and salutary rule that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. It has been held, for instance, that parties who have made a promissory note may not, after it has become due according to the time written therein, make the defense that it is not due by reason of a parol promise to extend the time, which promise would depend upon the credibility of interested witnesses. Henehan v. Hart, 127 Cal. 656, 658, 60 P. 426. In the case of Rottman v. Hevener, 54 Cal.App. 474, 482, 483, 202 P. 329, 333, the court says: "If the rule forbidding the alteration of written contracts by parol can be so readily circumvented, then a written instrument, however emphatically it may purport to be the embodiment of the entire agreement between the parties, will afford no obstacle to its facile and convenient overthrow by any debtor who may be able to adduce an amount of parol evidence sufficient to induce a credulous jury to believe that the time fixed by the writing for the maturity of the obligation is not that which the parties contemplated. We decline to give to section 1511 a construction that leads to a result so at variance with the 'parol evidence' rule."

In the instant case the note and collateral assignment were made and delivered for value, viz., the payment of the list of bills tendered by appellant to respondent. It is conceded that the bills were paid promptly. These bills were incurred by appellant, in

our opinion, in connection with the written contract herein referred to, in connection with which appellant received benefits in the form of thousands of dollars in cash and several thousands in addition thereto paid by respondent casualty company to creditors who furnished materials or labor in connection with the work done by appellant.

[8] Appellant's contention that the trial court fell into error in directing a verdict in favor of respondent is, in our opinion, without merit, because under the evidence in this case no other reasonable conclusion is legally deducible therefrom than that a verdict in favor of appellant herein, if such a verdict had been given, would of necessity have been set aside by a reviewing court, because of the absence of evidence of sufficient substantiality to support the same. Newson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama-Pacific International Exp. Co., 179 Cal. 63, 175 P. 454; In re Estate of Lances, 216 Cal. 397, 14 P.(2d) 768; In re Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579.

No other points raised on this appeal require discussion.

For the reasons given, the judgment herein appealed from is affirmed.

I concur: YORK, J.

I dissent: HOUSER, P. J.



14 Cal.App.2d 92

SCHMIDT v. C. I. T. CORPORATION et al. (two cases).

Civ. 9904.

District Court of Appeal, First District, Division 2, California.

May 15, 1936.

Hearing Denied by Supreme Court July 13, 1936.

1. Automobiles ⇐19

Statute requiring seller of motor vehicle to notify division of motor vehicles of sale applies to conditional, as well as to unconditional, sales, so that conditional seller cannot claim exemption from liability as owner for personal injuries or property damage caused by negligent operation of vehicle without giving required notice of sale (Civ.Code, § 1714¼; St.1931, p. 2105, § 45¾).

2. Automobiles ⇐19

Conditional seller of automobile who failed to notify division of motor vehicles of sale before buyer's accident *held* liable as "owner" to person injured through operation of automobile by buyer, notwithstanding conditional seller was not registered owner because of having failed to forward to division certificate of ownership indorsed and delivered to conditional seller when it bought automobile (Civ.Code, § 1714¼; St.1925, p. 547, § 153; St.1929, p. 514, § 45(b)(e); St.1931, p. 2105, § 45¾).

[Ed. Note.—For other definitions of "Owner," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Two actions by George C. Schmidt and by John Carl Schmidt, a minor, by George C. Schmidt, his guardian ad litem, against the C. I. T. Corporation, a corporation, and others. From judgments for plaintiffs, the named defendant appeals.

Judgments affirmed.

Thomas & Sullivan, of San Francisco, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondents.

SPENCE, Justice.

Two actions, one by an injured minor and the other by the father of the injured minor, were brought to recover damages resulting from the injuries sustained by the minor in an automobile accident. Said actions were consolidated for the purpose of trial and for the purpose of this appeal. Judgments were rendered in said actions in favor of the plaintiffs and against the defendants Jay Seaman and C. I. T. Corporation. The appeals from said judgments have been taken solely by the defendant C. I. T. Corporation.

Appellant was held liable as owner under the provisions of section 1714¼ of the Civil Code, in effect at the time of the accident on July 3, 1933. The main question raised upon this appeal is whether appellant was chargeable with liability as the owner under the undisputed facts disclosed by the record.

Appellant sold the automobile to defendant Jay Seaman and others under a conditional sales contract dated June 14, 1933. It is conceded that no certificate of ownership or certificate of registration was delivered to the conditional sales purchasers and that neither the certificate of ownership nor the certificate of registration was forwarded to the division of motor vehicles as provided in subdivision (b) of section 45 of the Vehicle Act (St.1923, p. 524, as amended by St.1929, p. 514) until some time after the accident on July 3, 1933. It is further conceded that no notice of the sale was given immediately after the sale as provided in section 45¾ of the Vehicle Act (St.1923, p. 517, as added by St.1931, p. 2105), and that such notice was not received by the division of motor vehicles until some time after said accident. The conditional sale vendees were given possession of said automobile by appellant on June 15, 1933, and said vendees used the same up to and including the time of the accident.

Section 1714¼ of the Civil Code, as then in effect, provided in part: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. * * * If a motor vehicle be sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such motor vehicle."

[1] Appellant contends that the last-quoted portion of said section 1714¼ exempted it from liability as owner and that the provisions of section 45¾ of the Vehicle Act had no application to conditional sales but only to unconditional sales. This contention of appellant may not be sustained, as it has been fully answered in the decision in Bunch v. Kin, 2 Cal.App.(2d) 81, 37 P.(2d) 744. It was there held that said section 45¾ of the Vehicle Act applied to conditional sales as well as to unconditional sales, and that a conditional sales vendor was not exempt from liability as owner under said section 1714¼, unless he had complied with the provisions of the Vehicle Act.

[2] Appellant further contends that it "was never the registered owner of the automobile in question and therefore did not come under the provisions of section 1714¼ of the Civil Code." This contention arises out of the fact that appellant purchased the automobile from Paul Kunde in May, 1933, and received from him the certificate of ownership duly indorsed by him, but appellant never forwarded said certificate of ownership to the division of motor vehicles as required by subdivision (b) of section 45 of the Vehicle Act. As a result, the automobile was registered in the name of said Paul Kunde until long after the accident occurred. Appellant concedes that, under section 45¾ of the Vehicle Act, said Paul Kunde was not liable as owner after the sale to appellant and the indorsement and delivery to appellant of the certificate of ownership, but seems to take the position that its failure to forward the certificate of ownership to the division of motor vehicles as required by subdivision (b) of section 45 of the Vehicle Act relieved it from liability as owner by virtue of the provisions of subdivision (e) of said section 45. We cannot sustain appellant's contention. Said subdivision (e) was enacted to encourage prompt compliance with the other requirements of the act and was not enacted for the benefit of those who fail to comply with such requirements. It is true that appellant was never the registered owner of the automobile, but we are of the opinion that it became the owner within the meaning of section 1714¼ of the Civil Code immediately upon the transfer from Paul Kunde. Its failure to comply with said subdivision (b) constituted a misdemeanor (Vehicle Act, § 153, St.1923, p. 565, as amended by St. 1925, p. 547), and appellant cannot take advantage of its own wrong. Civ.Code, § 3517. In other words, it must bear the burden of ownership under said section 1714¼ of the Civil Code in the same manner as though it had complied with the provisions of said subdivision (b) of section 45 of the Vehicle Act upon purchasing the automobile from Paul Kunde.

Appellant further contends that the trial court erred in giving certain instructions regarding liability under section 1714¼ of the Civil Code. We need not discuss this contention, as appellant was properly held

liable as owner under the undisputed facts, and the error, if any, in the instructions was not prejudicial.

The judgments are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



14 Cal.App.2d 22

PEOPLE v. McNEER.

Cr. 2834.

District Court of Appeal, Second District, Division 2, California.

May 12, 1936.

Hearing Denied by Supreme Court June 11, 1936.

1. Criminal law ⇐748, 1159(5)

Question of degree of crime is exclusively for jury, and its determination thereof will not be disturbed when there is any substantial evidence to support finding.

2. Homicide ⇐253(1)

Evidence of deliberate purpose to kill may be inferred from circumstances reasonably warranting inference of its existence as regards question whether evidence supported verdict of first degree murder.

3. Homicide ⇐253(1)

Evidence supported conviction of first degree murder of husband for killing of wife.

4. Criminal law ⇐829(3)

In murder prosecution, refusal to instruct respecting proof of premeditation *held* not error, where point was fully covered in instruction which was given and which correctly stated the law.

5. Criminal law ⇐778(5)

In murder prosecution, refusal to instruct on shifting of burden of proof *held* not error, where killing was denied and no attempt was made to justify, excuse, or mitigate it (Pen.Code, § 1105).

6. Criminal law ⇐829(12)

In murder prosecution, refusal to instruct respecting testimony of expert witnesses *held* not error, where point was fairly and correctly covered by an instruction given.

7. Criminal law ⇐1173(2)

In murder prosecution, failure to include in instructions on circumstantial evidence element requested by defendant that evidence must exclude every reasonable hypothesis except that of guilt *held* error, but not prejudicial, where evidence as a whole failed to disclose miscarriage of justice.

8. Homicide ⇐166(3), 338(1)

In prosecution of husband for murder of wife, admitting page of complaint in divorce action by wife against husband and permitting district attorney to read to jury allegations of complaint *held* error, but not prejudicial, where state proved acts alleged in complaint by other overwhelming evidence and defendant's denial of charges therein was weak and unconvincing.

9. Criminal law ⇐193½

Verdict of second degree murder in first trial did not preclude verdict of first degree murder on retrial on ground of former jeopardy, as against contention that verdict of second degree murder constituted acquittal of first degree murder, since the two degrees of murder were not separate offenses and granting of new trial placed parties in same position as if no trial had been had (Pen.Code, § 1017, subd. 3; § 1180; Const. art. 1, § 13).

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Gray Everett McNeer was convicted of first degree murder, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

Defendant was charged with the crime of murder. On a first trial he was convicted of second degree murder. He appealed and obtained a reversal. 47 P.(2d) 813. A second trial resulted in a conviction of murder in the first degree. The appeal is from said judgment.

Defendant and the deceased were husband and wife. About a week prior to the act charged in the information the decedent had been granted an interlocutory decree of divorce. On the night of June 27, 1934, defendant and decedent were found seated side by side in an automobile parked on the side of a road. Defendant was in the driver's seat and decedent was to his right. Life had already passed from the body of the decedent, who had three bullet holes in the left side of her head, one of which would have caused instant death. The powder burns indicated that the gun had been held from 6 to 12 inches from decedent's head. The testimony showed that decedent was right-handed. Her hands were folded in her lap; her head had fallen forward on her chest. There was a bullet hole in defendant's right temple; the bullet had traveled upward. He was mumbling, "She did it." A fifth bullet was found in the roof of the car. The gun used was a six-shot revolver which had been loaded with five cartridges. It had been taken from the home of a mutual friend. The sixth cartridge, unexploded, was found in the right-hand pocket of defendant's coat. The gun was found on decedent's knees with the trigger away from the body.

The physical facts and circumstances in evidence permitted the jury to reconstruct the crime with considerable accuracy. The evidence showed that decedent was unfamiliar with firearms and very much afraid of them. Expert testimony indicated that it was customary for safety to load the type of gun which was used with only five cartridges. That the gun was so loaded and that the sixth cartridge was found in defendant's pocket, point strongly to the conclusion that it was defendant who took the gun from his friend's house. It would have been impossible for the decedent, a right-handed person, to have held the gun from 6 to 12 inches from her head and fired the three shots which entered her head from the left. The bullet which penetrated her brain, causing instant death, was the first shot fired, for the reason that the body apparently did not convulse or lunge forward, but only slumped in the seat, leaving the hands folded in her lap. The shot which caused the injury to defendant entered from the right and slanted upward, and was fired by defendant himself. Defendant's theory at the trial was that decedent fired the first shot and that he did not know what happened thereafter. However, the position of decedent in death negatived the idea that there was a struggle for possession of the gun or that decedent ever had the gun in her hands. The placing of the gun on decedent's knees and the assertion, "She did it," indicated effort on the part of defendant to hide his guilt.

[1-3] Defendant first contends "that the evidence in this case, even when viewed in the light most favorable to the prosecution, only establishes that a criminal homicide was committed and that there is no evidence to support the verdict of first degree murder." The question of the degree of crime is one exclusively for the jury, and its determination in this respect will not be disturbed when there is any substantial evidence to support it. People v. Rico, 180 Cal. 385, 181 P. 663, People v. Mahatch, 148 Cal. 200, 82 P. 779, and cases cited in note 15, 13 Cal.Jur. 595. Evidence of a deliberate purpose to kill may be inferred from proof of such facts and circumstances in the case as would reasonably warrant an inference of its existence. People v. Mahatch, supra; People v. Welsh, 63 Cal. 167; also see 8 Cal.Jur. 190, § 265. There is substantial evidence to support the finding of the jury in this regard.

[4] Defendant's second contention is that the court erred in refusing to give an instruction requested by him with respect to proof of premeditation. This point was fully covered in an instruction which was given and which correctly stated the law.

[5] Defendant next contends that the court refused to give an instruction based on section 1105 of the Penal Code. Where the killing is denied, and no attempt is made to justify, excuse, or mitigate it, an instruction substantially in the language of section 1105 of the Penal Code is inapplicable. People v. Miller, 177 Cal. 404, 170 P. 817.

[6] The fourth contention of defendant is that the court erred in refusing to give an instruction requested by him with respect to the testimony of expert witnesses, but this point was fairly and correctly covered by an instruction which was given.

[7] In giving instructions on circumstantial evidence, the court failed to include an element requested by the defendant that the evidence must be of such a character as to exclude every reasonable hypothesis except that of guilt. People v. McClain, 115 Cal.App. 505, 1 P.(2d) 1085; opinion of

Supreme Court denying hearing in People v. Heuss, 95 Cal.App. 680, 273 P. 583. The error does not require a reversal of the judgment, since from the evidence as a whole it cannot be said that there has been a miscarriage of justice.

[8] Defendant's next contention is that the court erred in admitting in evidence the file in the divorce action heretofore mentioned and in permitting the district attorney to read to the jury the allegations of the complaint therein. A reading of the reporter's transcript discloses that the files in the divorce action were not actually admitted in evidence, but only one page of the complaint, which the district attorney read to the jury. This the court by its ruling admitted for all purposes. Such a ruling was held erroneous in People v. Holloway, 28 Cal.App. 214, 151 P. 975. The error, however, does not call for a reversal, since the prosecution proved the acts alleged in the divorce complaint by other overwhelming evidence and the defendant's denial of the charges was weak and unconvincing. The present situation is quite similar to that of the Holloway Case in which it was held that the error did not prejudice the defendant.

The defendant's final contention is that the verdict of murder in the second degree at the conclusion of the first trial was an acquittal of first degree murder and that his defense of once in jeopardy should have been sustained. Defendant says, "Contrary to general belief, we do not believe that there is a single case in California in which the same issue here raised has been directly passed upon by our Supreme Court or District Court of Appeal."

The question turns upon whether first degree murder and second degree murder are two separate offenses, or one offense with two degrees; the degrees being specified for the purpose of fixing the punishment. "The prohibition of the Constitution is against putting a person twice in jeopardy for the 'same offense.' Article 1 § 13. See, also, Pen.Code, § 1017, subd. 3." People v. Brannon, 70 Cal.App. 225, 233 P. 88, 89.

In the early case of People v. Keefer, 65 Cal. 232, 3 P. 818, 820, the defendant had been convicted of murder of the second degree at a former trial, and at the second trial he requested an instruction to the effect that, "having been previously tried on this indictment, and found guilty of murder in the second degree, he cannot now be convicted of murder in the first degree." This instruction the court refused. The defendant asked a reversal upon this ground. The court said: "At the second trial defendant was found guilty of murder of the second degree. It is obvious, therefore, that the mere refusal of an instruction that he could not be convicted of murder of the first degree did not prejudice him. Inasmuch, however, as there must be a retrial of this action, it is proper to add that the conviction of murder of the second degree would not have been a bar to a conviction of murder of the first degree. The indictment charges the crime of murder, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment. People v. Haun, 44 Cal. 96, 98; People v. Doyell, supra [48 Cal. 85]. After the act of 1856, which divided the crime into murder of the first and second degrees, murder remained, and it still remains, the unlawful killing of a human being with malice aforethought. Penal Code, §§ 187, 188. The malice may be express or implied; the express intent to kill or to commit one of the named felonies may be affirmatively established, or, the killing being proved, the malice may be implied, but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree."

In the case of People v. Gordon, 99 Cal. 227, 33 P. 901, 902, the two offenses, an assault with intent to commit murder and an assault with a deadly weapon, were involved in a plea of former jeopardy. The

court said: "In the case of People v. Keefer, supra [65 Cal. 232, 3 P. 818], the defendant was indicted for the crime of murder, and convicted of murder of the second degree. On his motion, a new trial was granted. At the second trial, his counsel requested the court to instruct the jury that, 'defendant having been previously tried on this indictment, and found guilty of murder in the second degree, he cannot now be convicted of murder in the first degree.' The instruction was refused, and, on appeal, the refusal was held to be proper. This was based upon the fact that there is but one crime of murder, which is the unlawful killing of a human being with malice aforethought. The court said: 'The indictment charges the crime of murder, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees, the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine in a particular case whether the crime deserved the extreme penalty of the law or a less severe punishment.' It was accordingly held that the defendant had subjected himself to a retrial on the charge of murder, and that on such retrial he might be found guilty of murder of the first degree, if the evidence would warrant such a verdict. That case is not in point here, for the reason that an assault with intent to commit murder and an assault with a deadly weapon are not the same offense, but are different offenses. Pen.Code, §§ 217, 245."

In the case of People v. Grill, 151 Cal. 592, at page 598, 91 P. 515, 517, the court said: "It has been held that a conviction of murder of the second degree, upon the trial of a charge of murder of the first degree, is no bar to a subsequent conviction of the higher degree, upon a retrial of the same case granted upon defendant's motion. People v. Keefer, 65 Cal. 232, 235, 3 P. 818; People v. Carty, 77 Cal. 213, 216, 19 P. 490; People v. Gordon, 99 Cal. 227, 232, 33 P. 901. Upon this exact point we need express no opinion." To have done so would have been obiter. Again in People v. Elmore, 167 Cal. 205, 138 P. 989, 991, in reversing a conviction for second degree murder on the ground of insufficiency of the evidence to sustain it, and where the question of former jeopardy was not involved, the court said: "By rendering a verdict finding the defendant guilty of murder in the second degree, the jury, in effect, acquitted him of murder of the first degree." In the case of People v. Phelan, 123 Cal. 551, at page 565, 56 P. 424, 429, in discussing alleged errors of the court in rulings on evidence and alleged errors in remarks made in overruling objections and in discussing the sufficiency of the evidence to sustain the verdict, the court made the incidental observation: "With respect to all these matters it may also be said that the verdict of murder in the second degree conclusively shows that the jury must have discarded the theories of the prosecution as to lying in wait, etc., for upon those theories the defendant was guilty of murder in the first degree." So far as we know these are the only references to the question which the Supreme Court has made, directly or remotely. In the Keefer Case the question was directly involved and became the law of the case. In all other cases the quotations above given were obiter dicta.

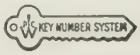
The defendant relies upon People v. Gilmore, 4 Cal. 376, 60 Am.Dec. 620; People v. Smith, 134 Cal. 453, 66 P. 669; People v. McFarlane, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L.R.A. 245, and People v. Muhlner, 115 Cal. 303, 47 P. 128. However, these are all cases in which the defendant at the first trial was convicted of manslaughter and not of murder. These and cases of similar import have all been decided upon the theory that manslaughter is a different offense from murder and not a different degree of the same offense. The defendant also relies upon the case of Radej v. State, 152 Wis. 503, 140 N.W. 21.

[9] At the first trial the defendant was not acquitted of murder. He was convicted of murder. There are not two offenses defined as murder; only one. The verdict of second degree was merely a finding by the jury made for the purpose of fixing the punishment. The decision of the Supreme Court in the early case of People v. Keefer has never been overruled and is the law in California. The granting of a new trial places the parties in the same position as if no trial had been had. Pen.Code, § 1180. This is in line with sound public policy. This policy should be followed where it can be fairly done

without violating the constitutional mandate with regard to former jeopardy.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



13 Cal.App.2d 720

ROTH DRUGS, Inc., et al. v. JOHNSON, State Treasurer, et al.

Civ. 5514.

District Court of Appeal, Third District, California.

May 11, 1936.

As Modified on Rehearing May 30, 1936.

Hearing Denied by Supreme Court July 10, 1936.

1. Appeal and error ⇐909(1)

In action to recover payment of sales tax, Court of Appeal would assume that statute imposing tax did not receive votes of two-thirds of all members of both Houses of Legislature as alleged in complaint on appeal from judgment for defendants after demurrer to complaint had been sustained (Gen.Laws Supp.1933, Act 8493).

2. Statutes ⇐21

Constitutional provision that no statute should go into effect until 90 days after adjournment of Legislature except acts calling elections, providing for tax levies, or appropriations for usual current expenses of state, and urgency measures necessary for immediate preservation of public peace, health, or safety, passed by two-thirds vote of each House, *held* to require two-thirds vote to enact only urgency measures for preservation of public peace, health, or safety, and not to require such vote for statute providing for tax levies or appropriations for usual current expenses of state (Const. art. 4, § 1).

3. Constitutional law ⇐14

Punctuation is never controlling factor and may be ignored when it becomes necessary to ascertain true meaning of language employed in constitutional provision.

4. Statutes ⇐250

In absence of constitutional or statutory prohibition to contrary, Legislature has inherent power to determine when its enactment shall become effective.

5. Statutes ⇐255

Retail sales tax act specifically providing that it should take effect immediately *held* to have become effective immediately upon its approval, notwithstanding that it was not enacted by two-thirds of votes of both Houses of Legislature (Gen.Laws Supp. 1933, Act 8493; Const. art. 4, § 1).

6. Constitutional law ⇐190

Retroactive tax measure is enforceable which does not result in impairing obligations of contract or interference with vested rights existing prior to enactment of law.

7. Licenses ⇐1
Taxation ⇐1

Retail sales tax requiring payment of specified percentage of gross receipts from sales of merchandise as privilege of conducting business of selling tangible personal property *held* "excise" or "privilege" tax, as distinguished from "personal property tax" (Gen.Laws Supp.1933, Act 8493).

[Ed. Note.--For other definitions of "Excise," "Personal Property Tax" and "Privilege Tax," see Words & Phrases.]

8. Constitutional law ⇐190

Failure of Retail Sales Tax Act to become effective until 90 days after final adjournment of Legislature *held* not to render illegal portion of first quarterly tax, notwithstanding that proceeds from portion of such sales were received prior to effective date of act, where issue of impairment of contract or deprivation of taxpayer's vested right was not raised (Gen.Laws Supp.1933, Act 8493, §§ 3, 9).

9. Constitutional law ⇐48

Statute is presumed to be constitutional until contrary appears.

10. Constitutional law ⇐211

Although statute must affect alike all persons in same class and under similar conditions, it is not subject to criticism on ground that it is not uniform so long as it operates alike on all persons and property under same conditions, and although classification should be reasonable, natural, and just, in absence of showing to contrary existence of good ground for classification will be assumed and act will be upheld (Const. U.S. Amend. 14, § 1; Const.Cal. art. 1, § 11).

11. Constitutional law ⇐229(1)

Federal constitutional guaranty of equal protection does not forbid reasonable discrimination in matters involving taxation, but Legislature is accorded sound discretion in making classification for operation of tax statute and every reasonable presumption in support of classification will be indulged and upheld if reconcilable on any reasonable and natural theory (Const.U.S. Amend. 14, § 1).

12. Constitutional law ⇐230(1)

Retail Sales Tax Act *held* not unconstitutional as unreasonably discriminatory between retail and wholesale merchants and tangible and intangible personal property (Gen.Laws Supp.1933, Act 8493; Const.U.S. Amend. 14, § 1; Const.Cal. art. 1, § 11).

13. Taxation ⇐93(1)

State may impose at its option taxes on "tangible personal property" within its limits irrespective of residence or allegiance of owner.

"Tangible property" is that which is visible and corporeal, having substance and body, as contrasted with incorporeal property rights, such as franchises, choses in action, copyrights, circulation of newspaper, annuities, and the like.

[Ed. Note.—For other definitions of "Tangible Property," see Words & Phrases.]

14. Constitutional law ⇐230(1)

Retail Sales Tax Act *held* not unconstitutional as discriminatory because tax was imposed on gross receipts of sales and statute provided that tax should be collected by retailer from consumer in so far as possible, notwithstanding that stores depending on numerous sales of small value could not charge tax to purchasers of numerous single articles of small value under breakdown system adopted by merchants of state (Gen. Laws Supp.1933, Act 8493; Const.U.S. Amend. 14, § 1; Const.Cal. art. 1, § 11).

15. Taxation ⇐1

Retail sales tax *held* not "franchise tax" within constitutional provision requiring such taxes to be levied in proportion to actual cash value of such property, since term "franchise," although sometimes used in broad sense of privilege conferred on individuals generally, within constitutional provision means special privilege conferred by government upon individuals and which does not belong to citizens of country generally of common right (Gen.Laws Supp. 1933, Act 8493; Const. art. 4, § 1; art. 13, §§ 1, 14).

[Ed. Note.—For other definitions of "Franchise" and "Franchise Tax," see Words & Phrases.]

16. Constitutional law ⇐230(1)

Retail Sales Tax Act *held* not unconstitutional as discriminatory because of specific exemptions of gross receipts from sale of motor vehicle fuel which was otherwise subject to taxation, of food used for free distribution to poor and needy, and of receipts from gas, electricity, and water (Gen. Laws Supp.1933, Act 8493; Gen.Laws Supp. 1935, Act 2964; Const.U.S. Amend. 14, § 1; Const.Cal. art. 1, § 11).

17. Licenses ⇐7(1)

Absence of constitutional authorization of levy of excise tax to raise revenue *held* not to invalidate Retail Sales Tax Act as tax on privilege of maintaining occupation or business enterprise, since, in absence of constitutional prohibition of such statutes, Legislature has inherent power to adopt them (Gen.Laws Supp.1933, Act 8493; Const. art. 13, § 15, adopted in 1933, and art. 18, § 1).

18. Licenses ⇐5

Legislature has inherent power to tax occupation of persons engaged in business of selling tangible personal property to purchasers for use or consumption.

19. Constitutional law ⇐26

State Constitution is reservation of authority rather than delegation or grant of power and consequently Legislature may be authorized to enact laws which are otherwise valid when Constitution fails to prohibit such enactment (Const. art. 13, § 15, adopted in 1933, and art. 18, § 1).

20. Licenses ⇐7(1)

Retail Sales Tax Act *held* not unconstitutional as abridging or depriving owner of privilege of engaging in mercantile business (Gen.Laws Supp.1933, Act 8493).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Roth Drugs, Incorporated, and others, against Charles G. Johnson, Treasurer of the State of California, and oth-

ers. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Leslie H. Kranz and Bernard P. Calhoun, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered against the plaintiffs for failure to amend their complaint after a demurrer thereto had been sustained on the ground that it fails to state facts sufficient to constitute a cause of action.

There are 550 plaintiffs who are parties to this action. They are retail merchants doing business in California. The complaint alleges that they paid under protest sales taxes in the aggregate sum of $61,293.30 to the Treasurer of the state of California, within ninety days from the date of the adoption of the California Retail Sales Tax Act (St.1933, p. 2599; Deering's 1933 Supp.Laws of Calif., p. 2360, Act 8493). It is alleged the act did not become immediately effective for the reason that it failed to receive the votes of two-thirds of the members of each House of the Legislature, as required by the provisions of article 4, § 1, of the Constitution of California, and that the taxes were therefore prematurely and illegally collected.

It is also claimed the act is unconstitutional for the reasons hereafter assigned.

The Retail Sales Tax Act was approved July 31, 1933. It recites that it became effective immediately. It is not claimed the act required two-thirds of the votes of both houses to render it valid. It is merely asserted that under the constitutional provision it requires a two-thirds vote to render it immediately effective, and that in the absence of such vote it would not become effective until ninety days after the legislature adjourned.

[1, 2] For the purpose of this appeal we must assume the act did not receive the votes of two-thirds of all members of both Houses of the Legislature. We are, however, of the opinion that article 4, § 1, of the Constitution of California does not require that an act providing for tax levies or appropriations for the usual current expenses of the state shall necessarily be passed by a two-thirds vote. The fourth paragraph of that section provides in that regard: "The second power reserved to the people shall be known as the referendum. No act passed by the legislature shall go into effect until ninety days after the final adjournment of the session of the legislature which passed such act, except acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the state, and urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house. Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act, which section shall be passed upon a yea and nay vote, upon a separate roll-call thereon; provided, however, that no measure creating or abolishing any office or changing the salary, term or duties of any officer, or granting any franchise or special privilege, or creating any vested right or interest, shall be construed to be an urgency measure. Any law so passed by the legislature and declared to be an urgency measure shall go into immediate effect."

To the constitutional mandate that no act shall go into effect until ninety days after the adjournment of the Legislature three classes of measures are specifically excepted. It is declared with respect to only the last one of these groups that it shall require a two-thirds vote. It follows that the other two classes of excepted acts may be passed by a mere majority of the votes of each house. That portion of the preceding paragraph, the construction of which is involved in this suit, reads as follows: "No act * * * shall go into effect until ninety days after the final adjournment of the session of the legislature, * * * except [1] acts calling elections, [2] acts providing for tax levies or appropriations for the usual current expenses of the state, *and* [3] urgency measures necessary for the immediate preservation of the public peace, health or safety passed by a two-thirds vote," etc.

To the original text we have added in brackets the three numerals to identify the classes of measures included within the exceptions. For the purpose of clarity, we have also omitted the comma which is

found in the original text in the last line above quoted, which appears after the word "safety." There would be no difficulty in construing the language requiring a two-thirds vote of the members of both Houses as applying to the last class only of *urgency measures,* if it were not for the comma which we have omitted following the word "safety." A critical examination of the entire paragraph impels us to hold that it was undoubtedly the intention of the Legislature to require a two-thirds vote to enact only the urgency measures for the preservation of the public peace, health, or safety. There appears to be good reason for requiring more particular procedure with respect to these police power enactments. There is no reason why acts calling for elections or measures providing for tax levies for the usual current expenses of the state should require a two-thirds vote any more than numerous other ordinary classes of legislation. If the Legislature had intended to require a two-thirds vote to authorize such enactments, it would have been very easy to have so expressed it. If the Legislature had so intended, after enumerating the exempt classes of acts, it would then have declared, "*each* of which acts must be passed by a two-thirds vote of both houses of the legislature." We must assume the Legislature deliberately refrained from saying this because it intended to have the two-thirds vote apply only to the last-mentioned class of urgency measures.

[3] In accordance with the uniform rule of construction, the comma in question may be disregarded, for punctuation is never a controlling factor, and it may be ignored when it becomes necessary to ascertain the true meaning of the language employed by the Legislature. In 23 California Jurisprudence, p. 733, § 111, it is said in that regard: "No doubt punctuation may be considered in reading a statute, but punctuation is never a controlling factor of interpretation, and may be entirely disregarded when necessary to ascertain the true intent and meaning."

To the same effect are the cases of Mitchell v. Superior Court of Fresno County, 76 Cal.App. 734, 245 P. 1109, and Treiman v. Kennon, 139 Cal.App.(Supp.) 796, 30 P.(2d) 636.

In arriving at the foregoing construction of the constitutional provision, it will be observed that the last class of "urgency measures" is distinctly separated from the preceding classes by a comma and by the word "and." There is good reason why this last class should be characterized as urgency measures which are required to be enacted with much more particularity than the preceding classes. This last group falls within the police powers which are authorized only for the necessary welfare of the public health, peace or safety, in emergencies, such as epidemics, insurrections, or sudden calamities. The constitutional provision in question clearly indicates that the Legislature therefore purposely distinguished between these excepted classes by providing for greater particularity in enacting urgency measures and by requiring a two-thirds vote to enable them to become immediately effective. It will be observed that directly following the enumeration of the three classes which are excepted from the general rule regarding the time when the acts of the Legislature may become effective, it is specifically provided with respect to urgency measures only that they shall contain a distinct section with a "statement of the facts constituting such necessity," which must be passed by a separate roll call of the members upon a yea and nay vote. Following this particular requirement, the paragraph concludes by adding: "Any law *so passed* by the legislature *and declared to be an urgency measure* shall go into immediate effect." Clearly this last sentence applies only to urgency measures, the specific manner of the enacting of which has just been prescribed. This is true for the reason that no other excepted group is designated as "urgency measures," and because the language "so passed" can refer to no class except the urgency measures, since they are the only acts that are required to be passed in a specified manner.

Assuming that the last-quoted sentence of the paragraph in question does not refer to the specified excepted acts "calling elections" or to those "providing for tax levies," for the usual current expenses of the state, then there is no provision specifically declaring that such measures may become immediately effective.

[4, 5] The fact that the Constitution fails to specifically provide that the first two classes of excepted measures shall become immediately effective upon their enactment by the Legislature does not mean that they, therefore, may not become effective until ninety days after the adjournment of the Legislature. The Constitution

has definitely declared that all three classes of acts are exempt from the general rule which precludes their becoming effective until ninety days after the adjournment of the Legislature. There can be no doubt that in the absence of a constitutional or statutory prohibition to the contrary, the Legislature has the inherent power to determine when its enactments shall become effective. That is exactly what the Legislature did in the Retail Sales Tax Act which is involved in this case. It is specifically provided therein that, "This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of section 1 of Article IV of the Constitution, take effect immediately." (Section 35.)

We are therefore satisfied the Retail Sales Tax Act was not required to be enacted by a two-thirds vote of the members of each House of the Legislature; that the Legislature had the authority to determine in that act when it should become effective, and that by specific declaration it did become effective immediately upon its approval, July 31, 1933.

[6-8] Even though the Sales Tax Act failed to become effective immediately on July 31, 1933, when it was approved, the collection of the taxes involved in this suit, which were levied for the first quarterly period beginning with August 1, 1933, is not illegal or void for the reason that the act would then become retroactive as to the period of time prior to its becoming effective. Section 3 of the act specifically provides that: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent. of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935."

Section 9 of the same act provides that this tax shall become payable in quarterly installments beginning with the first of August, 1933. There is no law of California to prevent the enforcement of a retroactive measure so long as it does not result in impairing the obligations of a contract or interfere with vested rights existing prior to the enactment of the law. City of Los Angeles v. Oliver, 102 Cal.App. 299, 309, 283 P. 298; McCann v. Jordan, 218 Cal. 577, 24 P.(2d) 457. The retail sales tax, which requires the payment of a specified percentage of the gross receipts from the sales of merchandise, as a privilege of conducting the business of selling tangible personal property, is an "excise" or "privilege tax," as distinguished from a personal property tax. 2 Cooley on Taxation (3d Ed.), p. 1094; 2 Cooley's Constitutional Limitations (8th Ed.) p. 988; 61 C.J., p. 242, §§ 227, 228; Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P.(2d) 14; Morrow v. Henneford, 182 Wash. 625, 47 P.(2d) 1016. There is nothing in the pleadings of this case which indicates that the retail sales tax impairs the obligations of any contract or that it deprives the plaintiffs of vested rights which they previously enjoyed.

With reference to the retroactive effect of a statute which imposed a tax upon incomes accruing in a portion of the year which had already passed before the act became effective, the Supreme Court of the United States said in Brushaber v. Union Pacific Railroad Company, 240 U.S. 1, 36 S.Ct. 236, 242, 60 L.Ed. 493, L.R.A. 1917D, 414, Ann.Cas.1917B, 713:

"The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the 5th Amendment, and as inconsistent with the 16th Amendment itself. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment, and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in Stockdale v. Atlantic Ins. Co., 20 Wall. 323, 331, 22 L.Ed. 348, 351, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said:

" 'The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.' "

The principle determined by the Brushaber Case is applicable to the present ac-

tion. Assuming for the sake of argument that the California Retail Sales Tax Act failed to become effective until ninety days after final adjournment of the Legislature, that fact did not render illegal the portion of the first quarterly tax which was based upon sales of merchandise from August 1, 1933, notwithstanding the fact that the proceeds from a portion of these sales were received by the merchant prior to the time when the act became effective. The measure provides that the period during which the tax was imposed extends from August 1, 1933, to and including June 30, 1935. Not even the first quarterly period thereof had elapsed before the time for which all the taxes which are involved in this suit were levied and paid. We are, therefore, of the opinion the taxes were not illegally collected, regardless of whether the act went into immediate effect or whether it became effective only after ninety days from the date of the adjournment of the legislature. Continental Oil Co. v. Walker (C.C.A.) 285 F. 729.

The Retail Sales Tax Act is not unconstitutional for the reason that it contravenes either the federal or the State Constitution by depriving individuals of property without due process of law, or because of an unreasonable discrimination with respect to different classes of business to which it applies.

The appellants contend that the act is unconstitutional and void for the reason that it discriminates unreasonably between retail and wholesale merchants; between tangible and intangible personal property; and because section 5 of the act exempts (a) property specifically absolved from taxation by the provisions of the Federal and State Constitutions, (b) taxes on the gross receipts from sales of gas, electricity, and water, (c) taxes on the sale of gold bullion, gold concentrates, or gold precipitates, and (d) gross receipts from sales of property for the performance of contracts for public works executed prior to the date when the Sales Tax Act became effective. We think there is no substantial merit in these claims.

We are of the opinion the California Retail Sales Tax Act does not violate article 14, section 1 of the Amendments to the Federal Constitution by abridging the privileges or immunities of any citizen, nor does it deprive any person of property without due process of law, for any of the reasons assigned, or at all. Nor do we think the act violates article 1, section 11, of the Constitution of California, which provides that, "All laws of a general nature shall have a uniform operation."

The power of a state to levy and collect taxes for governmental purposes is necessarily very broad. It is said in 2 Cooley's Constitutional Limitations (8th Ed.) p. 986, in that regard: "The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade and occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of government affect more constantly and intimately all the relations of life than through the exactions made under it."

[9, 10] So, also, the power of the states to make classifications of persons or property for the purpose of taxation is very broad. Adams v. Standard Oil Co., 97 Miss. 879, 53 So. 692. A statute is presumed to be constitutional until the contrary appears. It has been said that an act may not be held to be unconstitutional merely because it may contain provisions which seem to be unjust or oppressive, or because it may be deemed to violate the natural, social, or political rights of citizens, unless it appears that those features of the act contravene rights which are guaranteed by the Constitution. 1 Cooley's Constitutional Limitations (8th Ed.) p. 341. If a classification of persons or occupations made for the purpose of imposing taxes is founded on natural, intrinsic, or fundamental distinctions which are reasonable in their relation to the object of the legislation and otherwise, they will be deemed to be valid and binding. 5 Cal.Jur. p. 824, § 188. In determining the validity of classifications for the purpose of imposing taxes, it has been said that the classes or groups of persons legally and naturally affected by the statute should be considered. While it is necessary that the law shall affect alike all persons in the same class and under similar conditions, so long as the law operates alike on all persons and property under the same conditions, it is not subject to criticism on the ground that it is not uniform. While the classification should be reasonable, natural and just, in the absence of a

showing to the contrary, it will be assumed there is good grounds for the classification and the act will be upheld. 6 R.C.L. p. 378, §§ 369–376. In the case of People v. Monterey Fish Products Co., 195 Cal. 548, 556, 234 P. 398, 401, 38 A.L.R. 1186, it is said in that regard: "When a legislative enactment is attacked upon this ground [of an unauthorized classification], all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action (5 Cal.Jur. § 628 et seq., and cases cited), and the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary."

[11] The Supreme Court of the United States has definitely held that the Fourteenth Amendment of the Federal Constitution, which guarantees to all citizens equal protection to personal privileges and property rights, does not forbid reasonable discriminations in matters involving taxation. Classifications for the purpose of taxation are recognized as necessary and valid. In making such classifications a sound discretion is accorded the Legislature; every reasonable presumption in support of the classification will be indulged in and if it can be reconciled on any reasonable and natural theory it will be upheld. American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S.Ct. 43, 45 L.Ed. 102; Quong Wing v. Kirkendall, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350.

[12, 13] The taxing of tangible personal property as distinguished from intangible property is perfectly natural and reasonable. That is a distinction commonly recognized by the law. 21 Cal.Jur. p. 641, § 3. Tangible property is that which is visible and corporeal, having substance and body as contrasted with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper, annuities, and the like. Olschewski v. Hudson, 87 Cal.App. 282, 286, 262 P. 43. As it is said in 1 Cooley on Taxation (3d Ed.) 87: "A state may at its option impose taxes on tangible personal property within its limits irrespective of the residence or allegiance of the owner."

The reason for distinguishing between tangible and intangible property for the purpose of taxation is very evident. The first is visible, accessible, and easy to identify and levy upon, while the other is not so readily located or its value ascertained. There is no room for logical controversy over the right to distinguish between tangible and intangible property for the purpose of taxation.

The same thing is true with respect to the distinction between goods sold wholesale and those which are retailed. This is also a natural and a reasonable classification. Goods are usually sold at wholesale in large quantities or in bulk. If such sales were taxable, they would require segregation, elimination of the interests of the manufacturer from the middleman, and exclusion of such articles as might be shipped into the state in original packages. Many other elements render it much more difficult to impose just and uniform taxes on goods sold at wholesale. As merchandise is sold at retail the items are more accessible, readily identified, and less likely to be subject to duplicating or pyramiding the burden of taxes. The United States Supreme Court (Cook v. Marshall County, 196 U.S. 261, 25 S.Ct. 233, 49 L.Ed. 471) and nearly every state in the Union have recognized and upheld occupation taxes or retail sales tax acts based on the marketing of goods by merchants. 1 Cooley on Taxation (4th Ed.) p. 752. In the case of Knisely v. Cotterel, 196 Pa. 614, 46 A. 861, 863, 50 L. R.A. 86, it is said in that regard: "The division of venders into wholesale and retail is perhaps the most obvious and familiar that could be made." And in Commonwealth v. Clark, 195 Pa. 634, 46 A. 286, 288, 57 L.R.A. 348, 86 Am.St.Rep. 694, it is said: "It is complained that wholesalers are made a distinct and separate class from retailers, and that the ordinance specially legislates in favor of the wholesalers. * * We see no objection to classifying wholesalers and retailers separately." The last-cited case was affirmed by the Supreme Court of the United States in Clark v. Titusville, 184 U.S. 329, 22 S.Ct. 382, 46 L. Ed. 569.

We are satisfied the California act does not unlawfully discriminate in favor of wholesale merchants or against retail merchants.

[14] The appellants contend that the act is not uniform in its application for the reason that section 8½ thereof provides that, "The tax hereby imposed shall be collected by the retailer *from the consumer in so far as the same can be done,*" and that since section 3 imposes a tax of 2½ per cent. only on the gross receipts of sales it is impossible for the retail merchant to col-

lect the tax from the purchaser on a single item which sells for less than 40 cents for the reason that the tax would then amount to less than one cent, which is the smallest coin known to the American financial system. It is argued that a tax based on the gross income of all retail businesses is discriminatory, unjust and void for the reason that it results in penalizing the honest, efficient merchant who relies for success on his good will, established by maintaining a large volume of business on small margins of profit which profit may even fall below 2½ per cent. of his gross receipts, while others, who enjoy a small business with greater profit, may better afford to pay the tax. It is suggested the 15-cent stores, the drug stores, and other enterprises which depend for success upon numerous sales of small value, under the "breakdown" system adopted by the California merchants, find it impossible to charge the tax to purchasers of numerous single articles of small value. It is asserted the overhead expense of maintaining a business for the sale of articles of small value is relatively greater than that of selling automobiles, machinery, household furniture, or equipment which normally return a much larger percentage of profit, and that the present tax system therefore favors the last-mentioned enterprises to the detriment of the former. We are of the opinion these distinctions furnish no reason for declaring the act unconstitutional for lack of uniform operation. The validity of an excise tax for the privilege of maintaining a business is not dependent on the various methods or conditions of every private enterprise.

The system of imposing an excise tax for the privilege of conducting a business which is based on a percentage of the gross receipts therefrom has long been recognized as valid. City and County of Sacramento v. Crocker, 16 Cal. 119; Pauley v. State of California (C.C.A.) 75 F.(2d) 120; 1 Cooley on Taxation (4th Ed.) p. 836, § 389; 61 C.J. p. 154, § 93.

The act is not unconstitutional because section 8½ thereof authorizes the retailer to collect the tax "from the consumer *in so far as the same can be done.*" This act does not impose the tax on the consumer. The last-mentioned section merely authorizes the retail merchant to reimburse himself from the consumer in so far as it may be consistently done. He is not required to do so. He may waive that right. Section 8 of the act merely declares that it shall be unlawful for the retailer to *advertise* that he will assume and pay the tax or that he will not add it to the price of his merchandise upon sale thereof. In considering the entire act we are impelled to hold it is merely optional with the retail merchant as to whether he will reimburse himself from his customers for the tax he is compelled to pay. The act specifically declares that the tax is imposed *on retail merchants,* and not on the consumers. Section 3 provides in that regard, "For the privilege of selling tangible personal property *at retail a tax is hereby imposed upon retailers.*" Section 9 of the act further provides that "The tax levied hereunder *shall be a direct obligation of the retailer.*" Section 12 of the act prohibits any retail merchant from maintaining his business without first procuring a permit therefor as provided by that measure.

There is nothing in the record to support the assumption that the appellants were maintaining their businesses for net profits less than 2½ per cent. of the gross receipts, or that they depended upon large volumes of business from which they realized small profits. If that were true it might constitute evidence of poor business management rather than an unequal application of the tax law. Moreover, there is no provision of the act which prohibits merchants from increasing the selling price of their commodities so as to cover the tax or any other legitimate item of cost which will enable them to make a fair profit on sales. Good will may be acquired by gaining the reputation of selling goods for small profit, but that practice may be extended to an extreme limit so as to invite bankruptcy as a penalty for enjoying good will. If a tax law were required to classify all enterprises with respect to their magnitude of business and the proportionate profit on each sale, it would be necessary to have a different provision for each separate business, for no two are exactly alike in that regard. Carrying the principle of classification to that extreme limit would lead to an absurdity. The regulation of business so as to return a profit on sales and pay overhead expenses necessarily depends on sound judgment and the will of the merchant. If he is sufficiently anxious to secure customers he may be satisfied with minimum profits. When he becomes more independene he may be contented with fewer sales which produce larger profits. This may result in destroying his good will and his business, but that lack of business judgment may

not be charged to the faults of the sales tax. We have supposed the sale of articles of small value ordinarily pay a profit proportionately larger than those of greater value. Naturally it requires more numerous sales of articles of small value to earn a profit that will warrant the maintenance of a business of that character. Usually these articles are bought and sold in large quantities. Indeed these notion stores have developed into enterprises of tremendous magnitude resulting in chain systems which tend to monopolize the mercantile business of that nature. The small, specialized mercantile establishment has become the victim of that system, rather than of the retail sales tax. It is impossible to consider all these intricate distinctions between various business enterprises in adopting a uniform sales tax act. We are convinced the law does not require it.

The so-called "breakdown" system of sales taxes adopted by the merchants of California by agreement between themselves furnishes no evidence that the tax act is unreasonable or unconstitutional. That system is not provided for in the act. It was established by the merchants as a matter of accommodation to enable them to collect the tax from their customers. If a merchant sees fit to waive the collection from his customer of taxes on the sale of an article for a price less than forty cents that is his privilege. If the customer volunteers to pay an excessive tax he may not complain. The entire argument of the appellants on that score is answered by the fact that the law contemplates the imposing of a fixed rate of tax on the *gross receipts* and not on each particular sale of merchandise. That tax is uniform and valid.

[15] The California retail sales tax is not a tax on a franchise as that term is used in article 13, sections 1 and 14, of the Constitution of California, which require such taxes to be levied in proportion to the "actual cash value" of such property. It is true that the term "franchise" is sometimes used in the broad sense that it is a privilege conferred upon individuals generally. But that is too narrow a definition to apply to the excise tax upon the privilege of operating the retail enterprises covered by this act. This act affects only the sales of *tangible* personal property, as distinguished from intangible property. The Constitution authorizing the taxing of franchises refers to intangible property. It is said in 1 Cooley on Taxation (4th Ed.) p. 828, § 386: "A tax on intangible property in the state * * * is not an invalid burden on interstate commerce. This includes a tax on franchises of a corporation, at least so far as they are otherwise subject to taxation."

The term "franchise" which is applicable to the constitutional provision with respect to levying taxes according to the actual cash value of such property is commonly defined as follows: "Franchises are special privileges conferred by the government upon individuals and which do not belong to the citizens of the country generally, of common right." 26 C.J. p. 1008, § 1; 12 Cal.Jur. p. 677, §§ 2 and 14; 24 Cal.Jur. p. 85, § 69; Spring Valley Water Works v. Schottler, 62 Cal. 69, 105; Elliott v. City of Eugene, 135 Or. 108, 294 P. 358, 360.

The retail sales tax is not a tax upon a privilege which does not "belong to the citizens of the country generally, of common right." It is an excise tax on the privilege of operating retail mercantile enterprises which the citizens of this state formerly had a right to maintain. It therefore does not constitute a tax on a franchise, and it does not come within the constitutional provision requiring such taxes to be levied according to the actual cash value thereof.

[16] Nor is the act discriminatory or invalid because section 6 thereof specifically exempts from the application thereof the gross receipts from the sale of motor vehicle fuel. All such motor vehicle fuel is separately taxed by the provisions of the Motor Vehicle Fuel License Tax Act (St.1923, p. 571, and amendments, Deering's 1935 Supp. to Gen.Laws of Calif., p. 708, Act 2964). Motor vehicle fuel is a commodity incident to a large, separate industry which justifies its separate taxation.

The exempting of food used for free distribution to the poor and needy is in the nature of charity. Its exemption from taxation is uniform and justifiable. It applies to all retail merchants alike.

Nor was it unlawful for the act to specifically exempt from the sales tax the receipts from gas, electricity and water. These commodities are public utilities which are otherwise taxed. So, also, the

exemption from tax of the income from sales of property to fulfill contracts for public works which were executed prior to the adoption of the Sales Tax Act is not illegal. That exemption was provided to prevent the act from having the effect of violating the obligations of contracts. It is therefore justifiable and lawful.

The act is not unconstitutional by reason of any of the specific exemptions for which it provides.

[17, 18] It is true that the California Constitution does not specifically authorize the legislature to enact excise measures to tax the privilege of maintaining occupations or business enterprises as it does authorize the levying of taxes on franchises and inheritances. We are of the opinion it is not necessary that the Constitution should specifically authorize the levying of an excise tax to raise revenue. In the absence of a prohibition of the Constitution against such acts, the Legislature has inherent power to adopt them. People v. Coleman, 4 Cal. 46, 49, 60 Am.Dec. 581; San Jose v. San Jose & S. C. R. R. Co., 53 Cal. 475, 481; In re Nowak, 184 Cal. 701, 195 P. 402; 4 Cooley on Taxation (4th Ed.), p. 3383, § 1676; 26 R.C.L. 237, § 210; Bradley v. City of Richmond, 227 U.S. 477, 481, 33 S.Ct. 318, 57 L.Ed. 603; Reif v. Barrett, 355 Ill. 104, 188 N.E. 889, 897. In the authority last cited it is said in that regard: "The Legislature has the inherent power to tax the occupation of those persons engaged in the business of selling tangible personal property to purchasers for use or consumption."

[19] The Constitution is deemed to be a reservation of authority rather than a delegation or grant of power, and, consequently, the Legislature may be authorized to enact laws which are otherwise valid, when the Constitution fails to prohibit such enactments. Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288; People v. County of Glenn, 100 Cal. 419, 35 P. 302, 38 Am.St.Rep. 305; Wigley v. South San Joaquin Irr. Dist., 31 Cal.App. 162, 159 P. 985; Sheehan v. Scott, 145 Cal. 684, 79 P. 350; 61 C.J., p. 154, § 93.

In accordance with the preceding statement with respect to the power of the Legislature to levy taxes which are not specifically prohibited thereby, article 13, section 15, of the Constitution was adopted at the special election which was held June 27, 1933, which section contains the following provision: "The Legislature shall provide for the raising of revenue *by any form of taxation not prohibited by this Constitution* in amounts sufficient to meet the expenditures of this State not otherwise provided for."

Article 18, section 1, of the Constitution provides with respect to the effectiveness of amendments thereto that: "If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon, such amendment or amendments shall become a part of this Constitution."

The preceding amendment therefore became a part of the Constitution upon its approval by a majority vote of the people and authorized the legislature to enact the Retail Sales Tax Act, which was approved July 31, 1933. In 6 Ruling Case Law, p. 35, § 28, it is said regarding the time when an amendment to a state Constitution becomes effective: "Where an existing constitution provides that a proposed amendment, if ratified by the requisite majority, should become part of the constitution, it is usually held that amendments take effect from the time of their actual ratification." Seneca Mining Co. v. Osmun, 82 Mich. 573, 47 N.W. 25, 9 L.R.A. 770.

[20] The Retail Sales Tax Act does not abridge nor deprive an owner of the privilege of engaging in the mercantile business. It has been frequently held that the right to license or tax an occupation or business deprived the owner thereof of none of his inalienable rights to engage in the business.

We are therefore of the opinion the complaint in this action fails to state facts sufficient to constitute a cause of action, and that the demurrer thereto was properly sustained.

The judgment is affirmed.

We concur: PULLEN, P. J.; STEEL, Justice pro tem.

6 Cal.2d 384

HARRIS v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.

L. A. 15638.

Supreme Court of California.

May 15, 1936.

1. Bankruptcy ⇐20(1)

Proceeding, begun by mortgagor's successor after filing bankruptcy petition in federal court, to obtain extension of time for payment of mortgage note, *held* properly dismissed; subject-matter being within federal court's exclusive jurisdiction (St.1935, p. 1208; Bankr.Act § 75, see 11 U.S.C.A. § 203).

2. Appeal and error ⇐1024(3)

Whether major portion of property covered by trust deed securing note was located in another county than that in which mortgagor's successor commenced proceeding for extension of time to pay note was question for trial court primarily, and judgment dismissing proceeding for improper venue must be affirmed, in absence of showing that trial court erred in determining such question (St. 1935, p. 1209, § 2).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by W. S. Harris against the Pacific Mutual Life Insurance Company of California. From a judgment of dismissal, petitioner appeals. On respondent's motion to dismiss the appeal or affirm the judgment.

Motion granted and order affirmed.

Lloyd S. Nix, of Los Angeles, for appellant.

Guthrie & Darling, of Los Angeles, for respondent.

SHENK, Justice.

The respondent moved to dismiss the appeal or affirm the judgment under rule V, § 3.

On July 20, 1935, in Los Angeles county, W. S. Harris filed a petition for relief under the Mortgage and Trust Deed Moratorium Act of 1935 (St.1935, p. 1208). The petition therein showed that in August, 1932, the Imperial Crawford Company executed its note for $67,500 to the Pacific Mutual Life Insurance Company of California. To secure the payment of the note, it also executed a deed of trust on certain lots in Los Angeles county, and certain more extensive lands in Imperial county devoted to agriculture. The petitioner, Harris, succeeded to the rights and liabilities of Imperial Crawford Company on the note and trust deed. A trustee's sale originally noticed for December 16, 1933, became imminent, and on July 20, 1935, the petitioner commenced the present proceeding for an extension of time. The application was resisted by a motion to dismiss the proceedings on the ground that the same should have been commenced in Imperial county, where the major portion of the property was situated (St.1935, p. 1209, § 2), instead of in Los Angeles county; and on the further ground that exclusive jurisdiction in the matter had vested in the United States District Court, Southern District of California, on July 21, 1934, by the filing in that court by the petitioner of a petition in bankruptcy pur-

suant to section 75 of the Bankruptcy Act, see 11 U.S.C.A. § 203 which terminated by a dismissal of the proceeding by the Circuit Court of Appeals on August 5, 1935. Harris v. Prudential Ins. Co., 78 F.(2d) 849. The motion was granted on both grounds and judgment of dismissal of the application for an extension of time was entered on August 29, 1935.

[1, 2] The dismissal of the proceeding for relief under the Moratorium Act is fully supported on the ground that the subject-matter was within the exclusive jurisdiction of the United States District Court in the proceeding pending therein at the time the application herein was filed. Security First National Bank of Los Angeles v. Superior Court (Cal.App.) 55 P.(2d) 532. Furthermore, the question whether the major portion of the property covered by the deed of trust was located in Imperial county was one to be determined primarily by the trial court on the application for the extension of time. No showing is made that the court erred in its conclusion that the agricultural lands in Imperial county formed the major portion of the property involved, and that the petition should have been filed in that county.

The motion is granted and the order is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; CONREY, J.; LANGDON, J.



6 Cal.2d 433

DALZELL v. STATE BAR OF CALIFORNIA.

L. A. 15541.

Supreme Court of California.

May 26, 1936.

Rehearing Denied June 25, 1936.

1. Attorney and client ⇐44(2)

Contract of employment as attorney to take necessary legal steps to collect clients' interests in decedent's estate for fee of 25 per cent. of "amount recovered" *held* to warrant attorney's retention of only such percentage of amount actually collected for clients, so as to require his disbarment because of retention of and failure to account to clients for larger sum collected, as against contention that his additional charges were proper for services performed in effort to realize on judgment obtained by him for clients.

2. Attorney and client ⇐36(1)

Committee of State Bar and Supreme Court have jurisdiction to hear and determine charges against member of Bar in disciplinary proceedings.

3. Attorney and client ⇐53(1)

State Bar Committee, hearing charges against attorney, did not err in permitting inquiry into possible antecedent disciplinary proceedings against him.

In Bank.

Disciplinary proceedings against William C. Dalzell, an attorney. The State Bar of California recommended respondent's disbarment, and he petitions for review.

Petitioner ordered disbarred from the practice of the law.

W. C. Dalzell, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

WASTE, Chief Justice.

The State Bar of California has recommended that petitioner, a member thereof, be disbarred from the practice of the law. This recommendation, and the charges and findings upon which it is based, arose out of the following facts:

In 1918 Florence Ferguson Shoemaker died testate, leaving a life estate in her property to Samuel M. Ferguson, and upon his death the property was to pass to the direct offspring of O. W. Ferguson, and if none, then equally to her nephews and cousins. Her estate was accordingly distributed. Thereafter and in 1928 the life tenant died and his wife, Henrietta Ferguson, was appointed executrix of his estate. She died approximately one year later, whereupon Evelyn Fessenden was appointed administratrix with the will annexed of the estate of the life tenant, Samuel Ferguson, and was subsequently appointed executrix of his deceased wife's estate. In 1929, and pursuant to the decree of distribution entered in the estate of Samuel Ferguson, all of the assets of that estate, including certain of the assets in which he had a life estate un-

der the will of Florence Ferguson Shoemaker, were distributed to Evelyn Fessenden as executrix of the estate of Henrietta Ferguson.

At the time of the death of the life tenant no direct offspring of O. W. Ferguson survived who might take under the will of Florence Ferguson Shoemaker, and consequently under the terms of her will the remaining assets of her estate vested in several surviving nephews and cousins. In due time all of these heirs employed petitioner to recover for their use and benefit the assets, or the proceeds thereof, distributed to the life tenant under the will of Florence Ferguson Shoemaker.

The terms of the employment were identical in each instance and are set forth in letters addressed to the petitioner, reading as follows:

"I have been advised that I have a one-eighth undivided interest in the property of Florence Ferguson Shoemaker, according to the decree of distribution in her estate, and that it will be necessary for some legal action to be taken in order to secure this interest, and I desire to employ you to take whatever legal steps may be necessary to *collect* this interest for me. I understand that the other seven beneficiaries in said estate are also retaining you.

"In case you accept this offer, I authorize you to take whatever legal steps may, in your opinion, be deemed necessary to protect and secure my interests, and agree to pay you, as your compensation for your services in this matter, 25% of the *amount recovered,* either in settlement, compromise, adjustment, suit or otherwise, and authorize you to deduct this amount from the *amount of recovery.*"

Petitioner accepted the employment and entered upon an investigation to identify the assets included in the estate of Henrietta Ferguson as being the assets or proceeds of assets distributed to the life tenant in the will of Florence Ferguson Shoemaker. On behalf of his several clients petitioner thereupon brought an action against the executrix of the estate of Henrietta Ferguson for an accounting and for other relief in relation to said assets. Judgment was entered on October 23, 1930, in favor of the plaintiffs therein for $18,827.25, and the defendant Evelyn Fessenden, as executrix of the estate of Henrietta Ferguson, was directed to pay forthwith to the plaintiffs the sum of $5,724.67, representing the cash in her possession as such executrix, and was further directed to convert into cash certain other assets and to pay over to plaintiffs out of the proceeds thereof the balance of the judgment. No appeal was taken and this judgment became final. Up to this point no complaint was ever made of petitioner's services and the board of governors approved the finding of the local committee that petitioner had performed the same with diligence and skill.

On the day following the entry of the judgment in favor of petitioner's clients, the executrix of the estate of Henrietta Ferguson paid to the petitioner $4,500 in cash for the use of his clients. Petitioner did not advise his clients that he had received this sum on account of the judgment, but instead entered a charge upon his records against his clients in the sum of $4,706.81, representing 25 per cent. of the amount for which judgment had been entered, and applied the $4,500 received to his own use in partial payment of the fee so computed and toward an additional charge of $160 which he had entered upon his books for services in connection with his investigation incidental and preliminary to the commencement of the action above mentioned.

Thereafter and on January 7, 1931, acting on behalf of his clients, the petitioner undertook to have the executrix of the estate of Henrietta Ferguson removed. He accomplished his objective and succeeded in having himself appointed administrator of that estate, representing to the probate court that if appointed he would not claim any fee as administrator or as counsel for such administrator. He testified that this representation was made "to induce the court to grant me the letters." However, he entered a charge of $150 against his clients upon his records for services rendered by him in connection with this matter. He attempts to explain the same on the ground that he merely waived any charges in connection therewith only so far as the estate was concerned but not as against his clients. Shortly thereafter he entered a charge of $200 on his books for services rendered in opposing the allowance of fees to the removed executrix and her attorney.

Pending the removal of said executrix and on March 26, 1931, petitioner received from her the further sum of $2,835.50 on account of the judgment he had procured for his clients. On receipt of this sum petitioner for the first time advised his clients of the receipt of any money on their behalf and forwarded to each of his several clients a check for $200, retaining the balance

pending the adjustment of the fees claimed by the executrix whose removal was then being sought. Within a short period of time petitioner had said executrix removed and himself substituted as administrator with the will annexed, whereupon he procured the confirmation of the probate court of the sale by him, as administrator, to his clients of certain assets of the estate for the sum of $6,350, which was offset against the judgment above mentioned. A charge of $250 was entered on his books for this service. Three days thereafter the removed executrix delivered to petitioner as administrator all other assets of the estate remaining in her hands. He received and expended certain other amounts and on May 22, 1931, forwarded to his clients an aggregate of $900. On October 10, 1931, the probate court confirmed the sale of certain real property in the estate to petitioner as "trustee" for his clients apparently to facilitate the realization of the amount due under the judgment. Here, again, petitioner entered a charge on his records against his clients of $200 for services in connection therewith. Along about this same time and up until June 20, 1933, he received certain other amounts, made certain expenditures, entered on his records several additional charges for services, aggregating the sum of $1,359.34, and remitted to his clients $2,250.

During his employment, covering the period from August, 1929, to October, 1933, petitioner received from all sources in excess of $12,000. The fees and costs charged and offset by him against the collections aggregated in excess of $7,000 and but $4,950 was remitted to his clients. At no time during the four years of his employment did he render any report or account of his transactions—receipts or disbursements—until October, 1933, when required to do so upon request of an attorney employed by his (petitioner's) clients to procure such an accounting. The statement of account furnished by petitioner proved unsatisfactory, whereupon an action for an accounting was instituted against petitioner by his clients. It was subsequently stipulated therein that judgment should be entered against petitioner in the sum of $3,300 and costs, of which amount, according to the statement in respondent's brief approximately $3,000 still remains unpaid.

Disciplinary proceedings were instituted against petitioner wherein, following several hearings, it was found that without the knowledge of his clients he had charged and collected fees in excess of those authorized by the contract of employment and had failed over a period of years to account for the amounts collected or disbursements made by him on behalf of his clients and that he had improperly appropriated a substantial portion of such collections to his own use in the guise of fees. By reason thereof he was found to have violated his oath and duties as an attorney and to have been guilty of conduct involving moral turpitude. Based on these findings, it has been recommended, as stated above, that he be disbarred from the practice of the law.

[1] Petitioner admits that he had no agreement for compensation with any of his several clients other than the one above set forth. He urges, however, in attempted justification of his conduct, that his duties under the contract of employment were wholly performed when the judgment he procured for his clients had become final. In other words, he urges that under his contract of employment, as interpreted by him, he had earned and was entitled to collect his 25 per cent. fee upon the procurement of the $18,827.25 judgment in favor of his clients and against the executrix of the estate of Henrietta Ferguson, which fee he contends he properly could, and thereafter did, discharge from the first moneys coming into his possession under said judgment. In support of this contention he went so far as to testify that in his opinion if only 25 per cent of the judgment had been realized he would have been warranted in retaining the entire amount so collected, to the complete exclusion of his clients. Carrying his theory to its logical conclusion, he insists that the charges made by him in excess of 25 per cent. were proper for the additional services performed on behalf of his clients in an effort to realize on the judgment he had procured for them.

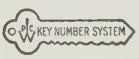
The construction placed on the contract of employment by petitioner is unreasonable and strained. As appears from the contract above quoted, he was employed to take whatever legal steps were necessary "to collect" the interests of his several clients in the estates above mentioned, for which he was to be paid "25 per cent. of the amount recovered," which fee was to be deducted "from the amount of recovery." As we read the contract, it can only be interpreted to warrant the retention by petitioner of 25 per cent. of the amount collected by or realized for his clients. In view of petitioner's unwarranted overcharge of his clients and because of his failure to account to them over

a period of several years, we are satisfied that disciplinary action is required in this case.

[2, 3] We find no merit in petitioner's contentions challenging the jurisdiction of the committee of the State Bar and of this court to hear and determine the charges filed against him. Nor do we perceive any error in permitting inquiry into possible antecedent disciplinary proceedings against an accused attorney. Marsh v. State Bar, 2 Cal.(2d) 75, 80, 39 P.(2d) 403; McCue v. State Bar (Cal.Sup.) 47 P.(2d) 268.

It is ordered that petitioner be disbarred from the practice of the law in all the courts of this state.

We concur: CURTIS, J.; SHENK, J.; LANGDON, J.; THOMPSON, J.



6 Cal.2d 416

LOEB v. CHRISTIE.

L. A. 15726.

Supreme Court of California.

May 21, 1936.

1. Guaranty ⇐77(3)

Payee could recover from guarantor of note secured by trust deed without first exhausting security, notwithstanding statute restricting obligation of guarantor to that of principal, since guarantor's obligation was not thereby made more burdensome than principal's (Civ.Code, § 2809; Code Civ.Proc. § 726).

2. Guaranty ⇐78(1)

Economic depression *held* not to constitute equitable defense to action to enforce liability of guarantor of note.

3. Action ⇐9½

Moratorium statute *held* not to bar action to enforce liability of guarantor of note on guaranty executed prior to effective date of statute (St.1934, Ex.Sess., p. 3, § 7).

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Edwin J. Loeb against H. H. Christie. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 51 P.(2d) 1133.

Sparling & Teel, of Los Angeles, for appellant.

Loeb, Walker & Loeb, Milton H. Schwartz, and Herman F. Selvin, all of Los Angeles, for respondent.

WASTE, Chief Justice.

Defendant appeals from a judgment entered against him in an action based on an unconditional guarantee of a promissory note payable to plaintiff, which guarantee was executed May 19, 1930. The note so guaranteed by defendant was secured by a trust deed and at the time of this suit the power of sale therein given had not been exercised by the plaintiff.

[1] It is first urged that an action will not lie against a guarantor of a secured obligation until the security has been exhausted. On many occasions it has been declared by this court to be the rule that the guarantor's liability may be enforced without first resorting to the mortgage security. Adams v. Wallace, 119 Cal. 67, 70, 71, 51 P. 14, 15; San Francisco, etc., Seminary v. Monterey, etc., Co., 179 Cal. 166, 172, 175 P. 693; Kinsel v. Ballou, 151 Cal. 754, 760–762, 91 P. 620; Carver v. Steele, 116 Cal. 116, 119, 47 P. 1007, 58 Am.St.Rep. 156; Cooke v. Mesmer, 164 Cal. 332, 340, 128 P. 917; Martin v. Becker, 169 Cal. 301, 305–307, 146 P. 665, 667, Ann.Cas.1916D, 171. In the case first cited it is declared that, "if she be a guarantor for the payment of the debt upon default, then (it would matter not whether there were other security, as by mortgage, for the payment of that debt) the principal creditor would have the right to prosecute his action against the guarantor without proceeding to realize upon other securities, or without going into equity to foreclose his mortgage." The case last cited points out that " 'the mortgage only affects the remedy against the mortgagor' or primary debtor." We perceive of no sound reason for the application of a different rule where the security has assumed the form of a trust deed rather than a mortgage. In Withers v. Bousfield, 42 Cal.App. 304, 319, 183 P. 855, 862, wherein we denied a hearing, it was held that a suit would lie against the guarantor of a note secured

by an instrument in the nature of a trust deed without first exhausting the security. It is there declared: "This case presents no different aspect from the foregoing, and numerous other cases, decided by the courts of last resort of this state, in which it has been held that, regardless of the necessity for exhausting the security given, before resorting to the personal liability of the maker of a note, nevertheless an indorser or guarantor, may be sued upon his personal liability before, and without, such action having been taken."

Appellant urges that the decision in the case last cited antedated our determination of Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940. In the Bentley Case we merely held, in effect, that as in the case of a mortgage, the land is intended under a trust deed to constitute the primary fund to secure the debt, thereby requiring a valid sale of the land as a prerequisite to the maintenance of a suit against the maker on the note. This always has been the rule in connection with a note secured by mortgage (section 726, Code Civ.Proc.), but we nevertheless held, in the several cases above cited, that the guarantor of such a note may upon default be directly proceeded against without the preliminary formality of a foreclosure sale. In our opinion, the logical effect of the Bentley decision upon the problem here presented is to suggest, as in the case of the note secured by mortgage, an action against the guarantor without the necessity of a prior sale of the land. The Bentley Case can afford no comfort to appellant.

Nor do we find anything in section 2809 of the Civil Code that requires a result different from that herein announced. The section reads: "The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation." This section has been in the Code since 1872 and its presence there in no way influenced the disposition of the several cases above referred to wherein it was held that an action would lie against the guarantor of a note secured by mortgage without the necessity of first foreclosing the mortgage. It is no answer to say that the section was overlooked in the decision of the above cases, for this argument would appear to be refuted by the reference to the section in Cooke v. Mesmer, supra, 164 Cal. 332, 334, 128 P. 917. Moreover, in Adams v. Wallace, supra, 119 Cal. 67, 69, 51 P. 14, 15, wherein it was urged upon appeal by the guarantor that the trial court erred in rejecting evidence tending to show that the guaranteed note was secured by mortgage, this court held that the guarantor "had bound herself for the payment of the note, and not for the payment of any deficiency which might result after the exhaustion of other security."

Our conclusion does not cause the guarantor's obligations to be any heavier or more burdensome than that of the principal or maker of the note. The fallacy in appellant's theory is traceable to the erroneous premise upon which it is based. He confuses the obligation of the principal or maker of a mortgage or trust deed note with the remedy to enforce such obligation. The liability of the principal or maker of a note secured by mortgage or trust deed is for the face amount of the note and is not simply for any deficiency remaining after foreclosure or sale, as appellant assumes. A mortgage, trust deed, or any other security is merely a fund which the principal or maker of the note makes available for the performance of his obligation to pay. Though the mortgage or trust deed security becomes the primary fund for the discharge of the indebtedness, by virtue, respectively, of the provisions of section 726 and Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, supra, they merely remain a source from which the obligation of the principal or maker is to be repaid. The principal debtor remains liable at all times for the full amount of the obligation and may be compelled to pay it, first out of the security, and thereafter out of his general assets. The obligation of the guarantor is no heavier or more burdensome, since he is liable for as much as, but no more than, the principal debtor or maker of the note, viz., the face value of the note. All that differs is the remedy against the guarantor, but, under the authorities above cited, the obligation of the guarantor is separate and independent from that of the principal debtor, and the fund which the latter may have supplied for payment of his own obligation is not necessarily or logically available to the guarantor. As stated in one of the above-cited cases, the mortgage only affects the remedy against the mortgagor or primary debtor.

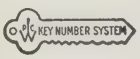
[2] Appellant's contention that the economic depression constitutes an equitable defense to the action is adversely disposed of by the decision in California Securities

Co. v. Grosse, 3 Cal.(2d) 732, 46 P.(2d) 170.

[3] It is also urged by appellant that section 7 of chapter 1 of an act of the Extra Session of the 1934 Legislature, effective September 15, 1934, commonly known as the Moratorium Act of 1934, is a bar to this action. Since the filing of appellant's briefs in this cause, we have handed down our decision in the case of Brown v. Ferdon, 54 P.(2d) 712, and companion cases. Our holdings in these cases necessarily preclude the retroactive application of section 7 of the Moratorium Act of 1934, which undertakes to prohibit the commencement of an action against the guarantor "of any note secured by a mortgage or deed of trust upon real property in any case while by virtue of any law no sale may be made under any power of sale contained in such mortgage or deed of trust." To hold otherwise would be to impair the obligation of a contract and render the act unconstitutional. The guarantee, which is the basis of this action, was executed in 1930, while the act relied upon as a defense did not become effective until 1934.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.



6 Cal.2d 448

PEOPLE v. KELLOGG.

Cr. 3936.

Supreme Court of California.

May 26, 1936.

1. Homicide ⊂=253(1)

Evidence *held* to support verdict that defendant was guilty of first degree murder.

2. Indictment and information ⊂=139

Denial of motion to set aside information charging murder made after defendant entered his pleas *held* not abuse of discretion, where defendant was not illegally committed and was not charged without probable cause, and did not request permission to withdraw pleas for purpose of making motion (Pen. Code, § 995).

3. Homicide ⊂=339

Refusal to permit character witness to state whether he knew general reputation of deceased for peace and quiet when deceased was intoxicated *held* not harmful to defendant charged with murder, where there was no evidence that deceased was intoxicated at time of killing and witness had previously stated that he did not know deceased's general reputation for peace and quiet.

4. Homicide ⊂=300(7)

In murder prosecution, refusal to instruct jury that evidence of bad reputation and quarrelsome and violent nature of deceased had been introduced *held* not error, where evidence was insufficient upon which to base such instruction.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

John Kellogg was convicted of first degree murder, and he appeals.

Affirmed.

Tom Okawara and Gerald H. Catania, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., Paul D. McCormick and R. S. McLaughlin, Deputy Attys. Gen., and Dan F. Conway, Dist. Atty., and James M. Thuesen, Deputy Dist. Atty., both of Fresno, for the People.

SHENK, Justice.

The defendant was charged with the murder of Curtis William Hupp on June 9, 1935, in the county of Fresno, and with a prior conviction in January, 1933, in the same county, of second degree burglary, a felony, for which he served a term of imprisonment. He entered pleas of not guilty and not guilty by reason of insanity to the homicide charge, but admitted the prior conviction. He subsequently withdrew his plea of not guilty by reason of insanity. He was convicted of murder of the first degree without recommendation. From the judgment imposing the death penalty and from the order denying his motion for a new trial he has appealed.

The deceased, Hupp, a white man, was last seen alive on Sunday, June 9, 1935, in the company of the defendant, a negro of about 21 years of age. On the afternoon of that day the defendant drove Hupp in

the former's Essex automobile twice to the home of Hupp's father-in-law, about three miles northwest of Fresno, where Hupp's wife was residing. On the first trip Hupp's wife was not at home, but on the second trip Hupp saw and conversed with his wife. There is evidence from which the jury could believe that at that time Hupp had money on his person consisting of silver and a roll of bills, at least one of which was of the denomination of $10. About eight days later officers inspected the farmhouse where the defendant lived with his father and sister. They found evidence that blood on the floor of the living room, kitchen, back porch, and on the ground in the rear of the house had been partially cleaned away, and that a rug or piece of carpet, a man's hat, and a gunny sack had been burned on the ground across the driveway from the house. The defendant was questioned and made five separate statements, three of which were taken down by a phonographic reporter and transcribed. All of these statements appear to have been voluntarily and freely given and without any promise of immunity. It also appears that at all times when he was examined he was fully advised of his rights and that his statements might be used against him. The three written statements were introduced in evidence. In the first the defendant related that when he came into his house alone on the afternoon of Sunday, June 9th, he saw a large cat getting at the meat on the kitchen stove; that he chased the cat around the kitchen, bedroom, and living room, and killed it with a stick or bat; that the cat bled profusely; and that he carried it by the tail to the rear of the house and wrapped it in burlap, put it in the back of the Essex automobile, and took it to, and threw it into, an irrigation ditch at Haynes avenue and Belmont near the city of Fresno. He admitted, however, that he told his sister that he had had a fight with a man; that his sister assisted him in washing the floors and removing blood in and outside of the house, and told him to burn a blood-stained rug, which he did. There was blood on the Essex, and one of the rear side windows was broken. This was explained by the defendant's statement that before he arrived home he drove an intoxicated man to Chinatown, and that as he turned a corner the man bumped his head against the window, breaking it, and that blood from the cuts dripped on the car.

In the second statement the defendant stated that he had had a fight at his home with a colored man by the name of Clarence, which was instigated by some insulting remarks made by "Clarence" about the defendant's sister; that the blood found on the premises issued from the cuts which "Clarence" received first from a grape knife which the defendant picked up, and then from his use of a stick or bat with which he knocked "Clarence" unconscious; that he dragged him outside and poured water on him to revive him, without success, and then, becoming scared, he wrapped him in burlap and put him, unconscious but still breathing, in the back of the Essex to take him to the hospital, but that "Clarence" revived and started to fight again, whereupon "Clarence" opened the door of the car, alighted, and walked away. He admitted, however, that he had told "Jackie," his sister's friend, that he had had a fight with a white man. He also admitted that the story about killing the cat was not true. In this second account he stated that the automobile glass broke when he stopped the car and the fight recommenced, and that this also accounted for the blood on the car.

On June 18th the body of Curtis William Hupp was taken out of the ditch at the location hereinbefore mentioned, in the presence of the defendant, who took the officers to the spot, and who identified the corpse as the body of a man he had wrapped in burlap and thrown into the ditch on June 9th. In the third written statement, made later that day, the defendant admitted that he twice drove Hupp to the latter's father-in-law's residence. He stated that he had not known Hupp before that day; that the deceased offered to put some gas in the defendant's car if he would drive him to his father-in-law's home; that between the two trips to that place Hupp spent his last money for four bottles of beer, and that after the second trip the defendant took him to his own house, where they had some wine; that thereupon Hupp began making improper advances to the defendant, which angered him; that Hupp threatened him with the grape knife, and that the defendant then ran to the woodbox where he found the stick or bat; that Hupp started to fight, and that he (the defendant) then hit him with the bat and "hit him pretty hard"; that Hupp fell down unconscious; that he then dragged the deceased out through the kitchen to the ground, poured water on him

to revive him, but, failing in this attempt, he then placed a "gunny" sack over his head, put the body in the Essex, drove to the irrigation ditch and rolled the body into it; that the glass broke by the door flying open and slamming as he was driving away with the body; that he thought the man's first name was "Clarence," but he admitted that it might have been Curtis.

There was testimony from which the jury could conclude that, when the body of Hupp was taken from the ditch, a watch which he carried was gone, that he had no money on him, and that the pockets of his clothes were turned inside out. In this last statement the defendant denied that he had searched Hupp's pockets. The evidence is conflicting as to whether the defendant had any money on Sunday morning, but there is evidence that he was not paid his wages on Saturday night, and that he admitted on Sunday morning that he had no money, although his father testified that he saw $5 then in his possession, and his mother testified that she had given him $2.50, and there is further evidence that he received $1.80 for some work previously done. There is also evidence that on Sunday evening the defendant paid a garage bill for replacing a bearing that he had "knocked out" that day.

The defendant did not testify on his own behalf. His counsel sought to defend the charge on the theory that the defendant killed Hupp in self-defense. The defendant in his first statement said that he received a cut or scratch found on his back by scraping his back on the bed-spring when he crawled under the bed in his chase after the cat. According to another account, the scratch was received when "Clarence" threw him against the bed. In the last account the wound was ascribed to the handling of the grape knife by Hupp. Although the defendant claimed to have received cuts on his hands in the fight, there is contradictory evidence that no wounds or cuts except the wound or scratch on his back were seen by those who had occasion to observe him on the same day and succeeding days. His mother testified that she saw fresh blood on his right hand that evening, and the physician who examined the defendant when he was arrested testified that a healed wound or scar on the right wrist and another on the third finger of the right hand could have been inflicted about eight days previously.

The autopsy surgeon testified that the deceased, Hupp, received five blows on the back of his skull which resulted in lacerated wounds extending through the soft tissue to the bone, and severe enough to induce unconsciousness, and that those wounds were the cause of death which would have occurred within a few minutes after their infliction; also that there were four wounds caused by blows on the front of the head, and that the sixth cervical vertebra of the neck was fractured; that the blows on the head caused numerous fractures extending all over the skull, and indicated that they were struck by a "blunt angled instrument"; that the fractured vertebra was likely to have been caused by a fall. The body when found was waterlogged, but there was no water in the lungs and no indication that the deceased died from drowning. There was no question of the identification of the body as that of Curtis William Hupp.

[1] The trial court appears to have accorded to the defendant every possible advantage in full and fair instructions on the law of self-defense in homicide cases. No contention is made, and under the facts here presented no contention may properly be made, that there is insufficient evidence to support the implied finding of the jury that the defendant did not strike the death blows in self-defense. The jury's verdict of guilty of murder of the first degree is also indubitably supported by the evidence, the substance of which has been related. Indeed, no serious contention to the contrary is advanced by the defendant. The motive was indicated as the acquisition of the money and valuables which the jury could have believed Hupp had on his person, and the extent of the punishment was for the jury to determine.

[2] The defendant contends that the court erred in denying his motion to set aside the information made on the ground that he was not legally committed by the magistrate. The preliminary hearing was originally set for July 5, 1935, but was advanced to June 19th on the promise of the officers to release the defendant's father and sister, who were also held. It is insisted that the defendant consented to the preliminary hearing on June 19th without being afforded an opportunity to procure counsel or being furnished with a copy of the complaint or being informed of his legal rights. The record shows that the de-

fendant came into court for the purpose of arraignment on June 20, 1935, and that he was then informed of his rights, that, on motion of the attorney appointed to defend him, arraignment was postponed to June 22d, that on June 22d the defendant with his counsel came into court, and that at that time a copy of the information was delivered to the defendant, the reading of which was waived by him, and that the time for entering his plea was continued to June 28th. The record also shows that on July 1, 1935, the defendant with his counsel came into court and entered his pleas, and that July 29th was set as the time for trial. The defendant made his motion to set aside the information on July 12th. The ground upon which an information must be set aside by the court is stated in section 995 of the Penal Code to be that, before the filing of the information, the defendant had not been legally committed by a magistrate. There is no showing that the defendant was illegally committed or that the defendant was charged without probable cause. The defendant's petition for the writ of habeas corpus, made on the grounds now urged, was denied by this court on July 22, 1935. Furthermore, the motion to set aside the information was made after the defendant entered his pleas. No request was made for permission to withdraw the pleas for the purpose of making the motion, and there is no showing of any abuse of discretion on the part of the trial court in denying the motion. People v. Magee, 60 Cal.App. 459, 462, 213 P. 513; People v. Linton, 102 Cal.App. 608, 611, 283 P. 389.

[3, 4] It is also contended that the trial court erred in sustaining an objection to the following question put to a character witness by the defendant's counsel: "Do you know the general reputation of the deceased, Curtis William Hupp, in the community in which he lived for peace and quiet when Curtis Hupp is intoxicated?" The defendant relies on the case of People v. Lamar, 148 Cal. 564, 83 P. 993, wherein under the facts of that case it was held error for the court to sustain objections to a similar question. In the present case, however, there was no sufficient showing that Hupp was intoxicated at the time, and it further appears that the witness to whom the question was addressed had already answered the question whether he knew the deceased's general reputation in the community for peace and quiet, to the effect that he did not know. In this state of the record there was no harm done to the defendant by the ruling of the court on the further question put to the same witness. We also conclude that there was no error in the trial court's refusal to instruct the jury that evidence of the bad reputation of the deceased and of his quarrelsome and violent nature had been introduced. The evidence was insufficient upon which to base the proffered instruction.

The judgment and the order denying the motion for a new trial are, and each is, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; LANGDON, J.



6 Cal.2d 414

PHILLIPS et al. v. RILEY, Controller.

S. F. 15657.

Supreme Court of California.

May 21, 1936.

States ⇐34

Constitutional provision limiting amount that might be paid for additional help for Legislature *held* to relate only to legislative session proper, and not to prohibit payment of reasonable expenses necessarily incurred in investigations by interim legislative committee appointed by joint action of both Houses to investigate problems connected with agricultural marketing (Const. art. 4, § 23a).

In Bank.

Petition for a writ of mandate by John Phillips, as chairman of the Interim Committee appointed to investigate problems connected with the marketing of agricultural products, known as the "Assembly Committee on Agricultural Marketing," and others, against Ray L. Riley, as Controller of the State of California.

Writ of mandate issued.

Knight, Boland & Riordan, of San Francisco, for petitioners.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

W. P. Rich, of Marysville, Fred B. Wood, of San Francisco, Charles W. Lyon, of Los Angeles, and Ralph E. Swing and Swing & Swing, all of San Bernardino, amici curiæ.

U. S. Webb, Atty. Gen., for respondent.

WASTE, Chief Justice.

The petitioner John Phillips, as chairman of the Interim Committee appointed to investigate problems connected with the marketing of agricultural products, known as the "Assembly Committee on Agricultural Marketing," and others, are here seeking a writ of mandate to compel the respondent controller of state to draw, execute, and deliver warrant for the payment of claims for services incurred by the special committee of the State Legislature appointed to investigate the problems connected with the proper marketing of agricultural products of the state. The due appointment of the committee by joint action of both Houses of the Legislature is not challenged, nor is it charged that the committee has not full power and sufficient authority to carry out the letter and spirit of the resolutions creating it. In the interim between the close of the legislative session of 1935 and the convening of the session of 1937, the committee is pursuing the required investigations and studies necessary for the proper discharge of its duties. In the performance of these duties, the committee has incurred certain expenses deemed by it to be necessary and proper, and reasonable in amount. The respondent refuses to draw warrants for the amount of the claims for the sole reason that, in his view, to do so would violate the provisions of section 23a of article 4 of the state Constitution.

That section does not, in our opinion, apply to these claims. So far as here material, it reads as follows: "The legislature may provide for additional help; but in no case shall the total expense for officers, employees and attachés exceed the sum of three hundred dollars per day for either house, at any regular or biennial session, nor the sum of two hundred dollars per day for both houses at any special or extraordinary session, nor shall the pay of any officer, employee or attaché be increased after he is elected or appointed."

We concur in an opinion but recently rendered by the Attorney General in advising a member of the State Senate on the precise question raised by this petition for the writ of mandate. We quote. "Section 23a of article 4, in our opinion, relates only to officers, employees or attaches of the legislature engaged in work in connection with the legislative session proper, including post-session services, but does not prohibit the employment by interim committees of such additional help as may be found necessary, provided that the entire expense of such committee does not exceed the amount of money set apart to it by the resolution creating it. Any other construction of that section, it seems to us, would, as a practical matter, render the work and studies of any such committee inadequate. In extensive investigations and studies phonographic reporters' services, for example, might be indispensable if the committee is to function with a proper degree of usefulness and efficiency." Any attempt to erect the section as a bar to recovery on the claims now before the court, or similar demands reasonable in amount, and shown to be necessary, is to apply a forced and unnecessary construction on plain and unambiguous language. We are not unmindful of the langage used by the District Court of Appeal in Hilborn v. Nye, 15 Cal.App. 298, 114 P. 801, and relied on with some assurance by respondent. The factual setup there and here are vitally different. The claims there considered were for services rendered by duly appointed "officers, employees and attaches" of the Legislature in closing up the work of the *regular* session. Further than to hold that such claims fall within the constitutional limit, the holding in the decision is mere dicta.

Let a writ of mandate issue as prayed for.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.

6 Cal.2d 408

ROBERTSON et al. v. HARTMAN et al.

S. F. 15356.

Supreme Court of California.

May 21, 1936.

1. Corporations ⇐298(5)

Where stockholders adopted resolution changing number of directors of corporation from five to nine, but no actual change in number of members who served as board of directors was ever effected, three of the five directors who continued to act as board constituted quorum and were empowered to authorize, at meeting of board, execution of binding trust deed on corporate property.

2. Corporations ⇐477(2)

Duly elected directors of corporation constituted proper board of directors, empowered to authorize execution of trust deed on corporate property, until election and qualification of their successors.

3. Corporations ⇐477(8)

Trust deed on corporate property could not be attacked by third party because its execution was authorized by less than quorum of directors of corporation or because director was interested in transaction, where neither corporation, its stockholders, nor any party to trust deed sought to avoid transaction, since trust deed was not void, but at most voidable at behest of corporation or its stockholders.

In Bank.

Appeal from Superior Court, San Mateo County; Maurice T. Dooling, Jr., Judge.

Action by John H. Robinson and another against E. A. Hartman and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Shelton, Gray & MacWilliams, of San Francisco, and Miller & Ellis and W. A. Alderson, all of Los Angeles, for appellants.

Sterling S. Carr, of San Francisco, for respondents.

PER CURIAM.

In this action to quiet title to certain lands in San Mateo county, the plaintiffs had judgment and the defendants appealed.

The common source of the titles claimed by the parties is the Capuchino Golf Corporation, which acquired a tract of land for the purpose of laying out a golf course and subdividing and selling the land adjacent thereto for residential purposes. The corporation engaged the defendant Stansbury Contracting Company to make extensive improvements on the property, for which it became indebted to the contracting company in a large sum for materials and labor, and for money advanced. The contracting company was demanding payment, whereupon the golf corporation agreed to execute promissory notes aggregating $102,626.88, and, as security therefor, a second trust deed on its interest in said property. On May 26, 1928, the president of the golf corporation issued a call for a special meeting of its board of directors, to be held on May 31st at 10 o'clock a. m. at the office of the corporation, and certified that on said 26th day of May he had served a true copy of the call on "each of the directors of the Capuchino Golf Corporation." On May 31st three directors of the golf corporation met at the time and place appointed and adopted a resolution authorizing the corporation to execute said notes and trust deed. Under date of June 1, 1928, the corporation, by its president and secretary, with the corporate seal attached, executed the notes and the trust deed. These instruments were delivered to the contracting company, accompanied by a copy of a resolution of the board of directors of the golf corporation, certified by its secretary to be a correct copy and to have been "unanimously carried" by said board, authorizing the execution and delivery of said notes and trust deed to the contracting company. The trust deed was recorded on June 4, 1928.

Default in the payment of the notes was duly declared by the assignee of the contracting company, the defendant E. A. Hartman, and under proceedings admittedly regular, the trustee sold said land and executed its deed conveying title to said assignee as the purchaser.

Under date of September 24, 1928, the golf corporation executed and delivered a deed conveying to the plaintiffs herein eight lots. These lots were included in the property covered by the trust deed to the contracting company. The plaintiffs claim through that deed, recorded on No-

vember 1, 1928, which was about five months after the trust deed was recorded. They commenced this action on June 12, 1930, which was subsequent to the trustee's deed to Hartman.

The conclusion of the trial court that the defendants' claim of title was invalid was based on its finding that the action of the board of directors of May 31, 1928, and the execution of the notes and trust deed pursuant thereto, were unauthorized and void because the meeting purported to have been held on that date was in fact no meeting of the board of directors and was illegally held.

Practically the sole question on this appeal is whether there is support in fact and in law for the foregoing finding and conclusion. The facts in the record which are claimed to be sufficient support for the finding are the following:

Capuchino Golf Corporation was organized in May, 1926. The articles of incorporation provided for a board of five directors and named the five directors who were to serve for the first year and until the election and qualification of their successors. The same five persons were shown by the articles of incorporation to have been the only subscribers to the capital stock of the corporation to the extent of one share each.

The first meeting of the stockholders of the corporation was held on May 10, 1926. At that meeting the stockholders adopted a code of by-laws which provided for a board of five directors to be elected annually and serve for one year and until their successors should be elected and qualified. The stockholders in meeting elected themselves as the directors for the ensuing year and until their successors should be elected and qualified. This election therefore conformed to the provision of the articles of incorporation, naming the same five men to act as directors for the first year.

On June 1, 1926, the stockholders held a special meeting, at which a resolution was adopted changing the number of directors from five to nine. A certificate to that effect was filed in the office of the secretary of state on June 16, 1926. But, although the above action was taken, no actual change in the number of the members who served as a board of directors was ever effected. The same personnel, with the exception of the substitution of J. B. Rogers for a director who had resigned, constituted the board of directors during all of the period herein mentioned. The corporation continued to function, as from the first, with a board of five directors, and executed contracts of purchase and sale of lands and deeds, and borrowed money, and generally so carried on its business with no notice taken even by itself of the proceeding initiated, but never completed to increase the number of directors from five to nine.

[1, 2] The minutes of the directors' meeting of May 31, 1928, showed that three directors, including Rogers, were presented and voted in favor of the resolution of that date authorizing the execution of the notes and trust deed here involved, and that two directors were absent. It is the contention of the plaintiff that the action taken by only three directors, when proceedings had been taken to increase the number of directors to nine, forms sufficient support for the finding of the court that the action of the board was unauthorized and of no effect.

We are, however, unable to find any support for the position taken by the plaintiff or for the conclusion of the trial court. The board of five directors named in the articles of incorporation and elected at the first meeting of the stockholders constituted, with the one exception noted, the same board which on May 31, 1928, acted on the matter of the corporation's indebtedness to the contracting company. There does not appear to have been any other meeting of the stockholders at which directors were elected held prior to that date. Those directors were duly elected to act as such and constituted the proper board of directors until the election and qualification of their successors. Kinard v. Ward, 21 Cal.App. 92, 130 P. 1194.

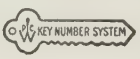
[3] Furthermore, if the action of the directors was irregular for the reasons stated by the plaintiff, it was an act which was not void, but at the most voidable at the behest of the corporation or its stockholders. Neither the corporation, its stockholders, nor any party to the trust deed, sought to avoid the force or effect of the transaction. In such a case the deed of trust must stand as the validly authorized act of the corporation. Wood Estate Co. v. Chanslor, 209 Cal. 241, 286 P. 1001; First National Finance Corp. v. Five-O Drilling Co., 209 Cal. 569, 289 P. 844; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252, and Id.,

134 Cal. 361, 66 P. 317. We must conclude that the finding and judgment of the trial court are without support in the record.

No other facts presented are sufficient upon which to base a finding for the plaintiff or an affirmance of the judgment. The trial court made no specific finding as to when the defendant Hartman became the owner and holder of the notes and trust deed. Stansbury testified that his corporation sold and assigned them to Hartman on March 1, 1929, which was before the maturity of the first note. There was documentary evidence that Hartman became the owner on December 9, 1929, which was subsequent to the maturity date of the first note and the default under the trust deed. Assuming that Hartman was not a holder in due course, that fact would subject him to any defenses which the maker might have had against the payee, but, as indicated by the preceding discussion and conclusion, would not of itself lay him open to the plaintiffs' attack based upon the claimed irregularity in the authority of the officers of the corporation to execute the notes and trust deed.

As justification for the judgment, the plaintiffs also rely upon the fact that about $4,000 of the indebtedness secured by the trust deed was originally incurred in favor of director Rogers. It is asserted that Rogers was therefore an interested party and, as he was a necessary member of a quorum of the board, his participation in the meeting rendered the transaction irregular. It is contended that the necessary participation of an interested director renders the resolution and any act pursuant thereto voidable, relying on Graves v. Mining Co., 81 Cal. 303, 320, 22 P. 665. The correctness of the principle stated in that case is not questioned or disputed. But the records of the golf corporation show that its indebtedness to Rogers was acquired by the contracting company before the meeting of May 31, 1928, when the resolution authorizing the execution of the notes and trust deed was passed. Furthermore, it is also a necessary factor that some act of avoidance or disaffirmance by the corporation or its stockholders must have been made before the claimed ineffectiveness of the attempted authorization is established. New Blue Point Min. Co. v. Weissbein, 198 Cal. 261, 244 P. 325, 45 A.L.R. 781, and cases hereinabove cited. As hereinbefore noted, no such action was taken before the rights of the defendants under the trust deed culminated in a transfer at the trustee's sale duly held pursuant to the provisions of the deed of trust. In accordance with the principles stated in the cases cited, it is now too late to question the validity of the defendant Hartman's title deraigned through the trustee's deed.

The judgment is reversed.



6 Cal.2d 402

CHALMERS-FRANCIS et al. v. NELSON et al.

L. A. 15162.

Supreme Court of California.

May 18, 1936.

Rehearing Denied June 15, 1936.

Physicians and surgeons ⇐6(1)

Licensed and registered nurse, employed by hospital, who administered general anesthetics in connection with operations under direction of operating surgeon and his assistants, *held* not engaged in illegal "practice of medicine" in violation of Medical Practice Act, since nurse was not "diagnosing" or "prescribing" while assisting in surgery and his activities were under control of surgeons (St. 1913, p. 722, as amended).

[Ed. Note.—For other definitions of "Diagnose; Diagnosis," "Practice of Medicine" and "Prescribe," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Allen B. Campbell, Judge.

Suit by William V. Chalmers-Francis and others against Dagmar A. Nelson and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Rehearing denied; CURTIS and LANGDON, JJ., dissent.

Le Roy Anderson and Frank L. Kostlan, both of Los Angeles, and Hartley F. Peart, of San Francisco (Howard Hassard, of San Francisco, of counsel), for appellants.

Mott, Vallee & Grant, John G. Mott and Paul Vallee, all of Los Angeles, for respondents.

Kenneth H. Gould, of Cleveland, Ohio, amicus curiæ for National Ass'n of Nurse Anesthetists.

WASTE, Chief Justice.

Two practicing physicians and surgeons, on behalf of themselves and all other doctors, brought this injunction proceeding to restrain the defendant Nelson, a licensed and registered nurse employed by the defendant hospital, from administering general anesthetics in connection with operations. Such practice by the defendant is asserted to constitute the illegal practice of medicine, in violation of the Medical Practice Act (St.1913, p. 722, as amended). Judgment went for the defendants, and plaintiffs have appealed.

Appellants' arguments are directed to the proposition that defendants are illegally practicing medicine. Respondents contend that the Medical Practice Act is a penal statute, the violation of which will not be enjoined in the absence of a nuisance resulting therefrom. They cite and largely rely upon the recent case of People v. Steele, 4 Cal.App.(2d) 206, 40 P.(2d) 959, 41 P.(2d) 946, 947 (hearing denied in this court), in which it was held that a mere violation of the Medical Practice Act does not constitute a nuisance warranting the issuance of an injunction in the absence of some showing that such asserted illegal practice of medicine is so conducted and carried on as to be injurious to public health, and therefore a nuisance. They overlook, however, the opinion of the District Court filed in denying a rehearing in the case, wherein that court, in distinguishing certain cases cited on petition for rehearing, declared that: "In those cases, holders of licenses to practice a profession were allowed to enjoin unlicensed defendants from practicing the same profession in competition with them. The cases are not in point on the question of the right of the state to enjoin such unlicensed practice." Appellants claim this language would seem to warrant the present type of action. Whether this be so or not is immaterial in this case. The judgment must be affirmed on the merits of the question at issue.

The findings, which are amply supported by the testimony in this case, show conclusively that everything which was done by the nurse, Dagmar A. Nelson, in the present instance, and by nurses generally, in the administration of anesthetics, was and is done under the immediate direction and supervision of the operating surgeon and his assistants. Such method seems to be the uniform practice in operating rooms. There was much testimony as to the recognized practice of permitting nurses to administer anesthetics and hypodermics. One of the plaintiffs' witnesses testified to what seems to be the established and uniformly accepted practice and procedure followed by surgeons and nurses, and that is that it is not diagnosing nor prescribing by the nurses within the meaning of the Medical Practice Act. We are led further to accept this practice and procedure as established when we consider the evidence of the many surgeons who supported the contention of the defendant nurse, and whose qualifications to testify concerning the practice of medicine in this community and elsewhere were established beyond dispute. That such practice is in accord with the generally accepted rule is borne out by the decided cases. Frank v. South, 175 Ky. 416, 194 S.W. 375, Ann. Cas.1918E, 682; Underwood v. Scott, 43 Kan. 714, 23 P. 942. While these two cases construe provisions of statute law specifically relating to the practices and duties of registered nurses, they are in agreement with the definitely established rule relating to the subject. Frank v. South, supra; In re Carpenter's Estate, 196 Mich. 561, 162 N.W. 963.

Aside from the proposition that nurses in the surgery during the preparation for and progress of an operation are not diagnosing or prescribing within the meaning of the Medical Practice Act, it is the legally established rule that they are but carrying out the orders of the physicians to whose authority they are subject. The surgeon has the power, and therefore the duty, to direct the nurse and her actions during the operation. Armstrong v. Wallace, 8 Cal.App.(2d) 429, 439, 47 P.(2d) 740; Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(N.S.) 505, Ann.Cas.1915C, 581.

The judgment is affirmed.

We concur: CONREY, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.

6 Cal.2d 421

MOORE et al. v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al.

S. F. 15579.

Supreme Court of California.

May 22, 1936.

Rehearing Denied June 19, 1936.

Injunction ⊜75

Under statute requiring fish and game commission to limit taking of fish so as to prevent waste and depletion, commission could not be enjoined from granting unequal allotments of fish to canneries, since canneries had adequate legal remedy in mandamus to compel granting of permit sought, notwithstanding delay occasioned by mandamus proceeding would cause irreparable damage by reason of shortness of fishing season (St. 1933, p. 486, § 1068).

In Bank.

Original petition for a writ of prohibition by E. C. Moore, C. E. Houchin, I. Zellerbach, as and constituting the Fish and Game Commission of the state of California, and others against the Superior Court of the state of California, in and for Contra Costa County, and the Honorable Thomas D. Johnston, judge of said superior court.

Writ granted.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for petitioners.

Tinning & De Lap, of Martinez, and Walter Slack, of San Francisco, for respondents.

LANGDON, Justice.

This is a petition for a writ of prohibition.

In 1933 the Legislature enacted section 1068 of the Fish and Game Code (St.1933, p. 486), authorizing the fish and game commission to grant permits for the taking of fish for reduction or extraction purposes. Under the statute the commission is required to limit the taking of fish so as to prevent waste or depletion of the species. In granting permits to various persons during the seasons of 1933–1934, and 1934–1935, the commission made equal allotments among the various plants. For the 1935–1936 season, however, the commission determined that permittees who had not theretofore engaged in the business should be permitted to take only half the amount allowed to those previously operating. Accordingly, after determining the total allowable tonnage, the commission gave permits to 35 old plants to take 4,320 tons each for the season, and gave permits to 10 new plants to take 2,160 tons each for the season.

Three of the new plants, Ozol Packing Company, Point Edith Fisheries, and Edible Fish Meals & Oils, Inc., then brought an action in the superior court of Contra Costa county to enjoin the members of the commission from enforcing the terms of the said permits, alleging that the action of the commission amounted to an arbitrary and unjustifiable discrimination against them. The said superior court, after a hearing, granted a temporary injunction, restraining the commission from interfering with the operations of these plants so long as they did not take in excess of 777 tons per month for the five-month season, on the theory that this was the equal share of each plaintiff in the 175,000-ton allotment of the commission for all the plants. Thereupon petitioners, members of the commission, sought this writ of prohibition to restrain the respondent superior court from enforcing its injunction.

In the lower court proceeding the commission filed the affidavit of N. B. Scofield, chief of the bureau of commercial fisheries, in which he states that from his experience he has determined that newly erected, constructed, and operated plants cannot and do not operate efficiently, and that the operation of such plants often results in waste and deterioration of fish, due to lack of experience in controlling the fish catch, to breakdowns and inefficiency of newly installed machinery, and to inefficiency in the handling and preparation of fish delivered to such new plants. On information and belief the affidavit set forth a charge of such waste and deterioration during the then current season (1935–1936) by Point Edith Fisheries, one of the plaintiffs. The commission contends that its unequal allotments of tonnages were based upon the conclusions set forth in said affidavit, and that the action was within its discretionary power. Respondents contend that the fact that a plant is new or old cannot be determinative on the issue of inefficiency or waste, and that the granting of un-

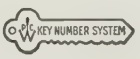
equal permits to plants substantially similar in construction and method of operation is manifestly unfair and arbitrary. No evidence as to how new plants operate, or data on the issue of waste or inefficiency of operation, was presented by either side, other than by the above affidavit. In this state of the record it might well be concluded that no sufficient showing of arbitrary action on the part of the commission has been made, although upon an adequate presentation of facts in support of the contention of the three plants, a case for correction of the order of the commission might have been made out. In other words, we cannot say that on its face the determination of the commission is unfair and arbitrary.

But if such a review of the commission's determination is sought, it must be in a proper proceeding. An appropriate legal remedy is available, a proceeding in mandamus to compel the granting of the permit sought. This being so, the equitable remedy of injunction is ordinarily improper. See Mutual Elec. Light Co. v. Ashworth, 118 Cal. 1, 50 P. 10; Southern Leasing Co. v. Ludwig, 217 N.Y. 100, 111 N.E. 470; Pacific States Supply Co. v. San Francisco (C.C.) 171 F. 727; 32 C. J. 245, § 386. It is also the rule that an injunction cannot be issued to prevent the enforcement of a public statute. Cal.Civ. Code, § 3423; Code Civ.Proc., § 526; Drumhiller v. Wright, 64 Cal.App. 498, 222 P. 166; Wright v. Jordan, 192 Cal. 704, 221 P. 915; Glide v. Superior Court, 147 Cal. 21, 81 P. 225. The injunction in the present case clearly operates to defeat the statute, for it increases the allotment of the three parties who obtained it, without reducing the amount allotted to other applicants who were not before the court, with the result that a total amount is permitted for the season beyond the limit found by the commission as the maximum permissible without depletion or waste.

Respondents argue that in exceptional cases an injunction is proper even though a legal remedy exists, and they say that the delay occasioned by a proceeding in mandamus would cause irreparable damage by reason of the swift passing of the fishing season. On the other hand, the granting of the injunction has defeated the purposes of a statute designed to conserve natural resources. We are of the opinion that the possible loss through delay in the pursuance of the appropriate legal remedy is not a proper ground for an exception to the rule against granting an injunction in such a case. The cases of Mutual Electric Light Co. v. Ashworth, supra, and Southern Leasing Co. v. Ludwig, supra, are in point. Such decisions as Abe v. Fish and Game Commission (Cal.App.) 49 P.(2d) 608, where an unconstitutional provision of a statute was enjoined, are, of course, clearly distinguishable.

It follows that the lower court was without jurisdiction to grant the injunction. Let a peremptory writ of prohibition issue restraining respondents from taking any further proceedings against petitioners herein based upon the allegations or prayer of the above-mentioned complaint.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



6 Cal.2d 395

DAM v. LAKE ALISO RIDING SCHOOL et al.

S. F. 15544.

Supreme Court of California.

May 18, 1936.

Rehearing Denied June 15, 1936.

1. Appeal and error ⇐1030

Trial court's errors relative to matters of pleading, rulings on evidence, instructions to jury, or other matters of procedure, do not justify reversal of judgment unless reviewing court, after consideration of entire case, is satisfied that such errors resulted in miscarriage of justice.

2. Animals ⇐27

So-called implied warranty of fitness for purpose in furnishing horse for hire does not insure suitableness of horse, but is only contractual obligation assumed against reckless hiring out of horse without reasonable care to ascertain its habits respecting its suitability for purpose for which it is hired.

3. Animals ⇐27

Bailee, to recover for injuries caused by unsuitability for riding of horse hired by bailee, although not necessarily required to

prove actual acts of misbehavior by horse prior to accident, must prove such facts as will justify jury in finding that at time of accident horse was unsafe and unsuitable for purpose for which it was hired.

4. Trial ⇐127

In action against owner for injuries received on fall from hired horse, sustaining of objection to question as to whether owner told mother of injured rider that he was insured and would see that accident was settled for *held* not error, since including admission by owner that he carried insurance.

5. Costs ⇐264

Where motion to strike cost bill, appearing in bill of exceptions, contained body of cost bill but did not set forth title of court and cause, but bill of exceptions contained number of action and names of parties, reviewing court would assume, in absence of contrary evidence, that cost bill contained same title of court and cause.

6. Costs ⇐264

Plaintiff's motion to strike cost bill from files *held* properly denied, where plaintiff was sufficiently informed as to claim of costs and party defendant presenting it.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Evelyn Dam, a minor, by F. H. Dam, her guardian ad litem, and another, against the Lake Aliso Riding School and Cornelia Van Ness Cress, which was dismissed except as to defendant Cornelia Van Ness Cress. From a judgment for defendant Van Ness Cress and an order refusing to strike defendants' memorandum of costs, plaintiffs appeal.

Affirmed.

For prior opinion, see 48 P.(2d) 98.

F. H. Dam, of San Francisco, for appellants.

Bronson, Bronson & Slaven and Kirke La Shelle, Jr., all of San Francisco, for respondents.

CONREY, Justice.

This cause has been submitted after argument pursuant to an order granting a hearing in this court, after decision by the District Court of Appeal, First District, Division 1, affirming judgment of the trial court and also affirming an order refusing to strike defendants' memorandum of costs. The case was tried by jury, and judgment entered in conformity with the verdict of the jury in favor of the defendant Cornelia Van Ness Cress. For a statement showing the nature of the case as presented to the trial court, we adopt the following paragraph from the opinion of the District Court of Appeal:

"This is an action on behalf of a minor by her guardian ad litem for damages for personal injuries. The father of the minor joins as plaintiff to recover special damages. Unless otherwise indicated, the word 'plaintiff' herein will refer to the minor. The complaint alleged that the defendants conducted and maintained a riding school for ladies and girls; that on the date mentioned in the complaint defendants, for a valuable consideration, furnished and hired to the plaintiff a certain horse referred to as 'Koko' for the purpose of horseback riding; that the defendants knew or should have known that the horse was not a gentle saddle horse and was not safe or suitable or fit for the plaintiff to ride; that the horse was unruly, vicious and dangerous, and would suddenly plunge and jump and bolt and become uncontrollable; that these characteristics were unknown to plaintiff; that when plaintiff rode the horse she was thrown violently from the saddle, resulting in the injuries set forth in the complaint. The complaint was so worded that the contract for hiring, from which an implied warranty of suitability may be inferred, is pleaded. In the same cause of action the complaint contains allegations of negligence. A general demurrer to the complaint was overruled. The case could have been tried upon the theory that it might have been a tort or a breach of a contract upon an implied warranty. Seemingly the latter theory was adopted by consent of counsel and will be therefore so considered on appeal."

Four special interrogatories were submitted to the jury, of which the first reads as follows: "1. At the time of the accident was the horse ridden by the plaintiff, Evelyn Dam, a vicious, dangerous and unsuitable horse for the purpose of riding by plaintiff?" The jury answered, "No," to this question. The answer to the first question being in the negative, no answer was required to the other three questions,

so they need not be considered at this time.

[1] From the foregoing it appears that appellants in presenting their case to the trial court relied upon a contract under which respondent Cress furnished and hired the horse to the plaintiff for the purpose of horseback riding, and upon the theory that the terms of the contract included an implied warranty that the horse was suitable and fit for the purpose for which it was hired. Accordingly, appellants' cause of action depended upon proof of the further fact that the horse was unsuitable for the stated purpose and that by reason thereof plaintiff suffered the injuries of which she complains. Assuming that the cause of action has been correctly described, and assuming that there was some credible evidence to sustain the special finding of the jury, it would appear that the general verdict and the judgment based thereon must be affirmed, unless appellants can show that in the course of the trial there was prejudicial errors or acts of misconduct which contributed to the rendition of a wrong verdict and so produced a miscarriage of justice by entry of the judgment. The District Court of Appeal pointed out that more than fifty acts, statements, rulings, or decisions were assigned by appellants either as misconduct or as prejudicial error; and it was suggested by that court that the enumerated cumulative assignments of misconduct appeared to be frivolous, and that many of the claimed errors were such that even if the rulings were not strictly correct, yet it does not appear that contrary rulings would have been likely to have resulted in a different verdict. As to these matters, we find no sufficient reason for disagreement with the conclusions of the District Court of Appeal. Errors of a trial court in relation to matters of pleading, rulings on evidence, instructions to a jury or in relation to matters of procedure, do not justify the reversal of a judgment unless the court of review, after consideration of the entire case, becomes satisfied that such errors resulted in a miscarriage of justice. If counsel, in presenting appeals and in preparing their assignments of error, would keep in mind this fundamental principle, they would not only lighten the burden of the courts of appeal but would also relieve themselves of much futility in labor and expense. Counsel for appellants in his brief recognizes the principle above stated, but proceeds upon the assumption that a multitude of minor errors acquires the cumulative force of grave and prejudicial error. This might be possible when they establish a course of conduct from which the court can infer that the appellant was deprived of a fair trial. But the intelligence and spirit of fairness usually manifested by trial courts makes very exceptional the unfair conduct of a trial. We are unable to say that there was any such unfair trial in this case.

The foregoing conclusions reduce the case to those remaining questions which we find in the statement made by appellants, in their petition for hearing in this court, of the principal questions involved. In the first of these three questions appellants contend that a person, who occupies the dual role of livery stable keeper and conductor and instructor of riding classes for girls, impliedly warrants that a horse, hired to a customer who is a girl pupil riding in a class under the stable keeper's instruction and control, is suitable for the purpose for which it is hired. It is said that this point has not been passed upon in this state and appellants rely upon the decisions of eastern states and of the English courts. For examples, see 12 A. L.R. 774, 778, 786.

In Conn v. Hunsberger, 224 Pa. 154, 73 A. 324, 325, 326, 25 L.R.A.(N.S.) 372, 132 Am.St.Rep. 770, 16 Ann.Cas. 504 (quoted by appellants herein), it is said: "It is the duty of a livery stable keeper to inform himself of the habits and disposition of the horses which he keeps in his stable for hire, and if he knows that they are dangerous and unsuitable, or by the exercise of reasonable care could ascertain the fact, he is liable for any injuries to his customers resulting from their vicious propensities. The law will not permit him to close his eyes and his ears, thereby remaining ignorant of the vicious habits of his horses, and relieve him from liability for injuries to a customer resulting from such habits. In his contract of hiring he impliedly engages that he knows, or has exercised reasonable care to ascertain, the habits of his horses, and says to his customer that the horse which he lets is safe and suitable for the purpose for which he has hired it. His warranty is against defects or vicious habits, which he knows, or by the exercise of proper care could know; and, if he fails to exercise such care, and it occasions injury to his cus-

tomer, he will not be relieved of liability, though he did not actually know the horse was unsuitable for the service. It is true a liveryman is not an insurer of the suitableness of a horse or carriage let to a customer, but he is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring. * * * In the case at bar, therefore, the questions were whether the mare was vicious and unsuitable for the purpose for which she was hired, and whether the defendant knew, or by the exercise of reasonable care should have known, the fact. The burden of establishing both propositions was on the plaintiff."

[2] We are of the opinion that the foregoing statement by the Supreme Court of Pennsylvania in the Conn Case exhibits the reasonable rule which should be approved and applied here. Under this rule the so-called implied warranty is not a warranty in that sense which insures the suitableness of the horse, but is only a contractual obligation assumed against reckless or heedless hiring out of a horse without reasonable care to ascertain the habits of the animal with respect to its safety and suitability for the purpose for which it is hired.

[3] Assuming, then, that the contract of hiring in the instant case included the obligation hereinabove defined, we come to the second proposition stated by appellants in their petition for hearing, i. e., that in such a case it is not necessary that the bailee, asking damages for injuries caused by unsuitability of the horse for riding by the bailee, prove acts of misbehavior on the part of the horse prior to the accident. We agree with appellants that it is not always necessary for the bailee to prove actual acts of misbehavior on the part of the horse prior to the accident. But in some way the bailee must prove such facts as will justify a jury in finding that at the time and place in question the horse was unsafe and unsuitable for the purpose for which it was hired. Here the evidence produced at the trial and the case as presented to the jury gave to appellants the opportunity to obtain a decision that the horse was unsafe and unsuitable for the purpose of the hiring. The jury on that issue found in favor of the respondent and that finding has support in the evidence. Concerning instructions to the jury, the reporter's transcript, page 389, contains the following statement: "It was stipulated by counsel for both parties that numerous instructions were asked by both sides which were refused by the court, but no point is made on the refusal of the court to give such instructions." As to the instructions given, notwithstanding some criticism by appellants, we do not find therein any error of which appellants reasonably may complain.

[4] The third and last statement of principal questions involved, as set forth in the petition for hearing in this court, relates to the contention of appellants that the court erred in sustaining the objection to the following question addressed by appellants to the respondent: "Q. Before you left her (plaintiff's) home that day you told her mother, did you not, that you were insured, and that you would see that the accident was settled for?" We find no error in the court's ruling which, of course, was caused by the fact that the question included an admission by the witness that she carried insurance against such accidents. It is true that where the fact of insurance is inseparably connected with an alleged admission, and the admission is one which ought to be considered, then the objection to the question should be overruled. But here the fact of such insurance or of such statement concerning insurance might have been omitted without impairment of the true import of the question, which called for an admission by the witness that she had promised to see that the accident was settled for. This fact deprives of all importance the alleged error of the trial court.

[5, 6] Concerning the appeal from the order refusing to strike from the files the memorandum of costs, we adopt the opinion of the District Court of Appeal, as follows: "The cost bill is not included in the clerk's transcript on appeal. The motion to strike appears in a bill of exceptions, contains the body of the cost bill and the affidavit thereto, but does not set forth the title of court and cause. The bill of exceptions contains the number of the action and the names of the parties plaintiff and defendant. We must assume, in the absence of evidence to the contrary, that the cost bill contained the same title of court and cause. The affidavit attached to the cost bill recites in part that the 'costs and disbursements are true and correct and have been necessarily incurred in this

cause.' The affidavit is silent as to the names of the defendants or the plaintiffs, but 'this cause' can refer only to the case designated by the title of court and cause. At the time of trial the case against all defendants, except as to defendant Cornelia Van Ness Cress, was dismissed. Plaintiff was sufficiently informed as to the claim of costs, and the party defendant presenting the same. The motion to strike the cost bill from the files was properly denied."

The judgment is affirmed, and the order refusing to strike costs is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.



6 Cal.2d 425

PEOPLE v. ZIRBES.

Cr. 3937.

Supreme Court of California.

May 25, 1936.

Rehearing Denied June 22, 1936.

1. Criminal law ⇐1160

Denial of motion for new trial on conflicting evidence would not be disturbed on appeal.

2. Criminal law ⇐959

Refusal to continue hearing of motion for new trial to permit defendant to obtain affidavits of other jurors in case on collateral matters brought out in examination of juror, whose alleged misconduct was ground of motion, *held* not error.

3. Criminal law ⇐721(6)

District attorney's criticism of defendant accused of murder for not explaining certain incriminating evidence *held* not misconduct under statute and constitutional provision (Pen.Code, § 1323, as amended by St.1935, p. 1942, § 3; Const. art. 1, § 13, as amended Nov. 6, 1934).

4. Criminal law ⇐919(3)

District attorney's remark that defendant accused of murder was "guilty as the shades of hell" *held* not so erroneous as to require new trial.

5. Criminal law ⇐730(9)

Alleged error in district attorney's remark that defendant accused of murder was "guilty as the shades of hell" *held* harmless where court directed jury to disregard remark.

6. Jury ⇐67(3)

Denial of challenge to panel of jurors on ground that sheriff whose deputy summoned some of jurors appeared as witness for prosecution *held* not error where jurors summoned by such deputy had been previously drawn in open court and deputy merely informed them of their selection (Code Civ.Proc. §§ 225–227, as amended by St.1933, pp. 1833, 1834, §§ 55–57; Pen.Code, § 1064).

7. Criminal law ⇐829(16)

In homicide prosecution, refusal to instruct that testimony of police officer was to be measured by same standards as testimony of other witnesses in case *held* not error where court gave instruction that jury had exclusive right to determine credibility of any witness, which applied to police officers testifying in case, as well as to other witnesses.

8. Criminal law ⇐850

Alleged disqualification of sheriff by reason of his appearance as witness for prosecution did not make retirement of jury in charge of two deputy sheriffs prejudicially erroneous.

9. Jury ⇐66(1)

Court's selection of jury from panel regularly drawn from list of names selected and placed in jury box in open court in presence of defendant and his counsel *held* not error.

10. Criminal law ⇐494

In homicide prosecution, testimony of identification expert who had no personal knowledge as to person whose fingerprints were on fingerprint card that fingerprint card bore fingerprints of deceased was hearsay, and hence was insufficient to make card competent.

11. Criminal law ⇐825(1)

In homicide prosecution, failure to instruct that jury could disregard all of dying declaration of deceased who was willfully false in one part of such declaration *held* not prejudicial error where defendant did not request instruction as to rule applicable to dying declarations (Pen.Code, § 1093, as amended by St.1935, p. 1941, § 1).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

William Zirbes was convicted of murder in the first degree, and he appeals.

Affirmed.

Ray T. Coughlin and Clifford A. Russell, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

CURTIS, Justice.

The defendant was convicted of murder in the first degree. The jury in its verdict made no reference to the punishment which defendant was to suffer under his conviction. The court of necessity imposed upon the defendant the death sentence.

The indictment under which the defendant was tried and convicted accused him of murdering Clifford Stanley Andrus, on April 20, 1934, in the county of Sacramento. Two persons were eyewitnesses of the crime. They were Mr. and Mrs. M. W. Hedge. They were sitting in their automobile at the side of the road in North Sacramento, and saw defendant drive up in a Chevrolet car bearing license No. 8H 61 67. The defendant stopped about 30 feet in front of them, and about 3 feet from where the deceased, Clifford Stanley Andrus, was standing. Near Andrus was a suitcase. When defendant's car stopped, Andrus went over to it and opened the door. Andrus and the defendant engaged in conversation, but the Hedges were not able to hear what was said. Just as Andrus opened the door to defendant's car the latter shot him. Andrus staggered back, and the defendant fired a second shot. He then got out of his car, put a gun back into his pocket, and went over to the suitcase, which he picked up and placed in his car. He then got back into his car and drove away. Andrus staggered over to the car where the Hedges were sitting. Mrs. Hedge asked Andrus why the defendant shot him, and the latter replied that he did not know. Mrs. Hedge took down the license number of defendant's car, and later turned the number over to the officers. Andrus was taken to the hospital where, after stating that he was dying, he said William Call shot him. Andrus died soon afterwards, and an autopsy surgeon testified that Andrus died from a gunshot wound in the chest and a hemorrhage resulting therefrom. The evidence showed that defendant had been going under the name of William Call. The Chevrolet car, bearing the license No. 8H 61 67, was found three or four days later near Sierra Oaks, where it had been abandoned. Later the defendant was found in Chicago, where he was extradited and brought back to California. While returning from Chicago to California, the defendant told the sheriff who accompanied him that he knew he was wanted for murder and had left for Chicago. On his trial the defendant testified in his own behalf, and stated that he was not in North Sacramento on the day Andrus was killed, but was in Oakland. He further stated that the last day he saw his Chevrolet automobile was the day before the killing, April 19th, when it was in his yard at his home. In rebuttal it was shown the defendant bought the car on April 13, 1934. The sheriff testified that on the way from Chicago to Sacramento the defendant told him that his car was stolen from him the next day after he bought it.

[1, 2] No claim is made that the evidence is not sufficient to support the verdict. After the rendition of the verdict, the defendant made a motion for a new trial, which was denied. Defendant now contends that the court erred in denying his said motion. The motion was made upon the alleged misconduct of one of the jurors, and was supported by affidavits of John McVanner and Paul Milovich. These affiants stated in their affidavits that one of the jurors, Alex Gorman, had had a conversation with them during the trial of the case on the subject of the charge against the defendant. Upon the hearing of said motion for a new trial, the court called said juror, Alex Gorman, to the witness chair, and interrogated him regarding the charges made against him by McVanner and Milovich. Gorman denied that he had made any statements to either McVanner or Milovich, or that he had had any conversation with either of them during said trial. Thereupon the court denied the motion for a new trial, and instructed the district attorney to proceed against McVanner and Milovich, as it was apparent to the court they had committed perjury in their affidavits. As the motion for a new trial was denied upon conflicting evidence, the action of the trial court will not be disturbed on appeal. This rule is so well established that citation of authorities to support it is not

necessary. No error was shown on the part of the trial court in denying said motion, nor in refusing to continue the hearing of said motion in order to permit the defendant to obtain affidavits of other jurors in the case upon certain collateral matters brought out in the examination of the juror, Gorman. People v. Worthington, 105 Cal. 166, 171, 38 P. 689.

[3-5] It is next contended that the district attorney was guilty of misconduct (1) in criticizing the defendant for not explaining certain facts brought out by the evidence of the prosecution, and (2) in stating to the jury in his argument "that man Zirbes is as guilty as the shades of hell." As to the contention that the district attorney erroneously criticized the defendant in not explaining certain incriminating evidence against him, we are of the opinion that the officer was well within the rule now in force under the recent amendment (Nov. 6, 1934) to article 1, § 13, of the Constitution, and section 1323 of the Penal Code (as amended by St.1935, p. 1942, § 3). Referring to the remark of the district attorney as to the manifest guilt of the defendant, statements of that character on the part of the prosecuting officers, while they are not to be commended, and should be omitted from the orderly proceedings in trials in courts of justice, are seldom if ever held to be so erroneous as to require a new trial in case of the conviction of the defendant. Especially is this so when, as in the present case, the objectionable remark was called to the attention of the court, and, at the request of the defendant, the court directed the jury to disregard it.

[6] The court did not err in denying defendant's challenge to the panel of the jurors on account of the bias of the officer summoning the panel which would be a good ground of challenge to an individual juror. It is contended that the sheriff of the county of Sacramento was biased against the defendant by reason of his appearance as a witness on behalf of the prosecution, and that therefore all his deputies, including the deputy who summoned certain of the jurors in this case, were disqualified from acting officially in summoning the jury. Conceding the disqualification of the sheriff and that this disqualification extended to his deputies, we are not persuaded that the challenge should have been allowed. The jurors who were summoned by the deputy sheriff were summoned to complete the panel for the trial of the defendant. Their names were drawn from the regular jury box, and given to the sheriff for service. The panel thus summoned by the deputy sheriff was not therefore a special venire summoned from the body of the county to complete the panel, as provided for by section 227 of the Code of Civil Procedure (as amended by St.1933, p. 1833, § 57). The manner of their selection and service is provided for by sections 225 and 226 of the Code of Civil Procedure (as amended by St.1933, p. 1833, §§ 55, 56). Under these sections of the Code, the officer merely performs the ministerial duty of informing the jurors, who have been previously drawn in open court, of their selection as such jurors and of the time and place of the trial. No challenge to the panel would therefore lie under section 1064 of the Penal Code, relied upon by defendant, as that section of the Code expressly applies only "when the panel is formed from persons *whose names are not drawn as jurors.*" (Italics ours.) That section of the Code was the decisive factor in the case of People v. Le Doux, 155 Cal. 535, 543, 102 P. 517, and for that reason the Le Doux Case is easily distinguishable from the case now before us.

[7] The court refused to give an instruction prepared by defendant that the testimony of a police officer was to be measured by the same standards as the testimony of other witnesses in the case. This refusal defendant claims was prejudicial error entitling him to a reversal of the judgment. No authority is cited in support of this claim, and no showing is made that the appellant suffered any prejudice by reason of the failure of the court to instruct the jury as requested by appellant. The court in this case gave the usual instruction relative to the exclusive right of the jury to determine the credibility of any witness, which applied to police officers testifying in the case, as well as to all other persons appearing as witnesses. An instruction in many respects similar to the proposed instruction in this case was refused in the case of People v. Kilfoil, 27 Cal.App. 29, 36, 148 P. 812. The action of the court in refusing said instruction was held not to be erroneous.

[8] The jury when it retired to deliberate upon its verdict was placed in charge of two deputy sheriffs. It is contended by appellant that the disqualification

of the sheriff extended to these deputies and that, therefore, the rights of the appellant were prejudicially affected by this action of the court. Again, the appellant fails to cite any authority in support of his contention. Similar objections were raised in the cases of People v. Babcock, 160 Cal. 537, 545, 117 P. 549, and People v. Nakis, 184 Cal. 105, 112, 193 P. 92. Practically the same situation in principle existed in those cases as was made to appear in the present action. The court held in each of these cited cases that no prejudicial error was shown, and refused to disturb the judgments. We are in perfect accord with the rule followed by the court on these two previous occasions.

[9] The appellant questions the legality of the drawing of the panel from which was selected the jury before whom the appellant was tried. It is contended that the court in impaneling said jury failed to follow certain sections of the Code, namely sections 227 (as amended by St.1933, p. 1833, § 57), 246, and 248 (as amended by St.1933, p. 1834, § 60) of the Code of Civil Procedure and section 1059 of the Penal Code. Without going into detail as to just what steps were taken by the trial court in selecting, drawing, and impaneling said jury, it appears from the record before us that the panel was regularly drawn from the list of names selected and deposited in the jury box of the county of Sacramento. From the names so drawn, the jury before whom the appellant was tried was selected and impaneled by the court in open court in the presence of the defendant and counsel. The objections made to the selection of the jury are technical in the extreme, and no showing is made that the appellant was, or could have been, prejudiced in the slightest degree by the procedure followed by the court in the impaneling of said jury.

[10] During the trial the appellant as part of his defense attempted to show that the deceased had been convicted of a felony for the purpose of impeaching the dying declaration of the deceased in which the deceased had stated that the appellant had shot him. As one of the links in this chain of evidence, the appellant sought to introduce a certain fingerprint card for the purpose of establishing the identity of the deceased as the same person convicted of a felony in the United States District Court in the state of Arizona. The objection of the prosecution to the admission in evidence of this fingerprint card was made upon the ground that the same was incompetent as there was no evidence before the court that the fingerprint card bore the fingerprint of the deceased. The card was produced from the state bureau of criminal identification and investigation by a Mr. Sked, an identification expert of the department who had no personal knowledge as to the person whose fingerprints the card bore. The court sustained an objection to the introduction of the card on the ground that the evidence of Mr. Sked was hearsay in so far is it purported to establish the fact that the card bore the fingerprints of the deceased. This ruling of the trial court was proper. People v. Van Cleave, 208 Cal. 295, 300, 280 P. 983; People v. Darling, 120 Cal.App. 453, 7 P. (2d) 1094.

[11] The trial court gave the usual instruction that a witness willfully false in one part of his testimony was not to be trusted in others. No objection was made to this instruction at the trial of the action, nor was any request made to the court for any change or amplification of this instruction. Appellant now claims that the court should have also instructed the jury that, "If you believe that the deceased was willfully false in one part of his declaration he should be distrusted in other parts and in such circumstances you would be entitled to disregard and cast aside the entire declaration." It was held in the case of People v. Thomson, 145 Cal. 717, 722, 79 P. 435, that the refusal of the court to give such an instruction, when requested, was prejudicial error and entitled the appellant to a reversal of the judgment. In the present case, as we have shown, no request was made by appellant of the trial court that it instruct the jury as to the rule applicable to dying declarations, which he now claims it should have done. Upon this subject the District Court of Appeal in the case of People v. Brown, 71 Cal.App. 181, 190, 235 P. 72, 75, held as follows: "At any rate, if defendant had thought such an instruction proper in the circumstances, he should have presented it for the consideration of the trial court. This he failed to do. Even assuming that defendant is right in his contention (which we are not prepared to do), as the matter stands, such omission cannot now be allowed as prejudicial error." We are in accord with the statement of law as thus enunciated by the District Court of Appeal.

This subject is also regulated by statute. Section 1093, Pen.Code (as amended by St. 1935, p. 1941, § 1).

We find no error in the record. The order denying appellant's motion for a new trial and the judgment are, and each of them is, hereby affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; LANGDON, J.



6 Cal.2d 405

HEAP v. CITY OF LOS ANGELES et al.

L. A. 15470.

Supreme Court of California.

May 21, 1936.

1. Officers ⇐11

Civil service commission has only special and limited jurisdiction.

2. Municipal corporations ⇐218(8)

Action of civil service commission in sustaining discharge of civil service employee in city's bureau of engineering *held* final and conclusive under statute, and commission had no jurisdiction thereafter to retry question or to rescind its former action and restore employee to duty (St.1925, p. 1067, § 112(a).

3. Mandamus ⇐163

Where civil service commission's order constituted exhibit to discharged employee's petition for writ of mandate and purported to rescind commission's prior order sustaining discharge, fact of prior order which, under statute, was final, was thus definitely established, and hence demurrer to petition was properly sustained without leave to amend.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by George A. Heap for a writ of mandate against the City of Los Angeles and others. From an adverse judgment, petitioner appeals.

Affirmed.

Prior opinion, 46 P.(2d) 205.

Leo V. Youngworth and J. Harold Decker, both of Los Angeles, for appellant.

Erwin P. Werner, former City Atty., Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Thatcher J. Kemp and Jerrell Babb, Deputy City Attys., all of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 1. After further consideration, we adopt the following opinion of said court as part of the opinion of this court:

"Respondents' demurrer to appellant's petition for a writ of mandate was sustained without leave to amend, and the appeal is from the judgment subsequently entered against petitioner. The petition alleges that the appellant, a civil service employee in the bureau of engineering of respondent city, was discharged from his position, and that he thereupon made written application to the civil service commission for an investigation of the grounds for such discharge and hearing thereon. A certified copy of the findings of the commission, the statutory name of which is 'Board of Civil Service Commissioners,' is made a part of the petition. This shows that on November 13, 1931, 'a motion was adopted rescinding the action of the Civil Service Commission on October 20, 1931, sustaining said discharge,' and that a second motion was then adopted, finding that the grounds stated for the discharge of the appellant were not sustained and ordering him restored to duty. The only question presented on this appeal is whether or not the civil service commission, after having passed upon the question submitted to it, could thereafter vacate its findings and make another and contrary order. Respondent contends that when the commission acted on the matter it exhausted its jurisdiction, and that the subsequent resolution is void.

"The charter of the respondent city provides that a discharged employee may file an application with the board of civil service commissioners for an investigation of the grounds for his discharge. It further provides: 'If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sus-

tained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person * * * to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be forthwith certified to the appointing board or officer, and shall be final and conclusive.' Section 112 (a), Stats.1925, pp. 1024, 1067.

[1, 2] "The jurisdiction of the commission is a special and limited one. Petersen v. Civil Service Board, 67 Cal.App. 70, 227 P. 238. The required procedure was followed, and the question of appellant's discharge was determined by the commission when it adopted the first resolution. Its action sustaining his discharge was 'final and conclusive.' Krohn v. Board of Water & Power Commissioners, 95 Cal. App. 289, 296, 272 P. 757. It had no jurisdiction to retry the question and make a different finding at a later time. The charter gives no such grant of power, and it may not be implied. 'A civil service commission has no inherent power after entering a final order dismissing an officer from the service to entertain a motion for new trial or rehearing and review and set aside its prior order.' 43 Cor.Jur. 682. See, also, Cook v. Civil Service Commission, 160 Cal. 598, 600, 117 P. 662."

Petitioner urges that the case of Lane v. United States, 241 U.S. 201, 36 S.Ct. 599, 60 L.Ed. 956, sustains his position. It was therein held that the secretary of the interior had power to reconsider a prior administrative order as to which persons were heirs of an Indian allottee of land, despite the fact that his order was, under the statute, "final and conclusive." A reading of the opinion, however, discloses that at the time the redetermination was made, title to the land was still in the United States and under the administrative control of the land department. There were undoubtedly several grounds, both of policy and statutory interpretation, for holding that in such a case a high executive officer had power to reconsider his orders.

But the rule stated above, that a civil service commission has no such power in the absence of express authorization, is sound and practical. If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure. Seemingly in recognition of this, the Los Angeles charter expressly provides a procedure for reconsidering orders of suspension or removal of policemen or firemen by a board of inquiry, within three years after the making of an order; but no such procedure is provided in the case of the civil service commission.

[3] Petitioner finally suggests that the petition does not affirmatively allege a prior order of the commission of October 20, 1931, certified to the board of public works, and that therefore it was improper to sustain the demurrer without leave to amend. There is no merit in this point, for the exhibit to the petition, which is the order of November 17, expressly refers to the prior action of October 20, 1931, and purports to rescind it. The fact of a prior order is thus definitely established, and the demurrer was properly sustained.

The judgment is affirmed.

14 Cal.App.2d 176

CHEEK v. FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES.

Civ. 10942.

District Court of Appeal, Second District, Division 2, California.

May 19, 1936.

Bankruptcy ⇐188(3)

Assignment by beneficiaries of their interest under declaration of trust created by them to trustee bank as collateral for debts owing by them to it, created equitable charge in favor of bank, entitling it to lien on assets of trust in hands of trustee in bankruptcy of one of beneficiaries, notwithstanding revocation of trust pursuant to its terms by bankrupt beneficiary and trustee in bankruptcy subsequent to assignment.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by Crules R. Cheek, as trustee in bankruptcy of the estate of James W. Hellman, bankrupt, against the Farmers & Merchants National Bank of Los Angeles. Judgment for plaintiff, and defendant appeals.

Reversed.

Williamson, Ramsay & Hoge, Fulton Hoge, and Alfred Connor Bowman, all of Los Angeles, for appellant.

Paul W. Sampsell and Benno M. Brink, both of Los Angeles, for respondent.

WOOD, Justice.

The defendant bank appeals from a judgment ordering it to deliver the assets of a revoked trust to plaintiff as trustee in bankruptcy of the estate of James W. Hellman, contending that it has a lien upon the assets created to secure loans made to Mr. Hellman.

James W. Hellman and Agnes K. Hellman, his wife, by instrument dated July 1, 1931, conveyed certain real and personal property to the Farmers & Merchants National Bank of Los Angeles and the bank thereupon executed a declaration of trust by which it was provided that payment of the entire net income thereof should be made to James W. Hellman during his life, and that thereafter a part of such income should be paid to Agnes K. Hellman during her life, the balance of the net income after the death of James W. Hellman being payable to the children of the trustors in equal shares. Among the provisions of the declaration of trust the following appears: "The Trustor, James W. Hellman, while he shall live, may, without the consent of the other Trustor, Agnes K. Hellman, by written instrument filed with the Trustee, and upon paying any sums due the Trustee and releasing it from and assuming all obligations affecting the Trustee to its satisfaction against any liabilities incurred by it in administering this trust, revoke it in whole or in part and/or may withdraw any or all of the trust estate, and the Trustee shall transfer and deliver the property affected thereby to said Trustor. * * *"

Contemporaneously with the execution of the declaration of trust, Mr. and Mrs. Hellman signed and delivered an instrument dated July 1, 1931, addressed to the bank, as follows: "For value received, we, jointly and severally, assign to The Farmers and Merchants National Bank of Los Angeles, as collateral security to any and all loans which we may now owe or may hereafter secure from The Farmers and Merchants National Bank of Los Angeles, all of our right, title and interest in and to a certain Declaration of Trust dated July 1, 1931, wherein The Farmers and Merchants National Bank of Los Angeles is designated as Trustee, and the undersigned are designated as Trustor, and is identified as trust No. P-1067, together with the assets held thereunder, and we further direct and authorize The Farmers and Merchants National Bank of Los Angeles, in the event that it becomes necessary to do so, to sell any part of the trust assets for the purpose of paying said loans."

Mr. and Mrs. Hellman were indebted to the bank at the time the above-mentioned instruments were executed. Thereafter further loans were made to them by the bank and they have been indebted to the bank at all times since July 1, 1931. James W. Hellman was adjudicated a bankrupt on August 1, 1932, and on September 30, 1932, the trustee in bankruptcy filed with the bank a written revocation of the trust and demand for the delivery of the assets thereof. On July 13, 1933, James W. Hellman, pursuant to an order by the referee in bankruptcy, executed a written revocation of the trust pursuant to the power of revocation therein reserved. No claim is made that either Mr. or Mrs. Hellman was insolvent at the time

the property was conveyed to the bank to establish the trust.

By clear and unmistakable language, Mr. Hellman was given the power to revoke the trust. The revocation made by the trustee in bankruptcy, reinforced by that of Mr. Hellman himself, unquestionably brought about the termination of the trust. It is clear that Mr. Hellman intended to and did assign to the bank as security for debts due the bank all his interest in the trust and in the assets thereof. Under the terms of the assignment, the bank held the assets of the trust upon its revocation as security for the debts. Without foregoing the argument that the assignment might properly be construed as a pro tanto exercise of the power of revocation to the extent necessary to satisfy the indebtedness due the bank, defendant earnestly contends that the assignment created an equitable charge in its favor which ripened into a direct lien upon the assets of the trust upon the exercise of the power of revocation. This contention must be sustained. Defendant cites with justified confidence the case of Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 152, 43 L.R.A. (N.S.) 404, in which the defendant Kedon had assigned to the plaintiff Bridge his expectant interest in the estate of his mother, who was then living, to secure the payment of certain sums loaned to Bridge. Prior to the death of his mother, Kedon was adjudged a bankrupt and was discharged from all debts, including the loan from Bridge. Upon the death of his mother Kedon received a share of her estate and Bridge commenced action to enforce the assignment. The court ruled that "the discharge in bankruptcy did not divest Bridge of his then existing equitable right to Kedon's prospective inheritance." The court said: "The California cases * * * state the rule as a general one that equity will uphold assignments, not valid at law, of any future interest, as a rule applying alike to those which are vested, but relate to property to come into existence in the future, and those which rest only in possibility, provided they are fairly made and not against public policy. * * * We do not find in any of the decisions or in any of the authorities any difference between the rule as applied to the assignment of property not existing, but which will be the produce or result of an existing contract or contractual relation, and assignments of a mere possibility, such as that of an heir in the estate of his living ancestor, at least so far as the right in either case to enforce such an assignment in equity is concerned." In Pierce v. Robinson, 13 Cal. 116, the court, referring to proceeds of future crops, said that equity will uphold assignments of things which have no present existence, but rest in possibility, and that "an agreement for such interests will take effect as such assignment when the subjects to which they refer have ceased to rest in possibility, and have ripened into reality," if fairly made and not against the policy of the law. No contention is here made that the assignment to defendant bank was not fairly made or that it was against the policy of the law. As was held in Bridge v. Kedon, from which quotation has just been made, the adjudication of Mr. Hellman as a bankrupt had no effect upon the bank's lien. The trustee received no greater rights in the premises than those of Mr. Hellman. It follows that the bank has the right to insist on the enforcement of its lien.

The judgment is reversed.

We concur: GOULD, Justice pro tem.; CRAIL, P. J.



14 Cal.App.2d 38

COHEN v. BONNELL et al.

Civ. 5520.

District Court of Appeal, Third District, California.

May 13, 1936.

Hearing Denied by Supreme Court July 10, 1936.

1. Mortgages ⊂=256

Where mortgagor had notified mortgagees of default on their note to mortgagor before mortgagees assigned mortgagor's note and mortgage after maturity, in suit by mortgagees' assignee to foreclose mortgage, mortgagor could set off deficiency due on mortgagees' note after sale of security, since mortgagor's right of set-off existed before assignment and did not first arise when deficiency was determined at sale which occurred after assignment (Code Civ.Proc. §§ 368, 438; Civ. Code, § 1459).

2. Mortgages ⇐256

Mortgagor's right to set up counterclaim for amount due on mortgagees' note to mortgagor in suit by mortgagees' assignee to foreclose mortgage was not affected by fact that mortgagees' note was secured by mortgage (Code Civ.Proc. §§ 368, 438; Civ.Code, § 1459).

3. Appeal and error ⇐1170(10)

Inconsistency, if any, in findings could be disregarded in absence of objecting party's showing that inconsistency was prejudicial (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Raymond L. Haight, Judge.

Suit by Mamie Cohen against Oliver A. Bonnell and others, wherein the named defendant filed a counterclaim, and wherein Bernath Schwartz and another were cross-defendants. From the judgment, plaintiff appeals.

Affirmed.

Morris Bordon and Frank S. Hemminger, both of Los Angeles, for appellant.

James M. Carter, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

On May 27, 1926, Oliver A. Bonnell executed a note for $11,000 to Rosie Newman, secured by a mortgage on certain real property. On July 7, 1932, and after maturity, Rosie Newman assigned this note and mortgage to Mamie Cohen, who brought this suit to foreclose the same. The answer of Bonnell admitted substantially all of the allegations of the complaint, and by way of counterclaim alleged that Rosie Newman and Bernath Schwartz were indebted to him on a note for $16,615 secured by a second deed of trust and chattel mortgage.

On June 18, 1932, because of default in principal and interest on this note, Bonnell filed notice of default, and on October 14, 1932, the real property described in the second deed of trust was sold, at the trustee's sale for $545.88; thereafter the sum of $150 was realized from the sale of the personal property secured by the chattel mortgage, leaving some $17,000 still due. Bonnell, in his pleading, sought to have this deficiency set off as against the amount due from him to plaintiff herein on the note and mortgage, which had been executed by Bonnell to Rosie Newman and by her assigned to plaintiff herein. This the trial court allowed and rendered judgment accordingly, and appellant now appeals, claiming the right of action against an assignor cannot be used as a basis of counterclaim against an assignee when the cause of action accrued after notice of assignment.

[1] The record shows that Bonnell received notice of the assignment of his note and mortgage in favor of Newman to Mamie Cohen July 28, 1932. However, on or about June 18, 1932, approximately forty days prior to this notice of assignment Bonnell had given notice of default to the maker, Rosie Newman.

Appellant claims the set-off could arise only after the sale of the property under the deed of trust, and the deficiency if any, ascertained, and therefore it was not until October 14, 1932, when the property was sold under the deed of trust that respondent's cause of action for a deficiency could arise.

Section 368 of the Code of Civil Procedure provides that, "In case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment." Section 1459 of the Civil Code provides for the transfer of a nonnegotiable written instrument by indorsement, which indorsement transfers all of the rights of the assignor subject to all equities and defenses existing in favor of the maker at the time of the indorsement.

St. Louis National Bank v. Gay, 101 Cal. 286, 35 P. 876, 877, construing the above sections, holds that a note may be claimed as a set-off though not due at the time the defendant received notice of the assignment if it matured before the commencement of the action by plaintiff. The court there said: "A debtor may fortify himself against the coming suit of his creditor by the purchase of any cross demands which may be counterclaimed when that suit shall come, and between them an assignee has no standing until he shall have given notice of the assignment. When a stranger voluntarily interferes with relations between third parties, and takes an assignment of an obligation from one of the latter to the other, he is in no position to beg for equitable consideration, and has only such right in the premises as the statute gives him, and under the statute he stands in the shoes of his

assignor until he gives notice of the assignment; but such notice in no way destroys or impairs any right which the debtor had acquired against the creditor prior to such notice. The relative times at which the notes in the case at bar matured is of no consequence, since they were due at the commencement of the action; for, under the rule invoked by appellant, a debtor could not use a note falling due before his own obligation, if before its maturity he received notice of assignment."

[2] The fact that the note here in question was secured by a mortgage is immaterial under the provisions of section 438 of the Code of Civil Procedure, which permits a counterclaim to be set up whether the same is secured by mortgage or otherwise, and even in cases where the action is one to foreclose the security. Hanes v. Coffee, 212 Cal. 777, 300 P. 963.

[3] Appellant urges a further objection to the judgment, asserting the court made inconsistent findings. This inconsistency is that the court found that the second deed of trust executed by Rosie Newman was valueless, and later the court found that the sum of $585.88 was paid at the trustee's sale for said property. The finding that the deed of trust was valueless was as to all times after June 15, 1932, and in particular on July 18, 1932, whereas the sale occurred on October 14, 1932; but conceding that some inconsistency did exist, it is not shown how it was prejudicial to appellant in any way, and therefore under the provisions of article 6 section 4½ of the State Constitution, may be disregarded.

Finding no error, the judgment should be affirmed, and it is so ordered.

I concur: THOMPSON, J.



BOYER v. TRAVELERS INS. CO.*

Civ. 9948.

District Court of Appeal, First District, Division 2, California.

May 22, 1936.

Hearing Granted by Supreme Court July 20, 1936.

1. Insurance ⇐175

Group life policy providing that employee failing to file written application for insurance on or before completion of one month of service would be insured from 14th day of calendar month following date of application provided employee was actually at work on such day *held* to permit insurance to become effective as to any employee only if health permitted him to be actually at work on specified date following making of application.

2. Insurance ⇐665(2)

Evidence *held* insufficient to support judgment granting recovery on group life policy under which automobile salesman had applied for insurance on ground that while in hospital on date of his death automobile salesman was "actually at work" as required by policy in order for insurance to become effective.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Edna K. Boyer against the Travelers Insurance Company. Judgment for plaintiff, and defendant appeals.

Reversed with directions.

Joseph T. O'Connor and Leo R. Friedman, both of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco (Clinton L. Markley, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

This action was brought to recover the sum of $4,000 alleged to have become due to plaintiff from defendant under a policy of group life insurance. Upon a trial by jury, plaintiff had judgment and defendant appeals.

The main question raised upon this appeal is whether the insurance under the group policy had become effective upon the life of Mr. Boyer at the time of his death on July 14, 1933. His employer, Edmund Lowe Motors Company, had previously obtained the group policy from defendant. Mr. Boyer made written application for insurance thereunder on July 5, 1933. He had made no previous application. At that time, he had been an employee for more than one month and less than four months. Said policy provided, "Each such Employee who fails to file written application for this insurance on or before the completion of one month of service, will be insured from the fourteenth day of the calendar month next following the date on which he files

such application provided he does so on or before the completion of four months of service *and is actually at work on said day, or if not actually at work, from the date on which he returns to work.*" (Italics ours.) It may be stated that employees applying for insurance after the completion of four months' service were required to obtain the approval of the insurance company "upon the basis of a medical examination."

After making his written application for insurance on July 5, 1933, Mr. Boyer continued his work as a salesman for the next few days. When he awoke on the morning of July 10, 1933, he was afflicted with a shortness of breath. A doctor was called and Mr. Boyer was rushed to a hospital where he was put under an oxygen tent. This tent was taken off at intervals, but was used most of the time until his death. While Mr. Boyer was able to sit up in bed and to carry on a conversation at least some of the time, he was continuously confined to his bed in the hospital under the doctor's care until he died on July 14, 1933, at 9:30 p. m.

Appellant contends that the evidence was insufficient to sustain the implied finding of the jury to the effect that Mr. Boyer was "actually at work" on July 14, 1933. In our opinion this contention must be sustained. Before referring to the evidence relied upon by respondent to sustain this finding, it may be stated that respondent concedes that it was not sufficient under the policy to show merely that Mr. Boyer was in the employ of the company on July 14, 1933, but that it was also necessary to show that he was "actually at work" on that date. It may be further stated that appellant concedes that if the evidence was sufficient to show that Mr. Boyer was "actually at work" on July 14, 1933, then the insurance was effective at the time of his death on the evening of that day.

The evidence showed that Mr. Boyer was employed in the capacity of a salesman on a commission basis. The sales manager testified, "The duties were the selling of Lincoln automobiles." He was an elderly man and was employed mainly because of his ability to make contacts with wealthy people who had the means to purchase high-priced automobiles. He was not required to do certain things which were required of the other salesmen, but he was nevertheless on call by the sales manager "at all times in the 24 hours," and it was his duty to carry out the instructions of the sales manager. He was not employed as an executive, nor did he have any supervisory powers or duties over others. He worked both independently of other salesmen and also in co-operation with other salesmen on prospective deals.

In an attempt to show that Mr. Boyer was "actually at work" on July 14, 1933, respondent introduced evidence to show that Mr. Lowe and the sales manager visited Mr. Boyer on that day and discussed certain prospective deals with him. They were there about twenty-five or thirty minutes. A review of this evidence shows that the discussion involved certain deals upon which Mr. Boyer had been working before he was taken to the hospital and that the said discussion related solely to the question of whether other salesmen should be permitted to carry on the work or whether said deals should be permitted to rest until Mr. Boyer was able to return to work. Upon this evidence, respondent seeks to sustain the finding under attack.

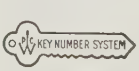
[1, 2] We believe, however, that said evidence was wholly insufficient to show that Mr. Boyer was "actually at work." Respondent lays great stress upon the fact that the effectiveness of the insurance as to Mr. Boyer was not dependent upon Mr. Boyer's state of health. While it is true that no physical examination was required and the employee was not required to make any representation regarding his health, it was the clear purpose of the policy provision to permit the insurance to become effective as to any employee only in the event that his health was such as to permit him to be "actually at work" on the specified date following the making of his application. Or, putting it another way, it was the clear purpose of the policy provision to prevent the insurance from becoming effective as to any employee, such as a salesman, who was so seriously ill as to be continuously confined to his bed in a hospital and unable to be "actually at work" on the date specified. The evidence upon which respondent relies to show that Mr. Boyer was "actually at work" is merely evidence of a conversation necessitated by the fact that he was not "actually at work" and could not be "actually at work" on the day in question.

The parties discuss the meaning of the words "actually at work" and the propriety of the trial court's instructions on this subject. No authority directly in point has been called to our attention and we know of

none. Respondent cites and relies upon Equitable Life Assurance Society v. Worthman (C.C.A.) 67 F.(2d) 721. Both the policy provisions and the facts regarding the illness were very different in that case. It was not there required that the employee be at work on any particular day. The deceased there was not confined to his bed at all times and his work was of an advisory and supervisory character. Appellant cites Leach v. Metropolitan Life Ins. Co., 124 Kan. 584, 261 P. 603, in which the words "actively at work" were used in the policy, but it was there conceded by the parties that the deceased was not "actively at work" at the time specified. We do not deem it necessary, however, to define the words "actually at work" or to discuss the trial court's instructions. Said words are in common usage, and their meaning, as applied to an automobile salesman, would seem quite clear and unambiguous. But granting that the rule of liberal construction could be applied, we would be required to stretch that rule beyond all reason in order to hold that the evidence here was sufficient to show that Mr. Boyer was "actually at work" on July 14, 1933, when it showed that he performed none of his customary duties as a salesman on that day, but merely discussed his inability to perform his duties and the advisibility of permitting others to carry on until such time as he might be able to perform such duties.

The judgment is reversed with directions to the trial court to enter judgment in favor of the defendant.

We concur: NOURSE, P. J.; STURTEVANT, J.



14 Cal.App.2d 208

Ex parte GARCIA.

Cr. 192.

District Court of Appeal, Fourth District, California.

May 19, 1936.

Rehearing Denied June 2, 1936.

Hearing Denied by Supreme Court June 18, 1936.

1. Criminal law ⇐260(7)

Dismissal of appeal of accused to superior court from justice court conviction because accused did not see that statement of facts was filed in superior court and appeal heard within 60 days after being perfected *held* error, where petitioner timely filed notice of appeal and served and filed statement on appeal, since justice had duty to transmit statement to superior court and appeal was not "perfected" until justice filed statement (Pen.Code, §§ 1468, 1468a).

[Ed. Note.—For other definitions of "Perfect," see Words & Phrases.]

2. Criminal law ⇐260(8, 9)

Superior court which by statute had no authority to dismiss appeal from justice court conviction until 60 days after appeal was perfected could not divest itself of jurisdiction by purporting to dismiss appeal when no ground to dismiss existed under statute; hence appeal remained pending, and justice court had no jurisdiction to issue commitment against accused (Pen.Code, §§ 1468, 1468a).

3. Bail ⇐71

Accused who gave bond to stay execution of judgment pending appeal was entitled to liberty until some further step was taken.

4. Criminal law ⇐260(8)

Where attempt of accused to bring his appeal to hearing within 60 days from date appeal was perfected was unsuccessful because of order dismissing appeal, time during which superior court refused to exercise jurisdiction was required to be deducted, and accused had remainder of 60 days within which to take steps to have appeal heard (Pen.Code, §§ 1468, 1468a).

Proceeding in the matter of the application of Louis Garcia for a writ of habeas corpus.

Petitioner discharged, and his bail on habeas corpus proceeding exonerated.

Karl F. Kennedy, of Coalinga, for petitioner.

Dan F. Conway, Dist. Atty., and S. L. Heisinger, Jr., Deputy Dist. Atty., both of Fresno, for respondent.

BARNARD, Presiding Justice.

A complaint was filed in a justice's court in Fresno county charging the petitioner and a man named Monroe with having the carcass of a female deer in their possession in violation of section 1250 of the Fish and Game Code, as amended

(Stats.1935, p. 1320). Monroe pleaded guilty and was fined $75, and the petitioner stood trial. The first jury disagreed, but on a second trial he was convicted. On November 8, 1935, he was fined $200, with the alternative of 100 days in jail, and written notice of appeal was filed in the justice's court on November 12, 1935. Apparently the justice then sent the papers to the superior court as the record in that court shows, under date of November 13, 1935, "Filed papers on appeal." However, the petitioner filed a statement of the case in the justice's court on November 16, 1935, in accordance with section 1468 of the Penal Code, and a notation of the same was entered on the docket on that date. It appears that the district attorney filed suggested amendments to this statement in the justice's court on November 19, 1935, but no notation thereof was made on the docket.

The next entry in the superior court, after November 13, 1935, was on January 31, 1936, when the district attorney filed a notice of motion to dismiss the appeal on the ground that the appeal had not been prosecuted by the appellant within the time required by law. On the same day, the petitioner filed notice of a motion to bring on the motion to dismiss the appeal for hearing, and for a hearing on the appeal. These matters came on for hearing on February 14, 1936, the statement on appeal having been filed the day before. The court entered its order dismissing the appeal and refusing to pass on the other matters presented. A certified copy of the order dismissing the appeal was filed in the justice's court on February 28, 1936, and on March 2, 1936, a commitment was issued by the justice of the peace upon which the petitioner was taken into custody. The application for this writ followed.

The main question here presented is whether the justice's court had jurisdiction to issue the commitment, and this in turn depends upon whether the superior court exceeded its jurisdiction in dismissing the appeal under the circumstances here appearing.

The superior court based its order dismissing the appeal upon the case of In re Bathurst, 98 Cal.App. 552, 277 P. 201, 202. In that case it did not appear that any statement to be used on appeal had been prepared, served, settled or filed at the time the motion to dismiss was made, which was long after the time allowed by the statute for the filing and serving of such a statement. In commenting on section 1468a of the Penal Code, the court there said: "This section insures a defendant the right to demand a hearing within the time prescribed, or to discharge, but its salutary application is predicated upon compliance by the defendant with other indispensable requirements of the same Code."

[1] In the instant case we have a different state of facts, in that the petitioner had complied with the other requirements of this Code and in addition to filing a notice of appeal had served and filed his statement on appeal within the time allowed. The district attorney had filed suggested amendments to this statement and he states that the justice had settled the statement. Whatever the fact in that regard, no such settled statement was filed in the superior court prior to February 13, 1936, at least. It is the respondent's contention that it was the duty of the petitioner, as the appellant, to see that this statement was filed in the superior court and to have the appeal heard within sixty days after notice of appeal was given, and the superior court adopted this theory in dismissing the appeal.

At the times here in question sections 1468 and 1468a of the Penal Code were in effect. The first of these provided that such an appeal should be heard upon a statement of the case to be settled by the justice who had presided at the trial, and that this statement must be prepared by the appellant and filed with the justice's court, with service on the opposite party, within five days after the filing of the notice of appeal. It is then provided that the other party may file amendments to the statement and, in any event, the court must settle the statement within ten days after the appellant's statement is filed. The other section provides that the appeal must be brought to a hearing within sixty days after "the appeal is perfected," unless good cause to the contrary is shown, and that if this is not done the appeal shall be dismissed, upon motion.

It will be observed that while section 1468 requires the appellant to file a statement in the justice's court within a certain time, and requires the justice to settle the same within ten days thereafter, it does not provide that the appellant shall undertake the duty of seeing that this

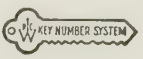
statement is filed in the superior court as a condition of perfecting his appeal. While the appeal may not be perfected, for certain purposes, until the settled statement is transmitted to the superior court, the appellant is entitled to the benefit of his appeal when he has complied with the terms of the statutes, by giving timely notice or appeal and serving and filing his statement of the case within the time allowed. The statements, when filed, are a part of the record in the justice's court, and it is not to be presumed that the Legislature intended to provide that such an official record should thereafter be turned over to the appellant or his attorney. On such an appeal it is the duty of the justice of the peace to transmit the proper papers in the case to the superior court and the only reasonable interpretation of the language used in the statutes is that it is also his duty to transmit these statements after the same have been settled by him. It would seem that the justice here transmitted certain of the papers to the superior court immediately after the notice of appeal was filed. The same duty rested upon him to transmit the statement of the case after the same was settled. While the statute does not provide any time within which the settled statement must be thus transmitted to the superior court, we are of the opinion that the appeal cannot be said to have been "perfected," within the meaning of section 1468a, until that has been done.

[2] When the motion to dismiss was heard in the superior court, it fully appeared that the petitioner had complied with section 1468 by serving and filing his statement of the case in the justice's court on November 16, 1935. It also appeared that the appeal had not been perfected until February 13, 1936, when the statement was filed in the superior court. Under section 1468a that court had no authority to dismiss the appeal until sixty days after the appeal had been perfected. That court could not divest itself of jurisdiction (Egan v. McCray, 220 Cal. 546, 31 P.(2d) 1041) by purporting to dismiss the appeal when no ground to dismiss the same existed under the statute. It follows that the appeal is still pending in the superior court and that the justice's court was without jurisdiction to issue the commitment under which the petitioner is held.

[3, 4] The petitioner, having given bond to stay execution of the judgment pending the appeal, is entitled to his liberty until some further step is taken. In re Bathurst, supra. The appeal not having been perfected until February 13, 1936, the petitioner had sixty days from that date within which to bring the matter to a hearing. He attempted to do this but was prevented by the order dismissing his appeal. We think it naturally follows that the time during which the superior court refused to exercise its jurisdiction must be deducted and that the petitioner has the remainder of the sixty days within which to take steps to have his appeal heard.

It is ordered that the petitioner be discharged and his bail on this proceeding exonerated.

We concur: MARKS, J.; JENNINGS, J.



UNION BANK & TRUST CO. OF LOS ANGELES v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.*

SAME v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES.

Civ. 10046.

District Court of Appeal, Second District, Division 1, California.

May 22, 1936.

Hearing Granted by Supreme Court July 20, 1936.

1. Bills and notes ⊂=6

Under statute, check drawn to payee who may be actual existing person but who is not intended to have any interest therein is "bearer" paper, as respects forgery thereof (Civ. Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Bearer," see Words & Phrases.]

2. Bills and notes ⊂=6

Employee with authority to sign checks drawn on employer who obtained cashier's checks payable to parties designated by employee, for checks drawn on employer and signed by employee, was "person making checks so payable," and hence, under statute,

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 65 P.2d 355.

cashier's checks were "bearer" paper, where employee never intended that proceeds of such checks should be delivered to payees designated therein (Civ.Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Person Making it so Payable," see Words & Phrases.]

3. Principal and agent ⇐160½

Act, intent, and knowledge of employee with authority to sign checks drawn on employer, in obtaining cashier's checks payable to fictitious persons, for checks drawn on employer and signed by employee, were binding on employer, giving bank perfect defense to any claim made on it by employer, and making bank's refund to depositor merely a voluntary contribution not resting on any legal obligation (Civ.Code, § 3090, subd. 3).

4. Bills and notes ⇐6

Cashier's checks payable to fictitious persons which were obtained by employee with authority to sign checks drawn on employer, for checks drawn on employer and signed by employee, were "bearer" paper negotiable by delivery, and hence employee's indorsement on cashier's checks of names of such fictitious payees did not constitute "forgery" which would render bank in which employee deposited checks and which guaranteed prior indorsements, liable to bank issuing such checks (Civ.Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Forgery," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Actions by the Union Bank & Trust Company of Los Angeles against the Security-First National Bank of Los Angeles and against the Citizens National Trust & Savings Bank of Los Angeles, which were consolidated for trial and were by stipulation combined for the purposes of this appeal. From the judgment, the plaintiff appeals.

Affirmed.

Loeb, Walker & Loeb, of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondent Security-First Nat. Bank of Los Angeles.

Mills, Hunter & Dunn and Edward C. Mills, all of Los Angeles, for respondent Citizens Nat. Trust & Savings Bank of Los Angeles.

WHITE, Justice pro tem.

In the court below these actions were consolidated for trial, and are by stipulation combined for the purposes of this appeal.

Although there are two defendants, the facts and issues raised are so similar that the cases may be treated as if there were but one action. The two actions will, therefore, except when otherwise necessary, be referred to in the singular, such designation, for the purposes of this decision, including both actions.

Appellant sued respondent to recover the principal amount of 22 cashier's checks aggregating $17,965.26, all drawn by appellant upon itself as drawee, and delivered to one Guy G. Williams.

The controversy arises out of the following facts: Guy G. Williams, during the period here in question, from March 28, 1930, to November 22, 1932, was a director and the assistant secretary of the Walter H. Leimert Company, and a director and the assistant secretary of the Westside Land Company. These companies maintained bank accounts with the appellant, Union Bank. Under the arrangement existing between said companies and the appellant, Union Bank, two signatures were required on all checks drawn by said companies upon their respective accounts with the appellant, Union Bank. Williams was one of the authorized signers of checks for both companies. About December 1, 1932, Williams' employers discovered that he had misappropriated corporate funds. Of the amount of such defalcations that are in question here, Williams accomplished his perfidy in the following manner—he would prepare checks to the order of the appellant, Union Bank, drawn upon the accounts of his employers, and signing them himself, procured the necessary counter-signatures. These checks, properly signed and countersigned, he presented to appellant, Union Bank, and upon a written requisition signed by him on behalf of his employers, procured cashier's checks drawn by appellant upon itself to the order of the payee designated by Williams in the requisition. The payees of such cashier's checks upon which this action is predicated were H. M. Hawkins and Harry Christensen, both actual persons, either then or formerly known personally to Wil-

liams, but to whom Williams never delivered any of the checks in question. Instead, Williams himself, in each instance indorsed the checks, first in the name of the payee thereof, and then in his own name, and deposited the checks so indorsed to his own account in the respondent banks, after which the latter bank stamped each check with the clearing house indorsement, "all prior indorsements guaranteed," and received from appellant, Union Bank, the amount of each of the aforesaid 22 checks, for which total amount, with interest, appellant sued respondent. It is conceded that at no time did Williams make any disclosure to the appellant, Union Bank, that he in fact intended to appropriate to himself the proceeds of the cashier's checks delivered to him, and appellant, Union Bank, made payment to respondent upon the faith of the guaranty of prior indorsements stamped on the checks by respondent bank, making no investigation to determine whether the signature of the original payee as indorsed on the checks was genuine. It further appears that during the entire period of Williams' defalcations, appellant, Union Bank, rendered monthly statements to Williams' employers, and as a part thereof returned to said employers all canceled checks, including those upon which the cashier's checks herein mentioned were obtained. After discovery of Williams' defalcations, appellant, Union Bank, without litigation, paid to Williams' employers the amount obtained by Williams through his aforesaid misappropriation of the cashier's checks. The trial court rendered judgment in favor of respondent, and from that judgment appellant prosecutes this appeal.

Appellant assails the judgment on several grounds; and we will first discuss the question raised by appellant as to whether the cashier's checks were bearer paper, negotiable by delivery, and whether the indorsement thereof constituted forgery; and also whether appellant was liable to its depositors for the issuing or cashing of these cashier's checks, or was a mere volunteer in making refund to its depositors without resorting to any defense it might have to an action by such depositors. If respondent's contentions on these questions are upheld, such ruling, in our opinion, would be determinative of this appeal.

The first question, therefore is: When is a check a "bearer" check? The applicable statutory provision is subdivision 3 of section 3090 of the Civil Code, which reads as follows:

"The instrument is payable to bearer— * * *

"(3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable."

[1] The outstanding case on this subject (Seaboard Nat. Bank v. Bank of America, 193 N.Y. 26, 85 N.E. 829, 831, 22 L.R.A. [N.S.] 499) lays down the rule that the intention to make the instrument payable to a fictitious person "must * * * exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery." In the construction of this particular language, it has been recognized that "fictitious or nonexisting persons" literally construed is not sufficiently embracive to cover all situations in which the instrument is "bearer" paper within the meaning of that language. Thus it has been definitely established, and the rule has been consistently followed, that a check drawn to a payee who may be an actual existing person, but who is not intended to have any interest therein is "bearer" paper. In Bank of England v. Vagliano Bros., L.R.[1891] A.C. 107, at page 152, we find the following: "* * * Where, then, the payee named is so named by way of pretense only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence."

In Norton et al. v. City Bank & Trust Co. (C.C.A.) 294 F. 839, 844, we find the following: "Nevertheless, the law is now well settled that a negotiable instrument is drawn to a fictitious payee whenever the payee named in it has no right to it, and its maker does not intend that such payee shall take anything by it." And again, in Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 606, 70 A. 876, 878, 128 Am.St.Rep. 780, the court says: "The intent of the drawer of the check in inserting the name of a payee is the sole test of whether the payee is a fictitious person. * * * It is clear, then, that, when the Legislature declared that a check payable to a 'fictitious or nonexisting person' is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never ex-

isted." Citing Phillips v. Mercantile Nat. Bank, 140 N.Y. 556, 35 N.E. 982, 23 L.R.A. 584, 37 Am.St.Rep. 596; Coggill v. American Exchange Bank, 1 N.Y. 113, 49 Am. Dec. 310. This line of reasoning was quoted with approval by this court in an exhaustive, learned, and well-considered opinion prepared by Mr. Justice Roth sitting pro tempore in this court, in the case of Goodyear Tire & R. Co. v. Wells Fargo Bank, etc., Co., 1 Cal.App.(2d) 694, 700, 701, 702, 37 P.(2d) 483, 493.

[2] Therefore, when, as in the instant case, Williams never intended that the proceeds of the cashier's checks should be delivered to the payees therein named, it became immaterial whose name or what name he directed be inserted.

But, says appellant, the faithless employee, Williams, did not make or sign the cashier's checks in question, nor was he an employee of the appellant, Union Bank, which appears as drawer and drawee on the checks in question; that Williams did not sign, nor had he any authority to sign, any cashier's checks. But the answer to this contention lies in the fact that while it is true that the maker of the cashier's checks in question was the appellant, Union Bank, still it was the faithless employee's, Williams', intent that must govern, because the bank made the cashier's checks payable to the parties designated by Williams. The appellant's intent was to make the cashier's checks payable to the parties that Williams intended them to be payable to. Williams, therefore, was the real drawer and "the person making it so payable" as to each cashier's check.

[3, 4] Remembering that Williams was authorized to sign checks drawn on his employer's account at appellant Union Bank he therefore, within the scope of his authority, presented to appellant, his employer's banking depositary, checks of his employer drawn upon and payable to appellant. With these checks he purchased the cashier's checks sued upon; all of which were issued by appellant, Union Bank, upon the written requisitions of Williams' employer, signed by the former on behalf of the latter. The appellant, Union Bank, followed the instructions implicitly; it executed its cashier's checks to a payee designated by Williams, with the former of whom it was unacquainted, of whom it had no knowledge, and concerning whom it had no intent. Regarding the payee named, appellant had no interest save that of following Williams' instructions, and the latter's intent was that a fictitious payee be named. Authorized as Williams was to sign checks drawn on his employer's depositary, if he had cashed such checks and obtained money, surely it would not be contended that the depositary would be liable to the depositor. How, therefore, can the depositary be held liable when, instead of obtaining cash on the checks, the faithless employee obtained cashier's checks? The intended fictitious payee was the creature of Williams' mind, and while the appellant Union Bank was the nominal maker of the cashier's checks, still Williams was the person who actually drew the bill and was the person making the cashier's checks payable to a fictitious payee; and since he acted within the scope of his authority, his act, intent, and knowledge, although adverse to and a fraud upon his principal, are nevertheless binding upon the latter. In paying out in cashier's checks, appellant did what was intended by Williams, an intent binding upon his employer; and in our opinion, therefore, under the authority of the Goodyear Case, supra, appellant had a perfect defense to any claim made upon it by its depositor.

In the case of Rancho San Carlos, Inc., v. Bank of Italy, 123 Cal.App. 291, 11 P.(2d) 424, "the person making it [the check] so payable" was not even a signer. The nominal maker signed a blank check and delivered it to an employee, thereby clothing the employee with power to designate the payee and fix the amount. The nominal maker did not know that the check was drawn to a fictitious payee. The trusted employee did. The court held the employee to be "the person making it [the check] so payable," saying, 123 Cal.App. 291, at page 295, 11 P.(2d) 424, 426: "And in principle the same rule should apply where the person who actually makes the check payable is expressly or impliedly authorized to complete it in that manner." The court then goes on to cite other cases in which the name of the payee was left blank and afterwards inserted, in which it was held that the checks became "bearer" paper upon the insertion of a fictitious payee by one other than the signer of the check.

To our minds, it is at once apparent that the Goodyear Case and the instant case are identical down to the point of the presentation of the employer's checks to the appellant Union Bank by Williams.

In the Goodyear Case the defrauding agent demanded and obtained from the depositary the amounts of the corporation checks in cash. In the instant case Williams elected to receive payment by means of a cashier's check in which he himself designates, and the bank writes in, a payee's name which is "fictitious." We thus see that the only difference between the cases is that in one the defaulting agent asked for and received cash, and in the other he asked for and received a cashier's check bearing a fictitious name.

Appellant attempts to distinguish the Goodyear Case from the instant case, arguing that the checks here sued upon were not the checks of the depositor, but were cashier's checks purchased with the checks of the depositor; and further, upon the ground that Williams' fraud, while binding upon his employer, was not binding upon the appellant, Union Bank, because Williams was the officer and agent, not of appellant, but of the appellant's depositor. In our opinion, the attempted distinction is without merit. Under the authority of the Goodyear Case, supra, the acts of the officer (Williams) of the depositor are held to be the acts of the depositor. In that case it was held that the officer of the depositor bound the depositor in procuring the payment of checks by the bank, although the checks were made to fictitious payees and were indorsed by the officer with the names of such fictitious payees, and although the officer was acting in fraud of his employer. We therefore conclude that the cashier's checks in question here were "bearer" paper, negotiable by delivery, and the indorsement thereon by Williams of the name of a "fictitious" payee did not constitute forgery of the character that operates to bind respondent.

In the Goodyear Case, supra, the depositor was denied relief in a case where a faithless employee caused checks to be issued to a fictitious payee, indorsed the latter's name thereto, and obtained the amount of such checks from the depositor's bank. By the same token, we feel that in the instant case, where, instead of obtaining cash from the depositor's bank, the faithless employee, upon similar checks which he was authorized by his employer to sign, obtained cashier's checks, there rested upon the bank no obligation to restore to its depositor moneys so paid out, and the restoration by appellant, Union Bank, to the depositor of such sums constituted a voluntary contribution upon the part of such bank, not resting upon any legal obligation in the premises. In commenting upon such a rule, this court, in the Goodyear Case, supra, quoting with approval from Norton v. City Bank & Trust Co. (C.C.A.) 294 F. 839, 845, said that it is "neither arbitrary nor fanciful, but is both just and equitable. The owner of the funds trusts its agent. It tells the bank to pay out its funds on his order. As between him and the bank, the latter is bound to pay whomsoever he will. If any particular check is paid to a person whom he intended to receive it, the bank has done precisely what it was instructed to do. In such cases as that here involved, it is true that the agent has proved false to his trust, and some innocent person must be the loser. Should it not be the one who gave him the power which he misused?" That the faithless employee obtained cashier's checks, rather than cash as in the Goodyear Case, from the defrauded employer's bank, does not, in our opinion, alter the rule.

In view of the conclusions reached, it becomes unnecessary to discuss or decide other questions raised on this appeal.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



14 Cal.App.2d 239

In re FASSETTA'S ESTATE.

TONER v. CATTANEO.

Civ. 10998.

District Court of Appeal, Second District, Division 2, California.

May 20, 1936.

1. Insane persons ⇐63

To recover against estate of insane person for board, care, and maintenance of incompetent at state institution, state *held* not required to prove admitted allegations of petition that incompetent had been inmate of and cared for by state hospital since designated date, that charge for care was $20

per month, and that guardian had refused payment thereof although often demanded.

2. Insane persons ⊂⇒63

Guardian of incompetent's estate *held* not entitled to assert that claim of state for maintenance and care of incompetent at state hospital was barred by laches where guardian admitted in pleadings that he had refused to make payment for such care though often demanded.

3. Insane persons ⊂⇒63

State *held* not estopped to assert claim for maintenance and care of incompetent at state institution for period from April 2, 1930, to August 2, 1934, by silence through years prior to 1930 with respect to collecting payment for care of incompetent, in absence of proof that state's conduct gained any advantage for state or produced any disadvantage to guardian of incompetent's estate.

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge.

Proceeding in the matter of the estate of Vincenza Fassetta, an insane person, wherein J. M. Toner, M. D., director of state institutions, filed a petition which was opposed by Iolanda Cattaneo, guardian of Vincenza Fassetta. From an adverse judgment, the guardian appeals.

Affirmed.

O. H. Myrick, of Los Angeles (C. W. Pendleton, of Los Angeles, of counsel), for appellant.

U.S.Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

CRAIL, Presiding Justice.

This is an appeal from an order directing payment by the guardian to the department of institutions of $20 per month for the board, care, and maintenance of the incompetent at a state institution for the period from April 2, 1930, to August 2, 1934.

Three points are raised on the appeal: "(1) That the director did not sustain his petition by any proof; (2) That the said demand is stale and is barred by laches; (3) That the director is estopped to present said demand on account of leading the guardian to understand that no demand of the kind would be made, but that the same was waived." The allegations of the petition are: (1) That the incompetent is and ever since the fifteenth day of May, 1922, has been an inmate of Norwalk State Hospital, cared for, maintained and given medical attention by that institution. (2) That from January 1, 1930 to August 1, 1934, the rate charged for board, care and medical attention given said insane person was $20 per month. (3) That though often demanded the guardian had failed, refused and neglected to make any payment. (4) That there is now due and owing to the department the sum of $1,100.

The answer admits all of said allegations except that it denies that there is or was due the sum of $1,100 or any part thereof. The answer also pleads laches and estoppel.

[1] With regard to the first point, the answer admits that the incompetent was confined in the institution for the period pleaded; admits that the charge made was $20 per month; and that it has never been paid. Under the pleadings, there was no burden upon the state to prove these facts, and no point is made that $20 per month is not a reasonable charge for the services rendered.

[2] With regard to defendant's second point, he is not in a position to claim that the demand is stale and is barred by laches where he has admitted in the pleadings the allegation numbered (3) above.

[3] With regard to the defendant's third point, i. e., estoppel, an essential element of estoppel is lacking. The act upon which the defendant relies to create an estoppel consisted merely in the state's silence through the years from 1922 to 1930 in the matter of collecting a similar $20 per month for the care of the incompetent and in its neglect to demand such sums for that period. There is no proof that the state's conduct gained any advantage for the state or produced any disadvantage to the defendant. There is no proof that the defendant changed his position by reason thereof to his injury.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

24 Cal.App.2d 271

In re McLELLAN'S ESTATE.

Civ. 10113.
District Court of Appeal, First District, Division 2, California.

May 26, 1936.

Rehearing Denied June 25, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Executors and administrators ⇐315(6)

Final probate court decree distributing estate, including distribution of trust fund, to trustees, who had also been executors, could not be attacked collaterally by beneficiary in trustees' proceeding for settlement of account on ground that trustees should be charged with interest on corpus of trust from settlor's death to distribution with compound interest.

2. Courts ⇐200¼

Probate court has no general equity jurisdiction, and questions other than business connected with administration of estates, which require judicial attention, must be settled in independent action in equity.

3. Trusts ⇐329

Where note and mortgage which trustee had executed to deceased settlor were distributed to trustees as part of trust fund, whether reduction in interest on obligation from 7 to 6 per cent. when trustee executed renewal note in 1933 was beneficial to trust estate rather than detrimental because of prevailing economic conditions *held* question of fact for probate court, whose judgment appellate court would not disturb (Civ.Code, § 2229 et seq.).

4. Trusts ⇐227

Refusing to allow trustees attorney's fees for advice given in connection with one trustee's executing renewal note for mortgage note executed to deceased settlor and distributed to trustees as part of corpus of trust estate *held* proper, since services so rendered were detrimental to interests of trust estate (Civ.Code, § 2229 et seq.).

5. Trusts ⇐315(2)

Allowing three trustees $100 for services *held* unreasonable, where trustees had performed duties as such and assumed all responsibilities under trust for more than seven years.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding in the matter of the estate of Mary Belle McLellan, also known as M. Belle McLellan, deceased, wherein Asher Bates McLellan and Asher Bates McLellan, as administrator of the estate of Mary Bates McLellan, deceased, objected to the approval of the trustees' account. From an order disallowing and disapproving their first and final account, Asa D. McLellan and others, trustees, appeal.

Reversed.

Hankins & Hankins, of San Francisco, for appellants.

A. J. Harwood, of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal by the trustees from an order of the probate court disallowing and disapproving their first and final account.

Mary Belle McLellan died on January 15, 1927, leaving a will in which she designated the three appellants herein as executors and also as trustees of certain trusts created by the will. One of such trusts was for the benefit of Mary Bates McLellan, with remainder on her death to Asher Bates McLellan. On January 23, 1928, a decree was duly entered settling the final account of these executors and for final distribution and discharge. By the terms of the decree of distribution the sum of $3,941.21 was distributed to the three appellants as trustees for Mary Bates McLellan. As part of the corpus of this trust there was distributed under the decree of distribution a promissory note and deed of trust executed by one of the trustees in favor of the deceased in the sum of $3,500. The decree of distribution became final, and thereupon the trustees regularly paid to Mary Bates McLellan during her life the income of the trust, and on June 3, 1929, paid her $500 on account of principal. She died on December 29, 1934, and thereafter the trustees paid the income derived from the balance of the trust to her son Asher Bates McLellan. In 1933 the note and deed of trust which had been distributed to the trustees by the decree of distribution was renewed, but with a reduction of interest from 7 per cent. to 6 per cent. per annum. On April 15, 1935, the entire amount of the note with interest was paid to the trustees and was ready for payment to the beneficiary at the time of settlement of the account.

The beneficiary objected to the approval of the account on the grounds: (1) That

the trustees should have received from the estate of Mary Belle McLellan interest on the corpus of the trust from the day of her death to the day of distribution, and, not having done so, they should be charged personally to account for that amount with compound interest; (2) that the renewal of the promissory note of one of the trustees was an invalid act on the part of all, and that they should therefore be charged to pay 7 per cent. interest from the day of renewal; (3) that the trustee should not be allowed attorney's fees for advice given in connection with renewal of said note; (4) that they were not entitled to the statutory fees as fixed for the ordinary proceeding in probate.

[1, 2] The probate court allowed respondent's first objection and charged the trustees with the sum of $512.13, with compound interest from the date of the death of Mary Belle McLellan. This was on the theory that the trust for the benefit of Mary Bates McLellan was a trust for maintenance carrying interest from the testator's decease. The point is contested by the appellants on the ground that the probate court had no jurisdiction to make the order. This position must be sustained. The decree of distribution became a final and conclusive judgment more than seven years before this collateral attack was made upon it. By the terms of that decree the trustees had distributed to them something over $3,900, and that is all of the corpus of the trust for which they can now be called upon to account. The fact that the executors and the trustees were the same individuals has no possible bearing on this proceeding to settle the account of the trustees. If because of such relation or if because of any other fact or circumstance not alleged or proved herein the appellants were guilty of fraud or breach of trust in connection with the decree of distribution that is a matter for a court of equity to determine. It is not the policy of the law that parties can be charged and penalized for fraud merely by innuendo in briefs of counsel. Fraud is a fact, and those charged with it are entitled to demand both allegation and proof. The authorities are uniform in holding that the general jurisdiction of the probate court is confined to the settlement of estates and that such court has no general equity jurisdiction. When questions other than the business connected with the administration of estates require judicial attention, those questions are to be settled in an independent action in equity. Parkman v. Superior Court, 77 Cal.App. 321, 246 P. 334; Estate of Hubbell, 121 Cal.App. 38, 42, 8 P.(2d) 530; Security-First National Bank v. Superior Court, 1 Cal.(2d) 749, 757, 37 P.(2d) 69. From the foregoing authorities it follows that, the decree of distribution herein having become final, it was not subject to collateral attack in a subsequent proceeding settling the account of the trustees.

[3] The second ground of objection to the final account presents a different situation. In accordance with the provisions of sections 2229 et seq. of the Civil Code, a trustee may not use trust property for his own profit or engage in any transaction in connection with the trust which is adverse to that of his beneficiary. The renewal of the promissory note in 1933 would seem to come within the prohibitions of these sections of the Code, and, though we are asked to take judicial knowledge of the fact that, because of prevailing economic conditions, the 6 per cent. interest was beneficial to the estate and not otherwise, this was a pure question of fact which was submitted to the lower court, and we can find no reason to disturb its judgment in that respect.

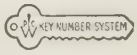
[4] For this reason the refusal to allow the trustees counsel fees for service in connection with the renewal of the note was not improper because the services so rendered were detrimental to the interests of the trust estate.

[5] The final objection made to the account relates to the compensation allowed the trustees and their counsel for their services. By the terms of the decree, the three trustees were allowed $100 for their services and $75 for services of their attorneys. The unreasonableness of the fee allowed the trustees is obvious. The decree of distribution was entered January 23, 1928, and from that time until the entry of the order herein on July 10, 1935, these trustees performed the duties of such under the trust and assumed all the responsibilities thereof, covering a period of more than seven years. Though the duties may have been light, the responsibilities alone call for a higher fee than that allowed. It is not unlikely that the meager fee allowed the trustee was fixed because of the court's finding on the first point relating to the corpus of the trust, but, for whatever reason, the allowance is unreasonable, in view of the circumstances, and the matter is remanded for the purpose of having a reasonable fee fixed. We express no opinion on the reasonableness

of the fee allowed counsel, as we have no facts upon which to base an opinion.

The order is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



14 Cal.App.2d 268

In re DEFFEBACH'S ESTATE.

DEFFEBACH et al. v. CODRICK.

Civ. 10999.

District Court of Appeal, Second District, Division 2, California.

May 25, 1936.

Hearing Denied by Supreme Court July 23, 1936.

Wills ⇐106

Where testator possessed two notes executed on same dates and for identical sums, one secured by first mortgage and other by second mortgage on identical property, and testator bequeathed one note to stranger to blood and the other to son, bequests *held* not so ambiguous as to be void for ambiguity, but to give stranger one note and son the note which remained, entitling stranger to election (Probate Code, § 102).

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Proceedings in the matter of the estate of Edward Deffebach, deceased, wherein Charles Deffebach and others filed petitions. From orders construing testator's holographic will, Myrtle Codrick appeals.

Reversed.

George Woods, of Hollywood, and C. P. Von Herzen, of Los Angeles, for appellant.

Clyde C. Triplett, of Los Angeles, for respondents Charles Deffebach et al.

Jensen & Jensen and William C. Jensen, all of Los Angeles, for respondent Jesse Ross Deffebach.

CRAIL, Presiding Justice.

This is an appeal from two orders construing the holographic will of the testator, a portion of which reads as follows: "My property consists of two notes of $5500.00 each, two houses and furniture in Los Angeles on one lot, one two story brick building in Ocean Park, some cash in bank. To Myrtle Codrick I will one of my notes of $5,500.00 date June 10, 1929, secured by mortgage on the property I sold on Twenty-fifth Street. To Jesse Ross Deffebach my son now living at Forum Apartments in Los Angeles, California * * * I will the other note for $5,500.00, dated June 10, 1929, secured by mortgage on the same property to my son Jesse Ross Deffebach." The testator was possessed of two promissory notes secured by mortgage, each dated the same day, each secured by mortgage on the identical property, and each for the identical sum of $5,500. One of these notes was secured by a first mortgage and the other note was secured by a second mortgage. The decedent by his will disposed of the rest of his property, devising his house to his son and his two-story brick building to his daughter. Myrtle Codrick was not related by blood to the testator. The trial court held that the provisions of the will with regard to the two notes were ambiguous and that the decedent died intestate as to said notes, and held further that the heirs at law of the decedent were entitled to inherit said notes in place of the devisees.

It will be observed that the will describes the note which was bequeathed to Jesse Ross Deffebach as a note "secured by mortgage on the same property to my son Jesse Ross Deffebach." The record before us is silent as to whether there was any such note. No point is made by either of the parties with regard to this language of the will, and we make no point of it.

In construing a will its words should receive an interpretation which will give to every expression some effect rather than one which will render any of the expressions inoperative, and of two modes of interpreting a will that is to be preferred which will prevent intestacy. Probate Code, § 102; In re Estate of Johnson, 107 Cal.App. 236, 290 P. 314; Le Breton v. Cook, 107 Cal. 410, 416, 40 P. 552.

It is our conclusion that the provisions of the will in question are not ambiguous in the sense that they are void for ambiguity. The intention of the testator as expressed by the will was to first give to Myrtle Codrick one of the said notes and to give to his son Jesse "the other"—the note which remained. Myrtle Codrick is entitled to her election. For somewhat similar

cases where an election was permitted see In re Turner's Will, 206 N.Y. 93, 99 N.E. 187, 41 L.R.A.(N.S.) 1049; Duckmanton v. Duckmanton, 5 Hurl. & N. 219, 20 L.J. Exch. 132; Tapley v. Eagleton, 12 L.R. Chancery Div., p. 683; Prater v. Hughston, 202 Ala. 192, 79 So. 564.

The orders are reversed.

We concur: WOOD, J.; GOULD, Justice pro tem.



14 Cal.App.2d 134

LOS ANGELES COUNTY v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10838.

District Court of Appeal, Second District, Division 2, California.

May 18, 1936.

Hearing Denied by Supreme Court July 16, 1936.

1. Master and servant ⇐375(1)

Back strain suffered by claimant, employed in county's forestry department, while making dormitory beds pursuant to superintendent's direction *held* to "arise out of and in course of employment."

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words & Phrases.]

2. Master and servant ⇐416

Commission, having found that permanent disability resulted from successive injuries and pre-existing arthritis, *held* justified in attributing one-half of such disability to arthritis and one-half to injuries.

3. Master and servant ⇐414

Determination of percentage of permanent disability *held* within commission's sound discretion.

4. Master and servant ⇐417(7)

Existence of permanent disability is purely fact question for commission whose decision is final and conclusive.

5. Master and servant ⇐405(6)

Evidence *held* to support commission's findings, two years after first back strain, that pre-existing arthritis and back strains on three different occasions caused permanent disability consisting of limitation of motion of back, notwithstanding absence of medical testimony on question whether disability was temporary or permanent.

6. Master and servant ⇐419

That commission failed to make finding on contention that awards were barred by limitations *held* not ground for complaint, since finding that claimant was entitled to further compensation impliedly negatived contention.

GOULD, J., dissenting.

Petition by Los Angeles County, employer, for a writ of review to annul awards of the Industrial Accident Commission on claims filed by Alfred A. Cordes under the Workmen's Compensation Act.

Awards affirmed.

Fred M. Cross, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, Asst. Atty., both of San Francisco, for respondent Industrial Accident Commission.

WOOD, Justice.

The petitioner, county of Los Angeles, seeks to annul three awards of the Industrial Accident Commission issued November 26, 1935, in favor of Alfred A. Cordes, an employee of petitioner in its forestry department. While engaged in lifting a heavy tire wheel from a truck on December 1, 1933, Cordes slipped and fell. He felt a severe pain in the lower part of his back and his left leg was paralyzed by pain. He was unable to rise and was lifted and put to bed. Medical treatment was furnished by petitioner. Cordes was totally disabled until January 8, 1934, when he returned to work. He was paid compensation for this period. While lifting a motorcycle on July 15, 1934, Cordes suffered a back strain which disabled him until October 3, 1934, when he again returned to work. For this period also he received medical treatment and compensation from petitioner. While making up dormitory beds on June 12, 1935, he suffered another back strain. Petitioner denied liability and no compensation was furnished for this injury. Thereupon Cordes filed claims with the commission for each of the three injuries.

The three claims were consolidated for the purpose of hearing and the commission

filed findings on each of the claims. It was found, in substance, that Cordes suffered injuries consisting of a strain superimposed upon a pre-existing arthritis; that the pre-existing arthritis and the three injuries resulted in "permanent disability consisting of slight limitation of motion of back with pain at limits of motion and on limits of hip flexion; tenderness over lumbar spine." It was further found that the percentage of said permanent disability amounted to 34½ per cent., one-half of which was reasonably attributed to the pre-existing arthritis and one-half of which was reasonably attributed to the combined results of the three injuries. The commission apportioned one-third of the total disability resulting from the injuries to each specific injury.

[1] Petitioner contends that the injury of June 12, 1935, did not arise out of and occur in the course of the employment. The witness Percy, under whose supervision Cordes worked, testified that he had directed Cordes to make the dormitory beds for all of the men "because the boys were assigned to other work and away from the station at that time and he was filling in in their place." The finding of the commission on this point is supported by the evidence.

[2, 3] Petitioner also contends that the commission was not justified in making the apportionment set forth in the award between the pre-existing arthritis and the several injuries suffered by Cordes. The answer to this contention may be found in Tanenbaum v. Ind. Acc. Comm. (Cal.Sup.) 52 P.(2d) 215, in which a similar apportionment was upheld. The determination of the percentage of disability is a matter left to the sound discretion of the commission. Hines v. Ind. Acc. Comm., 215 Cal. 177, 8 P.(2d) 1021.

[4, 5] Petitioner presents the contention that the evidence is insufficient to justify the findings of permanent disability. It is argued that the permanency of the disability is not established by medical testimony and that the commission cannot make such findings without expert testimony. The commission replies that expert testimony is not necessary in all cases and that in the present case there is in fact the testimony of both expert and lay witnesses of sufficient force to justify the findings. The award was made nearly two years after the original injury. Cordes and the superintendent under whom he worked appeared before the officials of the commission and testified that during this period Cordes could do only light work. His condition remained practically the same. The facts concerning each successive injury were explained to the commission. Ever since the first back strain, Cordes could not do the heavy labor which he had performed prior to that time. At all times since the first injury Cordes suffered from the back strain and at the time of hearing he was still receiving medical treatment. The medical reports in evidence, made nearly two years after the original injury, were to the effect that the employee's back had never been entirely normal since the occurrence of the first injury; that there is a limitation of motion present in the back which prevents the employee from bending to such an extent that he can reach only to within six or eight inches of the floor; that there is present at all times a great deal of sacro-iliac pain particularly on lateral bending to the right and rotation to the right; that there is a disarrangement of the spine which makes it very susceptible to injury. Dr. A. Pettefer reported: "Mr. A. A. Cordes had a left anterior sacro-iliac subluxation when I examined him which caused his left leg to be ½ inch longer than right and caused a pressure on the anterior nerve, resulting in the acute pain he complained of, which was evidently caused from some past strain or injury. Patient also had a slight subluxation between 2nd and 3rd lumbar vertebrae." No physician was asked the question whether in his opinion the injuries were permanent. The determination of the question whether petitioner suffered permanent injuries must be made by the commission and the decision of the commission is final and conclusive. The question presented is one purely of fact. Hart v. Ind. Acc. Comm., 119 Cal.App. 200, 6 P.(2d) 348. "The findings themselves are not subject to review except in so far as they may have been made without any evidence whatever in their support." Ethel D. Co. v. Ind. Acc. Comm., 219 Cal. 699, 28 P.(2d) 919, 922. We cannot say that there was insufficient evidence to support the findings in question.

No case has been cited to us in which it is held that the precise question whether an injury is permanent must be asked of a physician or surgeon. Nor has any case been cited in which it has been held that the commission cannot under any circumstances make a finding that an injury is permanent without the evidence of experts. Manifestly there are many cases in which

laymen can well determine the permanency of an injury, such as the loss of sight or limbs. Innumerable cases might be mentioned as coming within this category. The officials of the commission with their great experience in handling matters involving injuries to workmen are of necessity better qualified than the average layman to pass upon such questions. Indeed, the argument in favor of the necessity for expert testimony in cases where the injury is claimed to be permanent might be made with like effect in cases of temporary total disability. If the contention of petitioner should be upheld and carried to its logical conclusion, the result would follow that expert witnesses would be necessary in all cases. If the Legislature had not intended to place with the commission the determination of such questions, it doubtless would have made expert testimony a prerequisite to the making of an award. A similar prerequisite has been prescribed by the Legislature in cases involving charges of insanity, in which a court may adjudge a person insane only after the filing of a certificate by medical examiners. Pol.Code, § 2171. We are not unmindful of the rule that expert testimony is necessary "where the truth is occult and can be found only by resorting to the sciences." State Compensation Ins. Fund v. Ind. Acc. Comm., 195 Cal. 174, 231 P. 996, 1000. We are not now confronted with such a situation. On the record before us the commission was justified in making the findings under discussion.

[6] Petitioner complains that the commission failed to make a finding upon its contention that the first two awards are barred by the statute of limitations. An answer to the contention is found in the recent case of Consolidated Steel Corp. v. Ind. Acc. Comm., 57 P.(2d) 919, decided by the Supreme Court on May 13, 1936, in which it was held that the commission in finding that the petitioner was entitled to further compensation impliedly found against the plea that the claim was barred by lapse of time.

The awards are affirmed.

I concur: CRAIL, P. J.

GOULD, Justice pro tem.

I dissent. I cannot agree with the foregoing opinion in so far as it holds that expert medical testimony is not necessary to support the commission's finding of permanent injury. This case does not involve a patent permanent bodily injury such as loss of leg or other member of the body, visible and apparent to any one, layman or expert, but has to do with a hidden physical impairment, involving the patient's nerves, muscles, and joints and complicated with a pre-existing joint disease properly cognizable only by one trained and expert in such matters. To my mind it is plainly a situation with which a layman may not adequately deal, and which calls for the advice of one expertly versed in such matters by special education and experience.

In my opinion the matter should be remanded to the Industrial Accident Commission for further proceedings.



14 Cal.App.2d 252

GRAYBEAL v. PRESS-TELEGRAM PUB. CO.

Civ. 10797.

District Court of Appeal, Second District, Division 2, California.

May 22, 1936.

Hearing Denied by Supreme Court July 20, 1936.

1. Appeal and error ⇐722(1)

Assignment of error should take form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of judgment (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2, p. 10).

2. Appeal and error ⇐761

Counsel for appellant must comply with rule requiring each point to be separately presented under appropriate heading; reviewing court will not search record for errors not pointed out by counsel (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2, p. 10).

3. Appeal and error ⇐766

Where appellant's opening brief failed to present each point separately under appropriate heading showing nature of question to be presented and point to be made, appeal was dismissed (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2, p. 10).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by O. A. Graybeal against the Press-Telegram Publishing Company. Judgment for defendant, and plaintiff appeals.

Appeal dismissed.

Davis & Thorne and W. A. Alderson, all of Los Angeles, for appellant.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent after the trial court (1) sustained a demurrer to counts 1, 2, and 4 of appellant's amended complaint without leave to amend, and (2) granted a motion for nonsuit as to counts 3 and 5 of the amended complaint.

Appellant has failed in his opening brief to present each point separately under an appropriate heading, showing the nature of the question to be presented and the point to be made without any other matter appearing thereon. Rule 8, § 2, p. 10, Rules of the Supreme Court and District Courts of Appeal of the state of California.

[1] In Adams v. Standard Accident Insurance Co., 124 Cal.App. 393, at page 394, 12 P.(2d) 464, Mr. Justice Conrey, then presiding justice of the District Court of Appeal, Second Appellate District, Division 1, in commenting upon this provision of rule VIII, supra, accurately states the requirement thus: "Such assignment of error should take the form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of the judgment."

[2] This court has repeatedly held that it will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule VIII, supra, in its entirety. Battson v. Kirkpatrick (Cal. App.) 53 P.(2d) 762; Ferslew v. Andersen (Cal.App.) 53 P.(2d) 768; Bernstein v. Congregation Anshi Sfart, etc. (Cal.App.) 57 P.(2d) 954.

This rule is not a mere technical requirement, but is prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court.

[3] For the foregoing reason, the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.



M. P. MOLLER, Inc., v. WILSON et al.*

Civ. 9834.

District Court of Appeal, Second District, Division 1, California.

May 19, 1936.

Hearing Granted by Supreme Court July 16, 1936.

1. Fixtures ⇐35(3)

Whether article annexed to realty is fixture is question of fact to be determined on evidence of particular case (Civ.Code, § 660).

2. Appeal and error ⇐842(1)

Whether on established facts pipe organ installed in residence under conditional sales contract became fixture presented question of law to reviewing court (Civ.Code, § 660).

3. Fixtures ⇐1

Whether personal property attached to land becomes part of realty is determined by annexation to realty, either actual or constructive, adaptation, or application to use or purpose to which that part of realty to which it is connected is appropriated and intention to make article permanent accession to freehold (Civ.Code, § 660).

4. Fixtures ⇐4

In determining whether personal property attached to land has become part of realty, test of intention is to be given broad and comprehensive signification and does not merely imply secret action of mind of owner of property, and need not be expressed in words, but is to be inferred from nature of article affixed, relation and situation of party making annexation, structure and mode of annexation, and purpose or use for which annexation has been made (Civ.Code, § 660).

5. Fixtures ⇐7

Annexation to realty does not require actual attachment and attachment is not annexation in legal sense unless it is permanent (Civ.Code, § 660).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

* For subsequent opinion see 63 P.2d 818.

6. Fixtures ⇐4

Heavy bodies held in place on land by gravity are considered as fixtures where from nature of their use and circumstances of their installation intention is manifest to use them permanently with land (Civ.Code, § 660).

7. Fixtures ⇐4

As regards determination whether personal property attached to land becomes part of realty, whether personalty was placed in building for permanent use with building is primarily question of intention of owner as disclosed by admitted facts (Civ.Code, § 660).

8. Fixtures ⇐32

That pipe organ installed in residence could have been removed without substantial damage to building would be mere evidentiary and not conclusive fact in determination whether organ became fixture (Civ.Code, § 660).

9. Fixtures ⇐22

As between conditional seller and buyer of pipe organ installed in residence, reservation of title in seller would control even though organ became part of realty (Civ.Code, §§ 660, 1013).

10. Fixtures ⇐22

Where personal property has been sold for use with realty on which it is placed under circumstances which may result in its becoming part of realty, and it becomes converted into realty, reservation of title in vendor is ineffectual as against innocent purchaser of realty (Civ.Code, §§ 660, 1013).

11. Fixtures ⇐22

Doubt as to whether personal property sold on conditional sales contract has been permanently attached to realty should be resolved in favor of innocent purchaser of realty (Civ.Code, §§ 660, 1013).

12. Fixtures ⇐22

As between conditional seller of personalty and innocent purchaser of realty, question whether personalty has become fixture is not governed by actual intent that property attached to realty should or should not become fixture, but by apparent intent as it would reasonably appear to purchaser of realty (Civ.Code, §§ 660, 1013).

13. Fixtures ⇐22

Pipe organ installed in residence under conditional sales contract of which console weighing 1,500 pounds was held in place by gravity and was connected by a specially constructed shaft with organ chamber which was connected with motors and blower situated in laundry room by steel blower pipe which extended through concrete walls *held* "fixture" as between conditional seller and purchasers of realty who bought residence, without notice of seller's rights after organ had been installed (Civ.Code, §§ 660, 1013).

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by M. P. Moller, Inc., against D. W. Wilson and another. Judgment for plaintiff, and defendants appeal.

Reversed with directions.

Walter F. Haas, Stanley F. Maurseth, and Gerald E. Kerrin, all of Los Angeles, for appellants.

Craig & Weller and Paul A. Amos, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

This is an appeal by defendants from a judgment in favor of plaintiff in an action to recover possession of a pipe organ which had been installed in a residence under a conditional sales contract purporting to reserve title in plaintiff, the seller.

On May 4, 1929, plaintiff agreed to build a pipe organ and to install it in the residence of one Ferguson, the purchaser. The purchase price was $8,500, of which $2,784.21 was paid, and the balance was to be paid at the buyer's option in two or three annual payments, beginning one year after date of acceptance. The initial payment only was made. The organ was installed and thereafter defendants purchased the real property and took title as joint tenants for value, and without knowledge or notice that the organ had been sold on a conditional sales contract or that plaintiff had or claimed title thereto or any interest therein. The judgment was for the return of the organ to plaintiff or, if possession could not be delivered, for its value in the sum of $4,500, the basis of the judgment being, as found by the court, that the pipe organ was not a fixture and that title thereto did not pass to defendants by their deed. The sufficiency of the evidence to sustain this finding is the sole point involved on the appeal.

The following facts are established by the findings: That the pipe organ consisted of two motors and a blower situated in the laundry room of the residence, with wiring and switches, the same being connected by a steel pipe designated as the "blower pipe," 14 inches in diameter and approximately 48 feet long, with a chest and pipe situated in the organ chamber, which organ chamber had been specially constructed for the purpose of the installation of a pipe organ chest and pipes, and being without any economic use other than for storage; that the organ chamber was connected by a specially constructed shaft 2 x 5 x 8 feet with the living room which shaft contained a cable of approximately 500 wires, extending from the chest in the organ chamber to the console or keyboard situated in the living room, which console weighed about 1500 pounds and was held in place by gravity; that certain features of the residence were specially constructed to receive and to have installed in the same a pipe organ unit; that the organ chest was constructed to fit and be installed in said organ chamber; that in the installation of the organ unit there was a hole cut in the wall of the bedroom opposite the door at the head of the stairway leading to the organ chamber for the purpose of bringing into said organ chamber and installing therein two of the many organ pipes which were installed in said organ chamber, the said organ chest having theretofore been cut into two sections; that said hole in the wall in said bedroom was made and cut by an employee of plaintiff; that the organ could have been installed by cutting some of the organ pipes, but that the hole in the wall was cut instead because Ferguson desired not to have the pipes cut; that after the chest and pipes were installed and the two sections of the chest joined together, masonite partitions were erected around and entirely inclosing the same and similar partitions were erected dividing the so-called "swell" and great organ; that all of said portions of the organ were furnished by plaintiff under the contract save and except the blower pipe and the masonite partitions, which were furnished by Ferguson, but which were connected with the organ proper and erected with the consent and under the directions of plaintiff; that the blower pipe ran under the living room floor through several concrete walls and was attached in the organ chamber by means of a flexible joint bolted on the pipe and the other end thereof was fastened directly to the bellows by means of screws; that after said organ unit was installed the hole in the bedroom wall was closed and plastered; that thereafter the portions of the unit so installed were removed from the premises and in so doing a hole was again cut in the bedroom wall in order to remove said two sections of the organ chest and certain of the organ pipes, said hole thereafter being again closed and plastered; that prior to the removal of said chest and pipes from the said organ chamber, the said masonite partitions were taken down and demolished. Upon the above findings the court concluded as a matter of law that the organ was not a fixture.

[1-4] Whether an article annexed to the realty is a fixture is a question of fact to be determined upon the evidence of the particular case. While the court did not make a specific finding on the question, it did conclude as a matter of law that the organ did not become a fixture, and we shall regard this as the equivalent of a finding of fact. This finding, in our opinion, is not supported by the evidence, the substance of which is set forth in the findings. Whether, upon the facts thus established, the organ became a fixture presents to this court a question of law. The general rules which govern in the determination are not only well established in this state, but are also universally recognized. They are stated in Breyfogle v. Tighe, 58 Cal.App. 301, 305, 208 P. 1008, 1009, as follows: "In determining whether personal property attached to land becomes a part of the realty, there are—'three general tests which may be applied: * * * First, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention to make the article a permanent accession to the freehold.' 11 R.C.L. 1059. 'The test of intention is to be given a broad and comprehensive signification. It does not merely imply the secret action of the mind of the owner of the property, nor need it be expressed in words; but it is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been

made, which, obviously, suggests that the other tests are really part of this comprehensive test of intention, and that they derive their chief value as conspicuous evidence of such intention.' 11 R.C.L. 1062." Approval of these general rules has been given in Fisher v. Pennington, 116 Cal.App. 248, 2 P.(2d) 518; Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Bianchi v. Hughes, 124 Cal. 24, 56 P. 610; Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L.R.A. 680; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 P. 184, 13 Am.St.Rep. 147; Hogan Lumber Co. v. Oakland, 25 Cal.App. 130, 142 P. 1084; City of Los Angeles v. Klinker, 219 Cal. 198, 25 P. (2d) 826.

[5, 6] When these rules are applied to the admitted facts, the conclusion is inescapable that the organ became a fixture. It may be conceded that it was not fastened to the building by any substantial means, but this fact is of slight importance. Annexation to the realty does not require an actual attachment, and conversely attachment is not annexation in a legal sense unless it is permanent. Civ.Code, § 660. Heavy bodies held in place upon land by gravity are considered as fixtures where from the nature of their use and the circumstances of their installation an intention is manifest to use them permanently with the land. Excavations upon the land or extraordinary construction of buildings to fit them for the particular use intended are commonly recognized as furnishing evidence of permanent annexation. 26 Cor.Jur. pp. 660–663.

[7] The first question here is whether the organ was placed in the building for permanent use with the building, and this is primarily a question of the intention of the owner as disclosed by the admitted facts. Inferentially the court has found from the undisputed circumstances that the organ was installed temporarily and not permanently and in this we find ourselves unable to agree with the learned trial judge. It was in evidence and not disputed that the residence was designed for a pipe organ, including an excavation of a room under the library floor 13 x 15 feet in size. The 48-foot blower tube between the motors and the organ chamber which extended through and was sealed into concrete walls of the foundation, and a large shaft between the chamber and the living room, and the openings for the same and for the wire cable, were permanent. The units were very heavy and required no fastenings to keep them firmly in place. Everything was done which was necessary for a permanent installation. Nothing suggests a temporary one. The fact that the permanently affixed blower tube was threaded into the unit at one end and connected by a flexible rubber coupling at the other is of slight moment as tending to prove or disprove that the organ was a fixture. The building would have been incomplete without the organ, and those features of the building specially designed to accommodate the organ would have been useless without it. Assuming, although it is not to be conceded, that the organ could have been removed without substantial damage to the building, this would be a mere evidentiary and not a conclusive fact. Fratt v. Whittier, 58 Cal. 126, 41 Am.Rep. 251. If it was placed in the building temporarily, when and why and under what circumstances was it to be removed? Without an answer to these questions we can find no support for the theory that there was any intention that it should not be a permanent addition to the building. The evidence furnishes no answer and we are unable to supply one. In this connection, the fact that the seller reserved title is not material; it will be presumed that the buyer intended to fulfill his contract and that the seller expected him to do so.

We are cited to numerous cases in which the question has arisen between a conditional vendor of an organ and a lessor of the land, where the organ has been installed by a lessee. These cases are of little assistance. The rules of trade fixtures are not applicable here. Neither do we have the potent evidence upon the question of intention furnished by the temporary nature of the lessee's occupancy of the real property, nor the presumption which would naturally arise, in the absence of a special contract, that the lessee did not purchase the organ to enhance the value of the land. The annotator in 62 A.L.R. at page 368 states that the courts have generally found pipe organs to be fixtures where they have been installed in buildings by the owners thereof, and have reached a contrary conclusion where they have been installed by lessees for purposes of trade. Rogers v. Crow, 40 Mo. 91, 93 Am.Dec. 299; Denvir v. Crowe, 321 Mo. 212, 9 S.W.(2d) 957.

Here we have an owner installing a pipe organ in his permanent home at large ex-

pense. That the installation was not experimental or temporary is evidenced by the fact that the residence and the organ were specially constructed to carry out the plan. In the absence of evidence even suggestive of an intention contrary to that which is forced upon us by the admitted facts, we are unable to find an acceptable basis for the contention that the organ was not permanently added to the building.

[8, 9] As between plaintiff and Ferguson, the reservation of title in the former would control, even though the organ became a part of the realty. Civ.Code, § 1013; Dauch v. Ginsburg, 214 Cal. 540, 6 P.(2d) 952. But where personal property has been sold for use with realty on which it is placed, under circumstances which may result in its becoming a part of the realty, and it becomes converted into realty, a reservation of title in the vendor is ineffectual as against an innocent purchaser of the realty. Oakland Bank of Sav. v. California P. B. Co., 183 Cal. 295, 191 P. 524.

As said in Peninsula Burner, etc., Co. v. McCaw, 116 Cal.App. 569, 3 P.(2d) 40, 41: "The reason for the rule has been stated to be based on two grounds. The first is that the seller, voluntarily placing personal property in the possession and control of his vendee with knowledge that it would be affixed to the land if put to the use for which it is designed, is presumed to have agreed that it should be or might be converted into realty. The second reason is that where one of two innocent persons must suffer, he should bear the loss who caused the deceitful appearances. Oakland Bank of Savings v. California P. B. Co., 183 Cal. 295, 191 P. 524; 12 Cal. Jur. 568."

In such cases the personal property, with the vendor's consent, has been brought under the operation of the laws for recording contracts affecting realty and for the protection of innocent purchasers, and the purchaser of the land, having no notice of the secret title, is entitled to conclude that the property affixed to the land is a part of the realty. Bell v. Mortgage Guarantee Co., 109 Cal.App. 203, 292 P. 660. The rule has been applied in numerous other cases. Dauch v. Ginsburg, supra; Patch v. Mortgage Guarantee Co., 126 Cal.App. 563, 14 P.(2d) 856; Hammel Radiator Corp. v. Mortgage Guarantee Co., 129 Cal.App. 468, 18 P.(2d) 993; Frick v. Frigidaire Corp., 119 Cal.App. 707, 7 P.(2d) 321; Byron Jackson Iron Works v. Hoge, 49 Cal.App. 700, 194 P. 45; 13 A.L.R. 448.

[10, 11] Where it is not clear whether personal property sold on conditional sales contract has been permanently attached to the realty, the doubt should be resolved in favor of an innocent purchaser. Such doubts are always resolved in favor of vendees as against vendors and in favor of mortgagees as against mortgagors. R. Barcroft & Sons Co. v. Cullen, 217 Cal. 708, 20 P.(2d) 665; Commercial Bank, etc., v. Pritchard, 126 Cal. 600, 59 P. 130. The rule should have even stronger application as between a conditional vendor and an innocent purchaser of the realty. Such is the effect of the decision in Hammond Lumber Co. v. Gordon, 84 Cal.App. 701, 258 P. 612, in which it was held that as between such parties the question is not so much the actual intent that property attached to realty should or should not become a fixture, as the apparent intent as it would reasonably appear to a purchaser of the realty.

[12] It is not questioned that at the time defendants purchased the residence the organ was and for a long time had been completely installed and in usable condition. The defendants were justified in believing it to be a part of the building, and having purchased without knowledge or notice of the reservation of title their rights must prevail over those of plaintiff.

[13] By the evidentiary facts found by the court, which are fully supported by uncontradicted evidence, and under the rules we have stated, the pipe organ was shown to be a fixture, title to which was vested at the time of trial in defendants. The case has been fully tried and should be finally disposed of upon this appeal. The judgment is reversed, and the trial court is directed to make a new and different finding of fact upon the evidence heretofore received, to the effect that the pipe organ became a fixture and a part of the realty, and a new conclusion of law to the effect that defendants became and are the owners of said pipe organ, and thereupon to enter a judgment in favor of the defendants.

I concur: HOUSER, P. J.

DORAN, Justice.

I dissent. I do not believe it to be the function of the appellate court to disturb

the judgment of the trial court in the determination of the question as to what is the justice of the case when, as in the instant case, that question is susceptible of honest differences of opinion, and when, according to my understanding but wherein I appear to differ with my colleagues, it is not a question of law but a question of mixed law and fact.

The trial judge is charged with the important duty of determining such issues. In the case at bar, it seems to me, the conclusion of the trial judge was just, and was supported by the law and the facts, and therefore should not be disturbed on appeal.

The fact that the residence was designed for *a* pipe organ is not necessarily conclusive of the question as to whether the particular pipe organ involved became a fixture. The fact that everything was done which was necessary for a permanent installation appears to me to be of little importance; such an installation was to be expected under the circumstances. With the conclusion in the prevailing opinion that nothing suggests a temporary installation, I cannot agree; on the contrary, the contract to my mind constitutes the very essence of what was in the minds of the parties on this subject, and is positive proof that the organ was installed conditionally. Nor can I agree with the prevailing opinion wherein it holds that the building would have been incomplete without the organ. The recess, or room, especially constructed to receive an organ, might have been incomplete without one, but it does not follow that the usefulness of the building as a dwelling was destroyed or even seriously affected, if indeed it was affected at all, by its absence; in fact, the evidence reveals that the building was complete in every other respect and was occupied before the organ was installed, and, although the organ has been removed, is still occupied.

The inquiry in the prevailing opinion, namely, "If it [the organ] was placed in the building temporarily, when and why and under what circumstances was it to be removed," and the reply of my learned associates that "the evidence furnishes no answer and we are unable to supply one," presents a pertinent inquiry but overlooks the obvious answer, of which this very lawsuit is the result.

With the proposition stated in the prevailing opinion that "whether the organ was placed in the building for permanent use with the building, * * * is primarily a question of the intention of the owner," I also do not agree. According to my understanding of the law, as applied to the case at bar, it would be a question of the intention of both seller and buyer. It may have been the buyer's expectation that the organ would become permanent, but that such was his intention without reservation is difficult to reconcile with the execution of a conditional sales contract, a contract reserving title in the seller until receipt of the final installment payment on the purchase price. Ultimate permanency depended upon the fulfillment of a condition of which the purchaser had knowledge; how, then, could the purchaser have intended that the organ should, ipso facto, upon its installation, become permanent. Moreover, the sales contract further provided that if the organ was not satisfactory, and the seller did not make the same satisfactory within a reasonable time after a written notification, the seller agreed to remove the organ and release the second party from all obligation. By no process of reasoning could the conclusion be reached that the pipe organ was installed conditionally and permanently at the same time.

Referring to the subject of the reservation of title in the seller, the prevailing opinion declares: "In this connection, the fact that the seller reserved title is not material; it will be presumed that the buyer intended to fulfill his contract and that the seller expected him to do so." The fact that the seller reserved title, in my opinion, equals, if indeed it does not exceed in importance, all other facts and circumstances in the case, and I cannot, therefore, share the opinion that it is "not material." Nor does it appear to me that there is any justification for the presumption "that the buyer intended to fulfill his contract and that the seller expected him to do so." It was expected that the contract would be fulfilled, but nevertheless the seller took the precaution to protect itself by means of an agreement, the form and substance of which the courts have consistently and universally respected and enforced.

Referring to the organ, the prevailing opinion declares that, "It may be conceded that it was not fastened to the building by any substantial means," but concludes that "this fact is of slight importance." It is my understanding of the law of fixtures

that the manner of annexation is always important. If this is so, then the fact that it was not fastened to the building by any substantial means becomes doubly important, because such fact is in perfect harmony with the terms of the agreement under which the organ was installed, and which agreement, as elsewhere stated, provides for the performance of certain conditions, the failure of which could result in the removal of the organ by either the buyer or the seller.

The fact that the organ was not connected to the dwelling in such manner that it became embraced by the building as an appurtenance thereof, under the circumstances, is of genuine importance, even though other substantial evidence of the intention of the parties is not lacking, and this, together with the conditional sales contract executed by the parties, was sufficient evidence in itself to support the finding of the trial court to the effect that the installation of the pipe organ was temporary.

The doctrine of innocent purchaser referred to in the prevailing opinion is of no assistance whatever in determining whether or not the pipe organ is a fixture, and is therefore entirely beside that issue. The innocent purchaser doctrine becomes important only when the object or article in question is, or has become, a fixture. The rule is stated in Oakland Bank of Savings v. California Pressed Brick Company, 183 Cal. 295, 191 P. 524, cited in the prevailing opinion. It is as follows: "The owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer, upon the condition that the title thereto shall nevertheless remain in the seller until the price agreed on has been fully paid, and the title so withheld by the owner will until full payment, be superior to that of a subsequent mortgage or purchase of such personal property from the buyer, even if such subsequent mortgage or purchase was made without knowledge or notice of the reservation of title and paid full value for the property. * * * The above rule prevails so long as the property *retains its character as personalty* and the cases cited state the rule applicable in such case. The case at bar raises the question what the rule is or should be when the personal property which is the subject of the conditional sale has become affixed to the land of the buyer, so as to become a part of the realty, after its delivery to him, and the buyer has thereafter made a mortgage or trust deed to one who has no knowledge or notice that such title remains in the seller on condition, and money has been loaned on the faith of such security, also without knowledge of the secret title." The same decision further declares: "The exact question has often arisen in other states, and the overwhelming weight of authority is to the effect that the title of the seller of personal property of this character, which title is to be held by him until the price thereof is paid, *and which is afterwards affixed to land of the vendee, so as to become part of the realty*, is subject to the lien of a subsequent mortgagee in good faith without notice of the reserved title." (Italics added.)

The decisive question, therefore, in the case at bar is: Was the pipe organ affixed to the land so as to become a part of the realty? If it was, the appellants herein should prevail, for their claim as innocent purchaser then is controlling. If it was not, the respondent should prevail, for then appellants' claim as innocent purchaser is unavailing.

In my opinion the pipe organ did not become a part of the structure in which it was placed, and, for the other reasons hereinbefore stated, did not become a fixture. A pipe organ, installed as the evidence shows the one in the instant case to have been installed, is but a part of the household furnishings and, as I view the law and the facts, is no more a fixture than the gas range installed in a recess, especially designed to receive it, in the kitchen. Moreover, it should be emphasized that as to the respondent, the sale of the organ was the dominant transaction; the purchase price has not been paid in full and respondent now stands to suffer a total loss of the balance due. As to the appellants, on the other hand, the purchase of the dwelling was the dominant transaction and the pipe organ was definitely incidental, incidental, indeed, in a degree that is clearly evident from the fact that appellants removed the organ shortly after they occupied the premises.

It does not, therefore, appear to me to be just to apply the doctrine quoted in the prevailing opinion, namely, "where one of two innocent persons must suffer, he should bear the loss who caused the deceitful appearances." There is nothing in the evidence that even suggests that appellants

bought the residence because it had a pipe organ; on the contrary, it appears that the property was purchased in spite of that fact.

The sale of the pipe organ was typical and characteristic of such transactions in business and industry, and it should be noted in this connection that the law makes no provision for the recording of conditional sales contracts of the kind and character herein involved, that operates as notice to the world of the existence of such contracts. The holding, therefore, under the circumstances presented herein, that the pipe organ is a fixture, in effect renders a contract invalid and worthless that was executed in good faith and was valid in every respect. Such a rule suggests consequences that are by no means limited.

In my opinion the findings of the trial court were abundantly supported by the evidence, and the judgment should be affirmed.



14 Cal.App.2d 31

CLEMMENS v. CLEMMENS.

Civ. 10935.

District Court of Appeal, Second District, Division 2, California.

May 12, 1936.

Appeal and error ⇐544(1)

Where proceedings for preparation of transcript on appeal had been terminated because of appellant's want of diligence, and appeal was before reviewing court on judgment roll alone, appellant's contentions, relating to admission or exclusion of evidence, on which appellant relied for reversal could not be reviewed.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Actions by Mattie P. Clemmens and Lillian May Lowery against Herbert Clemmens. From the judgment, second-named plaintiff appeals.

Affirmed.

Jerome D. Rosenfield, of Los Angeles, for appellant.

Lloyd O. Miller and Hooper & Miller, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

In this appeal all of the points upon which appellant relies for a reversal are based upon the rulings of the trial court in sustaining or overruling objections to the introduction of evidence.

The appeal comes to us on the judgment roll alone, for the reason that there was a long delay by the appellant in the preparation of the reporter's transcript and the trial court, after due notice and a hearing thereon, granted respondent's motion for an order terminating all proceedings for the preparation of a transcript on appeal because of the want of diligence on the part of the plaintiff. The result is that there is no record before us to sustain any of the contentions of appellant.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



14 Cal.App.2d 44

NELSON et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 10629.

District Court of Appeal, Second District, Division 1, California.

May 14, 1936.

Hearing Denied by Supreme Court July 13, 1936.

1. Justices of the peace ⇐149(1)

Unsuccessful third-party claimants *held* dissatisfied parties entitled to appeal from justice's judgment determining title as between claimants and attachment debtor; claimant's right to appeal not being affected by entry of such judgment subsequently to default judgment for creditor against debtor (Code Civ. Proc. § 974, and § 689 as amended by St.1933, p. 1887).

2. Justices of the peace ⇐155(1)

Motion for new trial *held* to lie on behalf of unsuccessful third-party claimants after justice determined title as between claimants and attachment debtor, and hence

motion extended time for appeal (Code Civ. Proc. §§ 34, 659a, 689, as amended by St. 1933, pp. 1806, 1881, 1887).

HOUSER, P. J., dissenting.

Petition by F. O. Nelson and another for a writ of mandate against the Superior Court in and for Los Angeles County, and Robert W. Kenny, Judge thereof, to compel the respondent court to set aside an order dismissing appeals from a justice's court and to proceed with trials de novo.

Petition granted.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Edward K. Brody and Paul Roest, both of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and Douglas De Coster, Chief Deputy County Counsel, both of Los Angeles, for respondents.

YORK, Justice.

Petitioners seek by mandamus proceedings to compel the respondent court to set aside an order dismissing appeals and to proceed with trials de novo in said court.

It appears from the petition for writ of mandate that on April 30, 1935, at a time when there was pending in the justice's court of Santa Monica township an action entitled Jack L. Horn, Plaintiff, v. Anna H. Beardsley, Defendant, the plaintiff therein caused an attachment to be levied upon certain personal property then in possession of the defendant; that petitioners filed a third-party claim to said property, petitioner Chickenoff by virtue of a chattel mortgage thereon, and petitioner Nelson as vendor in a conditional sales contract. Hearing to determine the title to said property was had on May 16, 1935, and on May 21st default judgment was entered against defendant and in favor of plaintiff in the justice's court action. On May 22, 1935, the court entered its judgment in the proceeding to determine title to the effect that, as between petitioners and defendant in the justice's court action, defendant was the owner of the attached property. Within ten days thereafter petitioners moved the court for a new trial, which motion was denied, and order to that effect was entered on July 27, 1935. Thereafter, to wit, on August 12, 1935, petitioners filed and served their notice of appeal from the judgment determining title each depositing the sum of $100 cash in lieu of undertaking on appeal. Both appeals were set for trial de novo in respondent court on October 7, 1935. Meanwhile, on September 15th, the plaintiff in the original justice's court action moved the court to dismiss the appeals, which motion was granted, and on September 30th order was entered dismissing the appeals on the ground that the order appealed from was not an appealable order, and hence that the respondent court had no jurisdiction to entertain the appeals.

In answer to the petition for writ of mandate, respondent court has filed a demurrer based upon two points: (1) "No appeal lies from an order determining title under 689 C.C.P. [as amended by St.1933, p. 1887], where order determining title was not embodied in original judgment." (2) "Determination as to title of third-party claimant under 689 C.C.P. was entered by the court on May 22, 1935. Notice of appeal was filed on August 12, 1935, in excess of the thirty-day period allowed by law to appeal. Motion for new trial did not extend time for appeal, as no motion for a new trial lies under the provisions of 689 C.C.P."

[1] The petition filed herein shows that the judgment of the justice's court entered on May 22, 1935, was a final adjudication of title to the property in dispute as between the defendant in the original action and the petitioners now before this court. That being so, petitioners as "dissatisfied" parties were entitled to maintain appeals from such judgment, by virtue of the provisions of section 974 of the Code of Civil Procedure. See Williams v. Superior Court (Cal.App.) 49 P.(2d) 1126. In the cited case the adjudication as to title was embodied in the original judgment, while in the instant case the judgment appealed from was entered subsequent to a judgment of default in favor of plaintiff in the original action. The reasonable conclusion is that this would not affect the right of petitioners to maintain appeals, since the judgment appealed from was a final judgment so far as they were concerned and could not be embodied in a default judgment.

[2] As to respondents' second point that motion for new trial does not lie under the provisions of section 689, Code of Civil Procedure, as amended, we do not believe that petitioners are limited by the provisions of said section. The sections of the Code authorizing new trials contain no limitations respecting the character of the action in which they may be granted, and it would

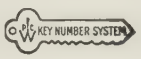
appear that a motion for new trial "may be made in any ordinary action or in any proceeding which assumes the character of a civil action, and is properly conducted under the rules governing pleading and procedure in civil actions, in which the determination of issues of fact, raised by ordinary pleadings, are properly involved. But where a complete scheme of procedure is provided by statute from the commencement of a particular action to the entry of judgment, and it expressly provides for an appeal, but makes no provision for a new trial, the latter remedy is not available." 20 Cal.Jur. § 6, pp. 16, 17. While section 689, Code of Civil Procedure, as amended by St.1933, p. 1887, as it read at the time the judgment herein appealed from was rendered, outlined the method of procedure for a third-party claimant, it did not expressly provide for an appeal. However, section 34, Code of Civil Procedure, as amended in 1933 (St.1933, p. 1806), makes the provisions relating to new trials applicable to all courts, to-wit: "The provisions of this code relating to the commencement and prosecution of, and the practice, procedure, and enforcement of judgments and decrees in, actions and proceedings in trial courts, shall apply to all such courts, except where special provision is made for particular courts, or where a general provision is not applicable by reason of jurisdictional limitations."

In an article entitled "Inferior Courts" in volume 6 of California Jurisprudence Supplement, p. 592, § 72, it is said: "The Practice Act expressly gave justices of the peace authority to entertain a motion for new trial, but no such power was granted by the code until recently. By a new section (900b, C.C.P.), adopted in 1929, the chapter of the Code of Civil Procedure relating to new trial was made applicable to proceedings in justices' courts in cities, cities and counties, towns, and judicial townships having a population of 30,000 or more. This section was repealed in 1933 [St.1933, p. 1904] and now by virtue of section 34 as amended in that year the chapter relating to new trial is applicable to proceedings in all justices' courts." Furthermore, section 659a, Code of Civil Procedure, as amended in 1933 (St.1933, p. 1881), provides: "Within ten (10) days after serving the notice [of motion for new trial], the moving party shall serve upon all other parties and file any affidavits intended to be used upon such motion. Such other parties shall have ten (10) days. * * * The time herein specified * * * may * * * be extended by any judge or *justice* for an additional period of not exceeding twenty (20) days." (Italics ours.)

We therefore hold that the motion for new trial was properly made and that it did extend the time for appeal. The demurrer of respondent court is overruled. The petition for writ of mandate is granted, and respondent court is directed to set aside and vacate its order dismissing the appeals and to proceed to hear and determine the same.

I concur: DORAN, J.

I dissent: HOUSER, P. J.



14 Cal.App.2d 246

Ex parte CLAUSEN.

Cr. 1896.

District Court of Appeal, First District, Division 2, California.

May 21, 1936.

1. Statutes ⇐158

Repeal of statute by implication is not favored.

2. Criminal law ⇐978

Where 60-day sentence was suspended and defendant was placed on probation for 2 years, commitment after expiration of maximum possible term for defendant's offense, which was 6 months, *held* within jurisdiction of justice's court as against contention that re-enactment of statute authorizing suspension of sentence for period not to exceed maximum possible term and providing exceptions repealed statute under which commitment was had (Pen.Code, § 19, as amended by St. 1933, p. 2216; § 1203a, as added by St.1933, p. 1340; §§ 1203 and 1203.1 et seq., as enacted by St.1935, p. 1706).

Original proceedings in the matter of the application of Charles C. Clausen, for a writ of habeas corpus.

Writ discharged, and petitioner remanded to custody.

Rosendale, Scott & Thomas, of Salinas, for petitioner.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Anthony Brazil, Dist. Atty., of Salinas, for respondent.

SPENCE, Justice.

Petitioner seeks his release from the county jail of Monterey county to which he was committed for 60 days.

On August 29, 1935, petitioner entered a plea of guilty to a charge of misdemeanor for which the maximum possible term of sentence was 6 months. Pen.Code, § 19, as amended by St.1933, p. 2216. He was thereupon sentenced to the county jail for 60 days, but sentence was suspended, and he was placed upon probation upon certain conditions for a period of 2 years. One of said conditions was the payment of certain money to the state labor commissioner. The time for the payment was extended from time to time, but petitioner failed to comply, and on April 3, 1936, petitioner was committed to the county jail for the 60-day period.

The sole contention of petitioner is that it was beyond the jurisdiction of the justice's court to suspend the execution of sentence for more than 6 months, and that the commitment of petitioner to the county jail after the expiration of 6 months was invalid. In our opinion, petitioner's contention is without merit. Section 1203a of the Penal Code was added in 1933 (St.1933, p. 1340), and courts having jurisdiction over misdemeanor cases were thereby empowered "to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed two years."

[1, 2] Petitioner takes the position that section 1203.1 of the Penal Code, as enacted in 1935 (St.1935, p. 1708), had the effect of repealing said section 1203a, but we believe that petitioner's position is untenable. In 1933, section 1203 of the Penal Code was a long section containing several numbered subdivisions. It dealt with the general subject of probation. Subdivision 1 thereof provided: "The court, judge or justice thereof, in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, *except as hereinafter set forth,* and upon such terms and conditions as it shall determine." (Italics ours.) When said section 1203a was added in 1933, an exception was thereby made with respect to courts having jurisdiction over misdemeanor cases, and said courts were permitted to suspend the execution of sentence for a period not to exceed 2 years, even though the maximum possible term of sentence was less than 2 years. In 1935, section 1203, as it existed prior thereto, was recast and broken up into sections numbered 1203, 1203.1, 1203.2, and so forth. St.1935, c. 604, p. 1706. Section 1203.1, as enacted in 1935, reads precisely the same as did subdivision 1 of section 1203 prior to the effective date of said section 1203.1. Section 1203a, as enacted in 1933, was not expressly repealed in 1935, and there is no justification for the claim that it was repealed by implication by the enactment of section 1203.1. Repeals by implication are not favored (23 Cal.Jur. 694), and are only found to exist where "it becomes apparent that the legislature did not intend the former act to remain in force." 23 Cal.Jur. 691. No such intent is apparent here. As we view the legislative history of these sections, section 1203a, when enacted in 1933, became one of the exceptions "hereinafter set forth" as provided in subdivision 1 of section 1203 as it read in 1933, and said section 1203a now remains one of the exceptions "hereinafter set forth" as provided in 1203.1. In other words, section 1203a still follows after the general provisions above set forth despite the transfer of said general provisions from subdivision 1 of section 1203 to section 1203.1. This view finds support in the editorial practice adopted with respect to such section numbering and lettering. See Statutory Record and Supplement to Index to Laws of California 1932, pp. 826 and 827; Deering's Pol.Code 1931, vol. 2, pp. 1404 to 1426.

The writ is discharged, and the petitioner is remanded to custody.

We concur: NOURSE, P. J.; STURTEVANT, J.

14 Cal.App.2d 275

ADLMAN v. McDONALD.

Civ. 9991.

District Court of Appeal, Second District, Division 1, California.

May 26, 1936.

1. Corporations ⇐121(5)

Evidence *held* to support findings that payee's indorsement and delivery to president of note made by corporation and previously indorsed by president, and delivery of president's stock to payee, was expedient to permit sale of stock pending issuance of permit to corporation to issue further stock, and that president waived any liability incurred by payee in indorsing note, precluding president's recovery on payee's indorsement.

2. Appeal and error ⇐110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Ames Peterson, Judge.

Action by William C. Adlman against Hazel K. McDonald. From the judgment, the plaintiff appeals.

Affirmed.

Leslie S. Bowden and Paul M. Joseph, both of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

ROTH, Justice pro tem.

Plaintiff was president of the Coast Braid Manufacturing Co., Limited, a corporation (hereinafter called "corporation"), which corporation had on January 19, 1931, made its promissory note in the sum of $5,000 to defendant as payee, in return for that amount of money loaned to the corporation by defendant through the persuasion of one G. P. McGregor. Before delivery of said note to defendant, it was indorsed by plaintiff and his wife and G. P. McGregor. The note was due May 19, 1931. On April 7, 1931, prior to the maturity of the note, defendant indorsed it in blank over the signatures of the prior indorsers, and caused it to be delivered to plaintiff in return for that amount of the par value of the stock of the corporation owned by plaintiff. The indorsement and the delivery of the note from defendant to plaintiff was an incident and consequence of the following transaction:

On April 7, 1931, defendant, acting through one Briggs, a realtor, had pending and was about to escrow a real estate transaction with a Mrs. Halloran. McGregor, a friend and adviser of defendant, was associated with Briggs, and, as already suggested, had previously persuaded defendant to become interested in the affairs of the corporation, of which he was secretary, stock salesman, and financial agent. On the date in question defendant was in Los Angeles, but was planning to return forthwith to Tacoma, where she had her permanent residence. In the real estate transaction mentioned, it developed through the manipulations of McGregor that defendant could use $5,000 of the corporation's stock for that amount of value. She had no stock, and the corporation had no permit to sell any stock in addition to that already issued. McGregor suggested to plaintiff, as a part of a plan to stabilize the corporation's finances, of which more will be said later, that plaintiff sell to defendant $5,000 worth of his stock in the corporation in exchange for the promissory note made by the corporation to defendant. This plaintiff agreed to do. Plaintiff contends that this agreement was predicated upon the condition that the defendant indorse the note in blank and that as a part of the same agreement the prior indorsements of plaintiff, his wife, and McGregor were to be eliminated. The note was indorsed in blank by defendant, and, when introduced in evidence, the prior indorsements were shown to have been crossed out. Defendant and McGregor testified that these indorsements were on the note at the time defendant signed. There was some dispute as to this, but the trial court found as a fact that "* * * at the time said defendant endorsed and surrendered said note as aforesaid to G. P. McGregor, the said note bore the prior endorsements of the plaintiff, Ruth M. Adlman, and G. P. McGregor."

The evidence shows that on April 7, 1931, the corporation was in financial straits, and that McGregor, who was close to Briggs, the realtor, as well as defendant, conceived the idea of converting defendant from a creditor of the corpora-

tion to a stockholder thereof, by inducing her to exchange the note for stock, which stock could be used in the real estate transaction for its full par value. The corporation, however, had no permit at the time to issue any stock in addition to that already issued. McGregor therefore talked the matter over with plaintiff, inducing plaintiff to deliver personally owned stock to defendant until such time as the corporation commissioner would issue a supplemental permit authorizing the corporation to issue stock not only to defendant, but to other creditors of the corporation in exchange for their claims against the corporation. In this connection McGregor testified: "I told Mr. Adlman that Mrs. McDonald was going back up North, and in order to effect the settlement with her prior to her going back North, we would have to deliver the stock for the note, and suggested to Mr. Adlman that he issue the stock for the time being, until a permit was issued, to issue additional stock, that would replace the stock that he was issuing at that time, and Mr. Adlman agreed to that, and it was definitely understood between he and I that he would get the new stock in lieu of the stock that he was issuing at that time to close this transaction prior to Mrs. McDonald returning to the North. With that understanding I took his stock to Mrs. McDonald's house, and told her I would like to deliver this stock, and pick up the note at that time."

Plaintiff contended in the trial court, as he does here, that, if McGregor or any one else represented to defendant, when she indorsed the note in blank, that she would not be liable thereon, this was a misrepresentation of law which could not support a defense of fraud. The legal proposition asserted by plaintiff may be sound enough. Robbins v. Law, 48 Cal. App. 555, 560, 192 P. 118; Haviland v. Southern California Edison Co., 172 Cal. 601, 608, 158 P. 328; People's Bank of Ava v. Baker (Mo.App.) 193 S.W. 632. The principle, however, has no application to the facts of this case for several reasons. The trial court made appropriate findings from abundant evidence that plaintiff, his wife, and McGregor were prior indorsers, and that the indorsement and transfer of the note from defendant to plaintiff in exchange for the stock was an expedient adopted until a supplemental permit had been issued to the corporation, at which time plaintiff could get his stock back, and that, at the time of the transaction, defendant had no intention of doing anything except to assist in McGregor's plan of converting creditors into stockholders, and that plaintiff had the same idea.

Plaintiff's theory seems to be that, even though defendant loaned $5,000 cash to the corporation, instead of the corporation owing defendant $5,000, defendant now owes $5,000 to plaintiff. Plaintiff argues that the $5,000 par value of the corporation stock belonging to plaintiff was actually transferred to defendant in consideration of the blank indorsement of the corporation's note by defendant to plaintiff, that this stock was used by defendant in an independent real estate transaction between defendant and a third party, and that defendant's note against the corporation was paid in this manner. Assuming, as we must for the purposes of this case, that defendant was not imposed upon in the real estate transaction, defendant's note, according to plaintiff's theory, not only was paid when she accepted worthless stock for it, but, in addition, procured for plaintiff, his wife, and McGregor a release from their liability as indorsers of the note. The effect of plaintiff's theory not only demonstrates the foregoing advantages to the corporation and the prior indorsers, but it appears, further, that defendant, as a premium for receiving payment of the note in the form of stock of an insolvent corporation, and because of her graciousness in relieving the prior indorsers, assumed legally a contingent liability for the sum of $5,000 to plaintiff, and, as plaintiff well knew, the legal contingent liability because of the financial condition of the corporation was actually and in fact a direct, fixed, and personal obligation for $5,000, which all parties involved in the transaction knew defendant had the ability to pay. The tragedy of the transaction disclosed by the facts is that defendant had to defend a lawsuit to vindicate her right to be imposed upon, so that she would not be subjected to further loss.

[1] The evidence abundantly supports the findings of the court that plaintiff was a prior indorser, and that the representations made to defendant were sufficient to warrant her in believing and assuming that her indorsement and delivery of the note to plaintiff was a mere expedient pending the issuance of a permit to the corporation allowing it to issue further stock, and

that any liability she incurred by indorsing the note was waived by plaintiff.

[2] No appeal lies from an order denying a motion for a new trial. The appeal from said order is therefore dismissed.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



14 Cal.App.2d 233

REHBOCK et al. v. RESERVOIR HILL GASOLINE CO. et al.

Civ. 9883.

District Court of Appeal, Second District, Division 1, California.

May 20, 1936.

1. Account stated ⇐1, 8

Monthly statements making full disclosure of facts of case rendered to lessors under oil and gas lease which were accompanied by checks which lessors received and cashed without objection constituted "accounts stated" between parties, precluding further recovery for royalties allegedly not accounted for, even though lessee's assignee had acquired all capital stock in corporation which bought the gas produced, in absence of proof of fraud.

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

2. Account stated ⇐1

An "account stated" amounts to an agreement between the parties that a certain sum shall be paid and accepted in discharge of an obligation.

3. Account stated ⇐8

An account stated may be set aside only for fraud, mistake, duress, or other grounds invalidating free consent of one of the contracting parties.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by F. W. Rehbock and others against the Reservoir Hill Gasoline Company and others. From an adverse judgment, defendant the Rio Grande Oil Company appeals.

Reversed.

H. L. Dunnigan and Gordon A. Goodwin, both of Los Angeles, for appellant.

Hy Schwartz and Clock, McWhinney & Clock, all of Long Beach, for respondents.

SHINN, Justice pro tem.

Plaintiffs, lessors under an oil and gas lease dated July 12, 1922, recovered from Rio Grande Oil Company, assignee of the original lessees, W. R. Ramsay and H. T. Coffin, certain sums as royalties which the trial court found to be due in addition to the royalties theretofore paid under the lease. Defendant Rio Grande, hereinafter referred to as the defendant, appeals.

The lease provided that: "In the event that petroleum, oil, naptha, natural gas, asphaltum or hydrocarbon, or other kindred or like substances are found in and produced from the demised premises, then the Lessee shall pay the Lessor as royalties or rentals and in the place and stead of all other rentals herein provided, one-sixth (1/6) of the net proceeds derived from the sale of said minerals produced, saved and sold by the Lessee; said minerals being those which may remain after taking from said total minerals any quantity required and used for fuel purposes in any mining or drilling operation carried on by the Lessee under this lease. Net proceeds or royalties as the expressions are used in this lease, shall be deemed to be gross receipts of sales of minerals produced from the demised premises and actually collected in cash by the Lessee, less taxes paid on said product or on said sales, or the proceeds thereof, and the usual charges for making said sales and for delivery and for the use of tanks, pipe lines, cars and storage facilities, and for insurance and for loss from fire or leakage, and a reasonable charge for the maintenance of the equipment of the Lessee used in storing, transporting, and selling said products based on cost nor shall the Lessee be obliged to account for any proceeds which using reasonable diligence he has been unable to collect. The Lessee shall on or before the 10th day of each month, prepare a statement of the amount of minerals produced and saved from the said premises during the previous month

upon which the Lessor is entitled to royalties and also a statement of the amount of sales made during said preceding month, and the amount of collections made during said preceding month and the amount of royalties on said collections to which the Lessor is entitled, and shall within said period furnish said statement to the Lessor and pay the Lessor the royalties on said collections to which he is entitled in accordance with said statement and the terms of this lease. The Lessee agrees that the Lessor or his legal representative shall at all reasonable times during business hours, have access to the books and accounts of the Lessee with reference to the operations of the Lessee under this lease, together with the right to examine and gauge any and all tanks and wells, to the extent necessary for the purposes of verifying the statement of the Lessee."

The complaint was in two counts; the first alleging that the defendants had failed to account to the plaintiffs for sufficient royalty on the gasoline extracted from the wet gas, and the second count charging the defendants with failure to account for all the dry gas remaining after the extraction of gasoline from the wet gas.

A well was brought in from which oil and gas were produced. Ramsay, who acquired the interest of Coffin in the lease, organized the Reservoir Hill Gasoline Company, the capital stock of which, as well as the lease, was acquired by Rio Grande in 1926. Under an agreement with Ramsay, Reservoir Hill took the wet gas and extracted the gasoline therefrom in its absorption plant, paying Ramsay and plaintiffs therefor a royalty of the value of 35 per cent. of the gasoline recovered, retaining 65 per cent. for itself, and also returning all of the dry gas. For about two years statements were rendered each month by Reservoir Hill to plaintiffs, showing the total gasoline sales, the 35 per cent. royalty, and plaintiffs' one-sixth thereof, for which payments were made by checks of Reservoir Hill to plaintiffs. Commencing with the month of May, 1926, Rio Grande furnished monthly statements to plaintiffs, accompanied by its checks. These statements showed the total quantity of gas received from the well, the theoretical gasoline content, the total amount of gasoline sold and recovered the preceding month, the amount of the total royalty of 35 per cent., and the lessors' one-sixth thereof. As to the dry gas, the statements showed the total amount of gas received from the well, deductions for plant fuel shrinkage, and recirculation, the amount of dry gas returned to the well, and the lessors' one-sixth thereof.

Plaintiffs' recovery which was limited to a period of four years preceding the commencement of the action, was upon the theories, first, that the lessee was not authorized to make any deduction for the cost of extracting the gasoline from the wet gas, and that therefore the lessor should receive one-sixth of 100 per cent. of the selling price of the gasoline; second, that the gasoline was paid for not at the market price, but at an arbitrary and lesser price fixed by defendant; and, third, that the defendant did not account or pay for all of the dry gas. Plaintiffs did not recover anything on account of the excess of the market value over the price paid for their share of the royalty of 35 per cent., but the amount which the court found they were entitled to receive as royalty on the remaining 65 per cent. of the gasoline was computed at higher prices than those used by defendant in paying plaintiffs' share of 35 per cent. royalty.

[1] As one of its several defenses, the defendant urged in the trial court, and urges here, that the statements rendered to plaintiffs from month to month, accompanied by checks which were received and cashed by plaintiffs without objection, constituted so many accounts stated between the parties, whereby the matters sought to be litigated here were agreed to and settled and constituted the accounting and royalty payments due from defendant according to the lease. This defense, in our opinion, is sound and must be sustained. Over a period of years plaintiffs received their monthly statements and checks without making any objection thereto. They knew, or should have known, and at least one of them, Clara S. Rehbock, testified that she did know, that the lessors were being paid one-sixth of 35 per cent, royalty on the gasoline extracted from the wet gas. These statements were rendered under the provisions of the lease by which they were required. Plaintiffs had the right to examine the defendant's books, which they did not seek to do, except in one instance which is not important here. The action is not based upon fraud or mistake. The only charge made was of

a failure to fully and correctly account for and pay the royalties due.

The questions involved upon this branch of the case have been decided recently by Division 2 of this court in the case of Alamitos Land Company v. Texas Company, 54 P.(2d) 489, by a decision which is now final. Under facts practically the same as those we have to consider, it was held that monthly statements of gasoline extracted from wet gas and sold by the lessee, accompanied by checks in payment of the lessor's royalty, accepted and retained without objection by the lessor, constituted accounts stated, conclusive between the parties thereto as to the correctness of the basis and the results of the accounting.

[2] It is fundamental that an account stated amounts to an agreement between the parties that a certain sum shall be paid and accepted in discharge of an obligation. 1 Cor.Jur. p. 689; Thornton's Law of Oil and Gas (4th Ed.) vol. 1, p. 716, § 284; Hansen v. Fresno Jersey Farm Dairy Co., 220 Cal. 402, 31 P.(2d) 359; Parsons v. Segno, 187 Cal. 260, 201 P. 580; Auzerais v. Naglee, 74 Cal. 60, 15 P. 371; Crane v. Stansbury, 173 Cal. 631, 161 P. 7; Terry v. Sickles, 13 Cal. 427.

[3] It is also fundamental that an agreement otherwise valid may be set aside only for fraud, mistake, duress, or upon other grounds invalidating the free consent of a contracting party. 12 Cal.Jur., p. 806; Johnson v. Fletcher, 97 Cal.App. 153, 274 P. 1001. An account stated falls within these rules. Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723; Gardner v. Watson, 170 Cal. 570, 150 P. 994; Parsons v. Segno, supra; Auzerais v. Naglee, supra.

It is contended by plaintiffs that they should be allowed to recover under the theory that Reservoir Hill Company is and has been since June of 1926 the alter ego of defendant Rio Grande, and that therefore all transactions between Rio Grande and Reservoir Hill were void. The complaint alleged the purchase of the Reservoir Hill stock by Rio Grande in June, 1926, but did not allege the date when plaintiffs learned of that fact. The court found that Reservoir Hill was the alter ego of Rio Grande, but we are unable to see that, if this were the fact, it would give plaintiffs the right to an accounting where otherwise they would have none. No such right exists after the accounts have been stated and paid, unless the accountings and settlements should be set aside on equitable grounds. The questions that might arise out of the stock control of Reservoir Hill are immaterial so long as the accountings stand. We are unable to see wherein the alleged domination and control of Reservoir Hill by Rio Grande can be relied upon to impeach the accounts stated. No concealment of the stock ownership is alleged or found by the court. No fraud or breach of duty is alleged to have resulted from the failure of Rio Grande to disclose its stock ownership. It is a fair inference that, if plaintiffs were satisfied with a share of 35 per cent. gasoline royalty paid by a stranger, they would likewise have been satisfied with the same royalty paid by a subsidiary. That question, however, was not presented to the court. Upon the record before us, it is clear that the fact that Reservoir Hill was a subsidiary of Rio Grande during the time the accountings were being made does not tend in any degree to invalidate the settlements.

There are other defenses which would have to be considered if the one we have discussed were not controlling, such as the construction of the contract by the parties with respect to the handling of the gas from the well, the right of the defendant to be reimbursed for the reasonable cost of extraction of gasoline from the wet gas, and the defenses of estoppel and laches. It is unnecessary to pass upon these defenses, in view of our conclusion that plaintiffs are foreclosed, by reason of the monthly statements of account to which they have agreed, from charging defendant with a liability for additional royalty.

The judgment is reversed.

We concur: HOUSER, P. J.; DORAN, J.

14 Cal.App.2d 264

CALIFORNIA CANNING PEACH GROWERS v. CORCORAN et al.

Civ. 10093.

District Court of Appeal, First District, Division 2, California.

May 25, 1936.

1. Venue ⇐8

Complaint by peach growers' association against member and canning company which alleged that member had sold peaches to defendant canning company in violation of marketing agreement with association *held* to show an attempt to state a cause of action in conversion against member and canning company, entitling association to maintain such action in county wherein canning company was engaged in business as against contention that member was entitled to change of venue to county of his residence.

2. Action ⇐6

Pleader asking for declaratory relief need not declare the relief, since declaration of relief will be made by court in response to allegations in complaint, new matter in answers, and matter introduced by plaintiff in nature of replication to defendant's plea.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action for declaratory relief by the California Canning Peach Growers, a nonprofit co-operative association, against D. P. Corcoran and others. From an order denying defendants' motion for a change of venue, defendants appeal.

Affirmed.

Seth Millington, of Gridley, and Jerome D. Peters, of Chico, for appellants.

Agnew & Boekel and Carroll Single, all of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal from an order denying defendants' motion for a change of venue from Alameda county to Butte county. The record presents no question of fact and but one question of law. The plaintiff's action against the defendants was one brought in Alameda county for declaratory relief. The defendants contend that D. P. Corcoran and John Doe Miller, copartners doing business under the name of Corcoran & Miller, and residents of Butte county, were the only defendants against whom a cause of action was pleaded and that B. H. Body Company, a corporation, having its principal place of business in Alameda county, was improperly named as a defendant, and that as against it no cause of action was alleged and therefore the demand of Corcoran & Miller to change the place of trial should have been granted. We find no merit in the contention. The complaint was drawn with meticulous care. It sets forth, among other things, the following facts: The plaintiff is a nonprofit, co-operative association and has been since December 1, 1921. Its articles of incorporation are pleaded in haec verba. Its by-laws, in so far as the same are pertinent to this litigation, are pleaded in the same manner. In conducting its business each of its members is required to execute a marketing agreement. The form of that agreement in use by the plaintiff is pleaded in haec verba. On January 5, 1933, Corcoran & Miller were the owners of 130 acres of land located about 2½ miles south from Gridley on the east side of old Marysville road in Manzanita school district, bounded generally on the north by Dick Criddle, on the south by W. P. Harkey, on the east by the Southern Pacific Railroad, and on the west by the county road, and the said land being known as Corcoran & Miller orchard. On said date the owners executed a marketing agreement with the plaintiff. Among other covenants it contained the following: "That the buyer does hereby purchase and the grower does hereby sell all of the canning peaches to be produced during the years 1922 to 1936 inclusive, on the following described land," etc. It also contained a covenant: "This instrument is intended by the parties to pass to and vest in the buyer a present title to all of the peaches covered hereby, and to give the buyer the right to the possession of said peaches when they are fit to be picked, and immediately thereafter the buyer shall have the right to enter upon said premises and remove the said peaches," etc. And it contained another covenant: "* * * Failure or refusal to deliver to the buyer the peaches purchased hereunder, the grower will pay to the buyer a sum equal to fifty per cent. of the market price at San Francisco of said peaches at the time of such breach. * * *" B. H. Body Company, a corporation, is engaged in the business of canning cling peaches at its place of business in Alameda county and it is the "canners" referred to by the plead-

er in the passages quoted below. The charging part of the complaint is as follows:

"During the 1935 canning season defendants Corcoran & Miller have delivered to said corporation approximately 100 tons of Tuscan peaches produced on twelve acres of said 130-acre parcel of land described in said marketing agreement, but plaintiff is informed and believes and therefore alleges that the number of canning peaches produced on said 130-acre parcel of land, in addition to said 100 tons of Tuscan peaches produced on said twelve acres of said 130-acre parcel, is approximately 1200 tons. The said defendants Corcoran & Miller have refused to deliver to and market through the said corporation the said 1200 tons of canning peaches produced on the said land during the 1935 season, in accordance with the terms and provisions of the said marketing agreement, and the said defendants Corcoran & Miller, by so refusing to deliver to and market through the said corporation the said 1200 tons, have repudiated the said marketing agreement and have refused, and now refuse, to further perform the same. Plaintiff is informed and believes and therefore alleges that the said defendants Corcoran & Miller are now engaged in harvesting the said 1200 tons of canning peaches and are delivering the same as harvested to the defendant canners, and the said defendant canners are accepting the said peaches as the same are delivered to them, and are canning the same. That the said Corcoran & Miller, claiming to be the absolute owners of the said 1200 tons of said canning peaches, have purported to sell them to the said defendant canners, and the said defendants Corcoran & Miller are looking to the said canners to pay the said defendants Corcoran & Miller directly the purchase price of the said peaches. That the said defendants Corcoran & Miller expect to retain the said purchase price if and when the same is received by them, in the same manner and with the same effect as though they were not members of the said corporation and had never executed the said marketing agreement; and the plaintiff is also informed and believes and therefore alleges that the said defendant canners threaten to pay the said defendants Corcoran & Miller the said purchase price of the said 1200 tons of peaches.

[1, 2] "An actual controversy exists between plaintiff and the said defendants Corcoran & Miller respecting their legal rights and duties under the said marketing agreement. Plaintiff is informed and believes and therefore alleges that defendants Corcoran & Miller in the said controversy contend as follows: that said marketing agreement executed by said defendants Corcoran & Miller to the said corporation covers only twelve acres of Tuscan peaches out of the said 130 acres of canning peaches, and that the remainder of said 130-acre parcel of land is not covered by said marketing agreement, and that said defendants Corcoran & Miller are not obligated to deliver to said corporation any of the peaches produced on said 130-acre parcel of land, other than the Tuscan peaches produced on said twelve acres of land admitted by defendants Corcoran & Miller to be covered by said marketing agreement. Plaintiff, on the other hand, in the said controversy contends that said marketing agreement covers all of the said 130 acres of cling peaches, and that said defendants Corcoran & Miller are obligated to deliver all of the peaches produced on said 130-acre parcel of land to plaintiff, and that if the said proceeds of the said sale of said 1200 tons of peaches are not paid to said plaintiff by said canners, said defendants Corcoran & Miller will be liable to the plaintiff in liquidated damages, as provided in the said marketing agreement, because of the said breach of the said marketing agreement by them. An actual controversy exists between plaintiff and the said defendant canners concerning their respective rights and duties in relation to the title to the said 1200 tons. Plaintiff is informed and believes and therefore alleges that said defendant canners claim that defendants Corcoran & Miller have title to the said 1200 tons of peaches, and that they are entitled to receive the proceeds thereof. Plaintiff, on the other hand, contends that it has title to the said 1200 tons of peaches under the said marketing agreement, and that it is entitled to the proceeds thereof." It is perfectly clear that if the marketing agreement above referred to covered the entire 130-acre parcel, the plaintiff has attempted to state a cause of action in conversion against Corcoran & Miller. It is equally clear that under the same set of facts it has attempted to state a cause of action in conversion against B. H. Body Company. Daggett v. Gray, 110 Cal. 169, 42 P. 568; 65 C.J. 29. Moreover, in asking for declaratory relief, we do not understand that the pleader should declare the relief. The declaration of the relief will be made by the court. Some of it will be in response to the allegations contained in the complaint,

some in response to the new matter contained in the answers, and some, perhaps, in response to the new matter, if any, introduced by the plaintiff in avoidance of new matter set forth in the answer, that is, matter introduced in the nature of a replication to the defendants' plea.

As it did not appear at first blush, nor at all, that B. H. Body Company was improperly joined as a defendant, the trial court did not err in denying the defendants' motion to change the venue. McClung v. Watt, 190 Cal. 155, 159, 160, 211 P. 17.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



14 Cal.App.2d 174

McKENNEY v. RILEY et al.

Civ. 10806.

District Court of Appeal, Second District, Division 2, California.

May 19, 1936.

Mandamus ⇐119

Legal owner of automobile trucks *held* not entitled to writ of mandate to compel state controller to give tax clearance certificate after repossession of trucks from conditional buyer by which they were used in its business as common carrier when it became indebted to state for delinquent taxes, since operative property of carrier was basis of tax and subject to tax lien regardless of ownership thereof (Pol.Code, §§ 3664aa, 3668c; St.1933, p. 937).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by Margaret A. McKenney against Ray L. Riley, controller of the state of California, and another. From a judgment dismissing the petition the plaintiff appeals.

Affirmed.

John E. McCall and Fred G. Goldsworthy, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and John O. Palstine, Deputy Atty. Gen., for respondents.

McCOMB, Justice pro tem.

This is an appeal from a judgment dismissing a petition for a writ of mandate after a demurrer thereto was sustained.

The facts are:

November 18, 1930, Tolson Transportation System, Inc., purchased four trucks under a conditional sales contract from appellant's assignor, reserving legal title in the vendor.

The vendee operated the trucks as a common carrier on public highways of the state of California and became obligated to pay the state of California a tax pursuant to the provisions of section 3664aa, Political Code. This tax has never been paid. Pursuant to section 3668c, Political Code, the delinquent tax became a lien upon all property belonging to the vendee.

Appellant on or about March 9, 1935, repossessed the trucks, as the vendee was in default under its contract. The department of motor vehicles of the state of California thereafter refused to issue appellant a license for said trucks because the controller would not make an indorsement showing that all state taxes levied and assessed against the motortrucks were paid.

This is the sole question presented for determination:

Is petitioner, as legal owner of certain motortrucks, entitled to a writ of mandate to compel the state controller to give a clearance pursuant to the requirements of the 1933 Tax Clearance Act (Stats.1993, p. 937), if the trucks were used by a conditional vendee, in its business as a common carrier, and said vendee is indebted to the state for delinquent taxes assessed against it under section 3664aa, Political Code?

This question must be answered in the negative for the reason that operative property of a corporation subject to taxation pursuant to section 3664aa, Political Code, is exempt from local taxes upon the basis of the use of the property, rather than upon its ownership. Third & Broadway Bldg. Co. v. County of Los Angeles, 220 Cal. 660, 663, 32 P.(2d) 377. Hence it logically follows that, as operative property, irrespective of ownership, is taken as a basis for exemption from local taxation, such operative property, irrespective of ownership, is to be taken as a basis of taxation, pursuant to section 3664aa, Political Code, and thus the statutory lien provided for in section 3668c,

Political Code, attaches to the operative property of the corporation irrespective of ownership; and until the tax lien is liquidated, the controller cannot be required to issue a tax clearance certificate. Therefore the ruling of the trial court was correct.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 78

SMITH v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 10192.

District Court of Appeal, Second District, Division 1, California.

May 14, 1936.

Rehearing Denied June 12, 1936.

1. Trusts ⇐112

In construction of trust, court must if possible ascertain and effectuate creator's intention.

2. Trusts ⇐134

Distinction must be made between trust established only for perfunctory purpose and one established with authority in trustee to alienate estate and vest title, since neither legal nor equitable title can be said to reside in party who can do nothing more than receive and disburse surplus funds after payment of costs (Civ.Code, § 863).

3. Trusts ⇐203

Where landowners, pursuant to arrangement with subdividers, executed agreement establishing subdivision trust and designating subdividers as beneficiaries and their interests as personalty, beneficiaries *held* precluded from asserting any title against owners who became purchasers at trustee's foreclosure sale of beneficiaries' interests, and trustee thereafter possessed neither title nor estate; word "title" carrying different meaning in different relations (Civ. Code, § 863).

The word "title" sometimes connotes the means by which property in land is established, as in the expression "chain of title." It sometimes means "property" or "ownership" in the sense of the interest one has in land. A common meaning is complete ownership, in the sense of all the rights, privileges, powers, and immunities an owner may have with respect to land.

[Ed. Note.—For other definitions of "Title," see Words & Phrases.]

4. Trusts ⇐112

Word "title" with reference to passing of title under trust deed may denote complete ownership in fee (Civ.Code, § 863).

5. Trusts ⇐112

Words, as in trust agreement, must be given meaning most commonly ascribed to them.

6. Conversion ⇐11
Trusts ⇐112

Words in trust agreement providing that beneficiaries' interests should be personalty, and that no beneficiary should have any right, title, or interest in and to property covered thereby, though not creating conversion of realty to personalty, throw some light on parties' intention.

7. Trusts ⇐112

Ordinarily, purpose of trust must be ascertained from trust agreement.

8. Trusts ⇐134, 203

Landowners' trust agreement executed pursuant to arrangement with subdividers, designating subdividers as beneficiaries and their interests as personalty, and providing that trustee held title in trust to sell and release lots and to sell beneficial interests on default, and obligating beneficiaries to discharge taxes, liens, etc., *held* to vest entire title and estate in trustee and none in beneficiaries, and hence beneficial interests were properly foreclosed as personalty, and contractor to whom beneficiaries assigned percentage of their share of proceeds of sale of lots acquired only chose in action, precluding contractor's recovery either against trustee or purchasers at foreclosure sale (Civ.Code, § 863).

9. Mortgages ⇐138

Ordinary trust deed securing debt conveys legal title only so far as necessary to enforce payment.

10. Trusts ⇐147(1)

Where landowners, pursuant to arrangement with subdividers, executed agreement

establishing subdivision trust and designating subdividers as beneficiaries, who conveyed to contractor percentage of their share of proceeds of sale of lots, contractor succeeded to no greater estate or right than beneficiaries had.

11. Trusts ⇐134

Every express trust on realty is deemed to vest whole estate in trustee (Civ.Code, § 863).

12. Trusts ⇐147(1)

Where subdividers, being beneficiaries of subdivision trust, assigned to contractor percentage of beneficiaries' share of proceeds of sale of lots, contractor who had no lien, title, or estate in corpus *held* not entitled to claim that trustee's sale of beneficial interests was void because notice of sale was not recorded under statute and did not describe realty (Civ.Code, §§ 863, 2924; Code Civ. Proc. § 692).

Appeal from Superior Court, Los Angeles County; Charles L. Kincaid, Judge.

Action by Sidney Smith against the Bank of America National Trust & Savings Association, a corporation, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Andrew M. Strong and Marcus Muskat, both of Los Angeles, for appellant.

Freston & Files, of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson and Howard Waterman, both of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

C. L. McFarland, Eugene Best, and Mary C. McFarland, all of Riverside, for respondents Stella M. Atwood and Julia Myers.

HAAS, Justice pro tem.

The salient facts of this case as set forth in the brief of respondents Stella M. Atwood and Julia Myers, and the contention of the parties herein, are as follows:

"Respondents Atwood and Myers being the owners of a considerable tract of land in Riverside county, arranged with Messrs. Millar, Stearns, Davis & Webster, to subdivide and sell out the property." (A tract of 410 acres in the Perris Valley, Riverside county, known as Edgemont Garden). "The mechanics of the arrangement were handled by means of a subdivision trust with the predecessor of the Bank of America National Trust & Savings Association, the other respondent herein, acting as trustee. The property was conveyed to the trustee by respondents Myers and Atwood and a declaration of trust executed by all of the parties.

"The trust agreement provides in brief as follows:

"It recites that the property has been conveyed to the trustee without consideration 'at the instance and request of Stearns, Davis & Webster, referred to in the instrument as 'beneficiaries'. It further recites that the beneficiaries are indebted to respondents Atwood and Myers, called 'first payees' therein, on a promissory note in the amount of $69,274.33, and are further indebted to four parties called 'second payees' therein, in varying amounts. This indebtedness is specifically declared to be secured by the beneficial interests of the beneficiaries.

"The terms and provisions of the trust are as follows:

"First. To sell and convey the property, to subscribe to a map and dedicate streets. The prices of lots are to be fixed by the beneficiaries, but until all the items of indebtedness to the payees are paid in full a minimum schedule is provided for.

"Second. A schedule of release prices is set up providing that any lots sold may be released from the trust on payment according to that schedule.

"Third. The beneficiaries agree to pay taxes, assessments, costs of the trust, the defense of any actions, to pay for all improvements, to install a pipe line system, and to keep the property free of liens, and the trustee is authorized to make these payments from any funds belonging to them.

"Fourth. The distribution of the proceeds of sales of lots is provided for, going first to the payees up to a certain amount and in a certain order, and second to selling expenses, and third to the beneficiaries.

"Fifth. Guarantees of title are to be provided at the expense of the beneficiaries.

"Sixth. Any sale, transfer, pledge or hypothecation of beneficial interest must be registered with the trustee.

"Seventh. The payment of any inheritance, income, or other taxes is provided for.

"Eighth. The remedy of any payee or the trustee in case of the default of any beneficiary is set out providing in brief for a written declaration of default and demand for sale to be served on the trustee. Three months shall thereafter elapse and then a sale of the 'entire beneficial interest under this trust (i. e.) the entire interest under this trust of the said beneficiary or beneficiaries, or such portion of such entire beneficiary's or beneficiaries' interest as may be necessary to satisfy such default' shall be had after publication of notice for four successive weeks in a newspaper. The trustee shall, at the sale, make and deliver to the purchaser an assignment of the beneficial interest so sold, and the purchaser is to have all of the rights and privileges of the original beneficiary or original beneficiaries thereunder which properly pass with said assignment 'subject, however, to all of the terms, conditions or obligations of this trust including the lien of any indebtedness secured hereunder which is prior in lien to that of the party for whose benefit such foreclosure sale is held, but freed from the liens of all subordinate or inferior demands against the same.'

"The distribution of the proceeds of sale is provided for and it is agreed that all beneficial interests are assigned and conveyed to the trustee for the purpose of making the foreclosure sale:

"Ninth. Provision is made for the protection of the various beneficiaries or their assignees in the event that other beneficiaries should default in any particulars.

"Tenth. This paragraph * * * in full is as follows: 'It is distinctly understood that the interest under this trust and of each beneficiary is personal property and that no such beneficiary has or shall have any right, title or interest in and to the property covered hereby, nor has any right or power in any manner to apply for or secure the dissolution or termination of this trust or the partition or division of any of the trust property; the sole right and power of each beneficiary hereunder being to enforce the performance of the terms of this trust as expressly set forth in this declaration, with the understanding, however, that in the event the beneficial interest thereunder becomes vested in a purchaser under the foreclosure sale provided for in paragraph eighth hereof on account of default in any of the obligations in favor of the first payees hereunder, that such purchaser shall have the right to demand of the trustee the conveyance of the real property then held hereunder, except such portion thereof as may be described in outstanding contracts of sale issued by the trustee as authorized in paragraph first hereof; provided, however, that as to such outstanding contracts of sale, the trustee shall continue to collect and account to such purchaser who has become beneficiary for all amounts due thereon as and when collected less its fees as provided in paragraph eleventh hereof; and provided, further, that if any default should occur on the part of any of the lot buyers, on such outstanding contracts of sale, the trustee, after such proceedings have been taken at the expense of such beneficiary as will in its opinion dispose of all further equity of such lot purchasers in the lots agreed to be sold to them, shall convey such lots upon demand to such beneficiary.'

"Eleventh. Provides for the fees of the trustee under various contingencies which may arise under the trust.

"Twelfth. Provides for the liabilities of the trustee.

"Thereafter Messrs. Millar, Stearns, Davis & Webster entered into a contract with appellant Smith for the installation of a water system on the property and he agreed to accept in payment therefor, promissory notes of the said parties, and an assignment of seventy-five per cent of the moneys to be paid to them under the terms of the trust, to be applied on the payment of the notes. In this regard, appellant's contract provides as follows: 'It is further understood and agreed by and between the parties hereto, that there has been a certain declaration of trust drawn between the parties of the second part and the Merchants National Trust & Savings Bank, Hellman Branch, 7th and Spring streets, Los Angeles, which said declaration of trust bears date of May 3, 1927, and contains provisions therein that the parties of the second part, to this contract, are to receive the first twenty per cent from any sale or sales that might be made of any portion of said land referred to in this contract, and more particularly referred to as Edgemont Garden, for the selling expense of each lot; that the remainder of said purchase price for said lot or lots so sold is to be paid into the trust fund created by said trust agreement, and said parties of the second part hereto agree to, and do hereby, sell, assign, transfer and

set over unto the said party of the first part, 75 per cent of any and all money paid into said trust fund, which, according to the terms of said declaration of trust, is to be paid to said parties of the second part, and said sum or sums shall be paid to the party of the first part on the 1st of each and every month by the Merchants National Trust & Savings Bank, Hellman Branch, and said Merchants National Trust & Savings Bank, Hellman Branch, 7th and Spring streets, is hereby, irrevocably, authorized, instructed, empowered and directed to pay over to said party of the first part, Sidney Smith, Contractor, 75 per cent of all the money so paid into said trust fund by reason of the sale of any of said lots or parcels of land referred to therein and heretofore referred to as Edgemont Gardens, or otherwise.'

"It will be noted that appellant Smith had no lien on the real property involved, either by a mechanics lien, mortgage, deed, trust deed, or otherwise, only an assignment of '75 per cent of any or all money paid into said trust fund which according to the terms of said declaration of trust is to be paid to the said parties of the second part.'

"After some months of operation the payments coming to the respondents Myers and Atwood having fallen into default, the beneficial interest of Messrs. Millar, Stearns, Davis & Webster, appellant's assignors, was sold as personalty, after proceedings had strictly in conformity with the provisions of the trust agreement, thereby terminating the possibility of any more funds becoming available to appellant under the terms of his assignment.

"Appellant now contends that the interest of his assignors in the trust was an equitable title or interest in the corpus thereof and constituted real property and can only be foreclosed as such, and later in his brief, that even if it was personalty and the foreclosure sale valid, the sale was made subject to his seventy-five per cent assignment and his interest was not eliminated by the sale.

"Respondents contend: First, that the beneficial interests under the trust were personal property and their foreclosure and sale as such was valid. Second, that the sale eliminated appellant's assignment and no further funds are available to him."

[1] We are impressed with the able argument of appellant. His thoroughness of research and deduction cannot be questioned. In arriving at a solution of abstract questions and in following the devious courses taken by the title to property involved in various transactions, we, however, sometimes lose sight of the full intention of the parties to these transactions. The primary rule in the construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the creator. Title Insurance & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14.

It is apparent from the facts set forth in the reporter's transcript and briefs that what the parties intended in this case was to place a large tract of land in Perris valley, Riverside county, on the market to be said as subdivided into smaller tracts, to have a water system established for the purpose of furnishing water to the tract and to pay for the land and the water, in a large part at least, out of the proceeds of the sales of the land so subdivided and furnished with water. This project they intended to carry out by establishing a trust and through a trustee, an ordinary method of subdividing, improving, and selling land in smaller subdivisions in California. They proceeded with their organization, making the defendant bank the trustee and negotiated with plaintiff to have him establish the water system for the price of $66,000, represented by 66 notes of $1,000 each, by making a written assignment to him of 75 per cent. of the amount of money to which the beneficiaries should be entitled under said declaration of trust, *"by reason of the sale of any of said lots or parcels of land"* in Edgemont Garden, a tract of some 410 acres, the said subdivision. This water system plaintiff installed according to his agreement. The bank was not a party to the contract, but accepted the assignment of trust funds therein named. The trust itself provides specifically that "the interest under this trust and of each beneficiary is personal property."

It appears that certain of the lots were sold, and certain moneys paid into the trust fund, and that plaintiff received $4,186.25.

The note due Atwood and Myers, the first payees and vendors of the land, fell into default, and at the request of these parties, quoting from the brief of respondent bank, "the bank * * * held a foreclosure sale of the beneficial interests in the trust, which formed the security for the obligation, and the creditors, Atwood and Myers" (holders of the first lien created by the trust agreement) "bought such

beneficial interest in at the sale," foreclosing the interest of the second lien holders (second payees) and precluding payment of any further moneys to the original beneficiaries, the assignors, to Sidney Smith, appellant, and hence to him leaving $65,575 unpaid to him. Hence this suit to determine whether the foreclosure was effective and whether Sidney Smith, appellant, owns an interest in the land.

[2-11] This brings us to the question whether the beneficial interests under the trust were personal property and hence properly foreclosed, or interests in realty, and hence not properly foreclosed, and whether the trust accomplished a conversion from real to personal property.

Appellant goes to some length to differentiate between the "title" to the property and the "estate" in the property. In this regard one must differentiate between a trust established for a perfunctory purpose only and one established with authority in the *trustee* to alienate the estate and vest title. Neither the legal title nor the equitable title can be said to reside in a party who can do nothing more than receive and disburse surplus funds after payment of costs. In King v. Gotz, 70 Cal. 236, 240, 11 P. 656, 658, Mr. Commissioner Searles states, "It follows from these provisions (which modify section 863 of the same Code) that the trustor of an express trust, *except as to his trustee* and those holding under him, is treated as the holder of the legal title." (Italics ours.) (The reference is to the Civil Code, § 863, and sections modifying.) In the case before us the purchasers of the foreclosure sale stepped into the shoes of the trustee upon such foreclosure and thus the clause "and those holding under him" would preclude the beneficiaries from asserting any title against the respondents Atwood and Myers. But, furthermore, it must be borne in mind that the word "title" carries a different meaning under different circumstances and in different relations. The meaning given to it in King v. Gotz, supra, was that estate or interest residing in the trustor before fulfillment of the trust provisions. In the case before us the trust provisions were fulfilled when the bank carried out its foreclosure proceedings to completion and it was thereafter neither possessed of title nor estate. As stated in Skelly Oil Co. v. Kelly, 134 Kan. 176, 5 P.(2d) 823, 824, "The word title has a variety of meanings. It sometimes connotes the means by which property in land is established, as in the expression 'chain of title.' It sometimes means 'property' or 'ownership' in the sense of the interest one has in land. A common meaning is complete ownership, in the sense of all the rights, privileges, powers, and immunities an owner may have with respect to land." We must conclude that our appellate courts in referring to the passing of title under a deed of trust had in mind the passing of the complete ownership in fee, under the axiom of the law that words must be given the meaning most commonly ascribed to them. Upon reading the trust agreement, as in the present case, we find no doubt nor uncertainty of the meaning of its provisions, and we find no word or words reserving to the beneficiaries any title or estate, legal or equitable, in themselves, but, to the contrary, do find repeated statements as in paragraph tenth of the trust agreement, to the effect that "the interest under this trust and of each beneficiary is personal property and that no such beneficiary has or shall have any right, title or interest in and to the property covered hereby." While it is true that words in a trust agreement to this effect do not *create* a conversion of real property to personal property, it throws some light upon the intention of the parties to the trust agreement, and, as stated, the *intention* is the criterion. Keeping this in mind, we may go to the trust agreement itself to find what burden it cast upon the trustee, for the purpose of the trust must ordinarily be ascertained from the trust agreement. 65 Cor.Jur. § 264, p. 513, and notes. It provides that the trustee holds the *title in trust:* (1) To sell and convey the property; (2) to release from the lien of the indebtedness secured by it any and all lots; (3) to receive and disburse the moneys received from the sale of lots in a manner provided by the trust deed; (4) to sell the beneficial interest created by the trust agreement as may be necessary to satisfy defaults and reasonable expenses and trust agreements; (5) and to publish the required notices therefor; (6) and may close the trust "by the sale of all the property hereunder; provided, however, that in the event said trust should be closed by the conveyance of said property or *any remaining unsold portions thereof to the beneficiaries* or their nominees without consideration" the trustee

shall receive a fee therefor. We are of the opinion that this clothes the trustee with all the indicia of ownership while carrying the burden of the trust exclusive of any ownership in the beneficiaries during the life of the trust, and while the beneficiaries are called upon by the trust to bear and pay all taxes, costs, fees, and expenses and all claims, liens, and encumbrances affecting the title to the property, this is nothing more than a condition exacted by the trustee before it will agree to assume the trust burden and is not indicative of any reservation of title or vesting of title or estate in the beneficiaries.

This trust agreement differs materially from the ordinary trust deed given for the security of a debt which conveys the legal title only to the trustee so far as may be necessary to the execution of the trust, i. e., to enforce the payment of the debt. Such a trust deed "carries none of the incidents of ownership of the property other than the right to convey upon default on the part of the debtor in the payment of his debt." Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, at page 656, 20 P.(2d) 940, 944.

In short, having no title or estate when they entered into the agreement with the appellant, Sidney Smith, they could pass none on to him. If, then, the beneficiaries have neither reserved to them nor vested in them any title or estate during the life of the trust, they are, of course, themselves entirely closed out if and when the trustee forecloses upon default to satisfy the claims of the first payees, as in this case. We need go no further than to an analysis of the trust agreement itself to come to such a conclusion. If the beneficiaries are thus cut off from any redress against the trustee, it follows that the appellant herein, who has succeeded to no greater estate or right than the beneficiaries had, is also powerless to enforce any claim against the trustee. "One cannot transfer to another a larger right than he himself has." Maxims, vol. 1, New Calif.Digest, p. 28, and cases cited.

It is made quite clear from the trust agreement itself that during the life of the trust the entire title and estate is in the trustee; when, upon foreclosure proceedings, it "passes title" and estate to the first payees, it ceases to be burdened with the trust and the title and estate as well, and the trustee is no longer answerable to appellant for payments called for by his agreement with the beneficiaries. Appellant's claim was therefore but a chose in action, a right to receive 75 per cent. of the moneys payable to the beneficiaries as long as there was money due the beneficiaries in the hands of the trustee according to the interpretation given to section 863 of the Civil Code and sections amending it, by the court in Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am.St.Rep. 97: The trust agreement vests "the whole legal and equitable estate which the testator enjoyed" and "the beneficiaries * * * take no estate as such." Any other interpretation would defeat the purpose of the trust (65 Cor.Jur. p. 513) and overthrow the too well-established doctrine in this state held to be the law here, even though it is a fiction of the law, that every express trust on real property vests the whole estate in the trustee (section 863 of the Civil Code). The interest of the appellant herein must be held to have been personal property (Craven v. Dominguez Estate Co., 72 Cal.App. 713, at page 718, 237 P. 821, 823), and not an interest in realty. "As against the trustee [under an express trust] and those lawfully claiming under him [the trustee] the beneficiary has no interest in the property itself, but only in the proceeds thereof after the property has been sold by the trustee." Craven v. Dominguez Estate Co., supra. See, also, Houghton v. Pacific Southwest Trust & Savings Bank et al., 111 Cal.App. 509, 295 P. 1079.

[12] As it must be held that appellant, Smith, never did have any lien, title, or estate in the corpus of the trust, either legal or equitable, he is not in a position to set up the claim that the trustee's sale is void because no notice of sale was recorded under section 2924 of the Civil Code, and that the notice of sale did not describe the real property as required by section 692, Code of Civil Procedure. Such a claim could avail him nothing.

Thus it follows that the foreclosure and sale of the beneficial interests are valid as to the appellant; that the respondents have nothing to account for to appellant, no sums to pay; and that the judgment of the trial court should be, and it is, therefore, affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

14 Cal.App.2d 241

WINGER v. ELMORE.

Civ. 9787.

District Court of Appeal, First District, Division 1, California.

May 21, 1936.

Hearing Denied by Supreme Court July 20, 1936.

1. Automobiles ⇐245(14)

In action for injuries sustained when defendant motorist was making left turn into highway, conflicting evidence as to defendant's negligence in entering highway without obeying stop sign and driving into pathway of plaintiff's on-coming automobile *held* for jury.

2. Automobiles ⇐245(61, 90)

In action for injuries sustained when defendant motorist was struck by plaintiff's on-coming automobile while making left turn into highway, conflicting evidence as to whether negligence of plaintiff or defendant or both was proximate cause of collision *held* for jury.

3. Appeal and error ⇐842(4)

Determination by jury of whether negligence of one automobile driver or other or both was proximate cause of collision is one of fact and controlling on appeal.

4. Trial ⇐296(3)

In action for injuries sustained in automobile collision wherein defendant motorist filed cross-complaint, instruction that was allegedly an instruction to effect that defendant was negligent *held* not prejudicial when considered with other instructions on same subject-matter.

5. Trial ⇐296(3)

Instruction that one motorist has right to assume that another motorist will obey law allegedly erroneous because of omission of qualification that jury must first find motorist relying on such assumption was himself exercising due care *held* not prejudicial in view of other instructions.

6. Appeal and error ⇐1041(2)

Denial of application to amend cross-complaint so as to increase amount of damages prayed for *held* not prejudicial where verdict awarded cross-complainant no damages.

7. Costs ⇐76

Where order that neither party was entitled to costs had not been set aside, subsequent order taxing costs after denial of motion for new trial *held* without effect and was annulled on appeal therefrom.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by J. B. Winger against Herman Elmore, wherein defendant cross-complained. From the judgment and from an order made subsequent to judgment apportioning costs, defendant appeals.

Judgment affirmed and order apportioning costs annulled.

Hamilton Wright, of Oakland, for appellant.

Clark & Heafey and James W. Hughes, all of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff brought this action to recover damages for injuries sustained in a collision between his automobile and one driven by defendant, alleging that the collision was proximately caused by the defendant's negligence. Defendant, answering, denied he was negligent, and interposed a cross-complaint alleging that the collision was proximately caused by the negligence of plaintiff. The trial took place before a jury, which decided in effect that the accident was due to the concurrent negligence of both parties, and that therefore neither was entitled to damages. Judgment was entered accordingly, and defendant appeals from that portion thereof denying him relief, urging as first ground for reversal insufficiency of the evidence to justify the implied finding of the jury that he was negligent, and that his negligence proximately contributed to the happening of the accident. There is no merit in the point.

[1] The accident happened during the month of June, about 7 o'clock in the evening, on the main highway between Livermore and Hayward, known as the Dublin canyon highway, where it is intersected but not crossed by a side road known as Santa Rita road. Plaintiff was traveling easterly along said main highway, and defendant was driving northerly along the Santa Rita road. The collision occurred within the intersection, as defendant was making a left turn therein. Along and upon the Santa Rita road near the junction thereof with the main highway there are four separate warnings of the presence of the intersection. The first

is a "Cross Road" sign attached to a post on the easterly side of the Santa Rita road. A little nearer the intersection there is another sign upon and across the easterly side of the road displaying the word "Slow" in large white letters. Still closer to and about ninety feet from the intersection there is a regulation arterial "Stop" sign on the easterly side of the road; and fifteen feet from the main highway the word "Stop" is painted in large white letters across the Santa Rita road. Defendant, being a resident in that locality, traveled very frequently over both roads, and was familiar with the traffic conditions at said intersection. He admits that he did not stop at the regulation arterial stop sign along the side of the Santa Rita road, but claims he did stop at the last stop sign painted in white letters across the road. Testimony was given to the contrary, however, by plaintiff and two other witnesses who stated positively that defendant did not stop at all before entering the main highway; that he drove right on into the intersection directly in the pathway of plaintiff's on-coming car. Therefore, in view of the foregoing conflict in the testimony, so far as the issue of defendant's negligence is concerned, we are bound by the conclusion reached by the jury and by the implied finding of the trial court in denying defendant's motion for new trial.

[2, 3] Defendant further contends, however, that even assuming he did not stop before entering the intersection, his failure so to do was not a proximate cause of the accident. Where, as here, however, the state of the record shows a conflict in the evidence as to the circumstances relating to the happening of the accident, the question of whether the negligence of one driver or the other or both was the proximate cause of the collision is one of fact to be determined by the jury, and such determination is controlling on appeal. Dougherty v. Ellingson, 97 Cal.App. 87, 275 P. 456; Fishman v. Silva, 116 Cal.App. 1, 2 P.(2d) 473; Hill v. Peres, 136 Cal.App. 132, 28 P.(2d) 946.

[4, 5] Defendant next complains of the giving of four instructions. In this regard it is contended that instruction XXI was in effect an instruction that defendant was negligent, and that instruction XXX, which embodied the legal principle that one driver has the right to assume that another will obey the law, omitted the qualification that the jury must first find that the driver relying on such assumption was himself exercising due care. It appears, however, that several other instructions were given by the trial court relating to the same subject-matters embraced within the two which defendant criticizes; and when all are considered together, it is evident that the jury could not have been misled nor defendant's case in any way prejudiced by the giving of the two instructions complained of. The remaining two about which defendant complains (XXXII and XXXIII) obviously followed the law as declared in the cases of Bullock v. Western Wholesale Drug Co., 91 Cal.App. 369, 266 P. 978, and Wise v. Stott, 114 Cal.App. 702, 707, 300 P. 883, and therefore were not erroneous.

[6] In his cross-complaint defendant prayed for damages in the sum of $10,000, and during the trial he asked leave to amend so as to raise the amount to $20,000. He now contends that the court erred in denying his application. Manifestly, since the jury and the trial court found that defendant was not entitled to any damages, the amount sought by him becomes an immaterial matter.

[7] Defendant has appealed also from an order made subsequent to judgment, apportioning costs. In this connection the record discloses that following the entry of judgment both parties served and filed cost bills. The items set forth in plaintiff's bill amounted to $46.25 and those in defendant's bill totalled $188.22. Subsequently both parties moved to tax costs, and besides defendant moved to strike out plaintiff's cost bill. On November 27, 1934, and in due course said motions came on regularly for hearing in another department of the court, before the presiding superior judge of that county, and after arguments were heard an order was regularly entered "that neither party is entitled to costs and neither cost bill is allowed." Thereafter and on December 20, 1934, the motion for new trial came on for hearing before the judge who had heard the case, and at the conclusion of the argument on said motion the judge inquired whether or not it was desired that he should decide the matter of costs, to which counsel replied, after some discussion, that they were willing he should do so; whereupon and on December 24, 1934, said judge caused an order to be entered denying the motion for new trial, and further ordered "that plaintiff's costs be taxed herein in the sum of $27.50 and that defendant's costs be taxed in the sum

of $90.71." The appeal which defendant has taken is from the latter order so made on December 24, 1934. But there is nothing in the record to show, nor is it claimed, that the previous order made on November 27, 1934, by the other department of the court, was ever vacated or set aside. It follows, therefore, that since the first order so made on November 27, 1934, became final, any order made thereafter relating to the same motions was without force or effect.

The judgment on the merits is affirmed, and in accordance with the views above expressed as to the invalidity of the order made on December 24, 1934, apportioning the costs, from which the appeal was taken, said order is annulled.

We concur: TYLER, P. J.; CASHIN, J.

KEY NUMBER SYSTEM

REINERT v. CALIFORNIA ALMOND GROWERS EXCHANGE et al. *

Civ. 10934.

District Court of Appeal, Second District, Division 2, California.

May 25, 1936.

Rehearing Denied June 22, 1936.

Hearing Granted by Supreme Court July 23, 1936.

1. Appeal and error ⊂⊃901

Appellate court will not assume task of searching record for purpose of discovering errors not pointed out by counsel (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2, p. 10).

2. Appeal and error ⊂⊃766

Where appellant failed to set forth questions involved on first page in his opening brief thereof without any other matter appearing thereon, appeal was dismissed (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2, p. 10).

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Jane V. Reinert against the California Almond Growers Exchange and others. Judgment for defendants, and plaintiff appeals.

Appeal dismissed.

Webster & Lyon and Ray B. Lyon, all of Paso Robles, Griffith & Thornburgh and William G. Griffith, all of Santa Barbara, and Flint & MacKay, William A. Bowen, and Edward L. Compton, all of Los Angeles, for appellant.

Warren Olney, Jr., F. F. Thomas, Jr., F. W. Mielke, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondents.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent after trial before the court without a jury.

[1, 2] Appellant has failed in his opening brief to set forth on the first page thereof without any other matter appearing thereon the questions involved. Rule VIII, § 2, p. 10, Rules of the Supreme Court and District Courts of Appeal of the State of California.

In Adams v. Standard Accident Insurance Co., 124 Cal.App. 393, 394, 12 P.(2d) 464, Mr. Justice Conrey, then Presiding Justice of the District Court of Appeal, Second Appellate District, Division 1, in commenting upon the provisions of rule VIII, supra, accurately states the requirement thus: "Such assignment of error should take the form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of the judgment."

This court has repeatedly held that it will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule VIII, supra, in its entirety. Battson v. Kirkpatrick (Cal.App.) 53 P.(2d) 762; Ferslew v. Andersen (Cal.App.) 53 P.(2d) 768; Bernstein v. Congregation Anshi Sfart (Cal.App.) 57 P.(2d) 954.

This rule is not a mere technical requirement, but is prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court.

For the foregoing reason, the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.

⊂⊃For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 70 P.2d 190.

14 Cal.App.2d 279

TUMANSKY et al. v. WOODRUFF et al.

Civ. 9820.

District Court of Appeal, Second District, Division 1, California.

May 26, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Appeal and error ⇐1008(1)

Finding that there was consideration for notes executed in return for payee's notes to maker in equivalent amount *held* conclusive on appellate court (Code Civ.Proc. § 1962, subd. 3).

2. Bills and notes ⇐95

Payee's notes given to maker for maker's notes in equivalent amount *held* "valuable consideration."

[Ed. Note.—For other definitions of "Valuable Consideration," see Words & Phrases.]

3. Deeds ⇐32

Generally, a deed executed in blank as to grantee is void and passes no title.

4. Deeds ⇐32

Where grantors delivered deed with grantee's name in blank to escrow agent under written agreement naming grantees and giving agent specific authority to insert grantees' names or their nominee's name, agent's delivery of deed in blank to intended grantees authorized them to insert name of grantee (Civ.Code, § 2349).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Harry Tumansky and another against Leonard J. Woodruff and others. From a judgment for plaintiffs and from an order denying a motion for a new trial, the named defendant appeals.

Judgment affirmed and appeal from order dismissed.

Edward Fitzpatrick, of Los Angeles, and Earl J. Opsahl, of Hollywood, for appellant.

Glenn M. Still, of Los Angeles, for respondents.

ROTH, Justice pro tem.

Plaintiffs in this case in return for a deed to the Windsor Apartments (which were heavily encumbered and under foreclosure at the time), and a note for $20,000 made to them as payees from one Rabinowitch and wife, received from Craig and Wallace $22,000 in notes. Of this latter sum $15,000 was made up of five several promissory notes of defendant and appellant herein, Leonard J. Woodruff (hereinafter called "Woodruff notes"). The Woodruff notes were made payable to Craig, and by Craig and Wallace, prior to maturity, indorsed, guaranteed, and delivered to plaintiffs. Judgment in the instant action was obtained against appellant alone, the maker of the notes (Craig and Wallace not being served), for the principal amount of said Woodruff notes with interest and attorney's fees. The appeal is from the judgment and from the order denying motion for new trial.

The Woodruff notes were delivered to plaintiffs through their attorney, who acted as the escrow agent for both parties in the Windsor Apartment transaction, wherein the deed to the apartment house and the Rabinowitch note were transferred to Craig and Wallace. Plaintiffs delivered the deed to their attorney, the said escrow agent, duly executed in all respects except that the name of the grantee was left blank. Prior to the escrow, a suit had been commenced by plaintiffs on the Rabinowitch note (payment of which had been refused). The escrow agreement was in writing, signed by plaintiffs, Craig, and Wallace, and provided with reference to these two features as follows:

"The Grantee's name in said deed is in blank and you are hereby authorized to insert as grantee in said deed the nominee of Mary D. Wallace and Gavin W. Craig. * * * Upon the payment in full of the above described promissory notes evidencing said sum of Twenty-two Thousand and no/100 ($22,000.00) Dollars, you are instructed to deliver the above described grant deed to Mary D. Wallace and/or Gavin W. Craig.

"You are further instructed that Harry Tumansky and Betty Tumansky at their option shall have the right at any time to instruct you to deliver said grant deed to Mary D. Wallace and/or Gavin W. Craig, in which event you are to surrender and deliver to Harry Tumansky and Betty Tumansky all of the above described promissory notes or any part thereof remaining in their possession, in which event the delivery of said grant deed shall be unconditional. * * * Harry Tumansky

and Betty Tumansky do hereby execute and deliver in blank a substitution of party plaintiffs and substitution of attorneys in that certain action entitled: In the Superior Court of the State of California, In and For the County of Los Angeles, Harry Tumansky & Betty Tumansky, Plaintiffs, vs. Samuel Rabinowitch & Fannie Rabinowitch, Defendants, No. 339325.

"Mary D. Wallace and Gavin W. Craig agree that in the event that they receive any sums of money and/or property which is converted into money by reason of the settlement and/or levying of execution of said action No. 339325, that they will apply said sums toward the payment of the purchase price of the above described property of Twenty-two Thousand and no/100 ($22,000.00) Dollars."

Defendant contended in defense (a) that there was no consideration for the notes passing from Woodruff to Craig and that plaintiffs had notice of such defect; (b) that there was no consideration for the Woodruff notes, nor for the notes from Craig and Wallace, passing from plaintiffs to Craig and Wallace, because a grant deed executed to a blank grantee is no deed, and because the substitution of parties plaintiff and substitution of attorneys, as provided for in the escrow agreement, was not delivered to Craig. The evidence in this connection showed that in December of 1932, plaintiffs filed an involuntary petition in bankruptcy against Rabinowitch, in which they averred they were the owners of and holders of the Rabinowitch note.

The record, however, contains plentiful evidence to establish as facts that the escrow in question was completed within a week after it was started on or about May 27, 1932, and that the deed to the apartment house was delivered to Craig; further, that the substitution of parties plaintiff and attorneys was ready for Craig at any time he desired to accept it, as well as the Rabinowitch note. It appears that Craig did not take delivery of the Rabinowitch note, instructing plaintiffs' attorney to attempt collection and apply the proceeds of such demand to the payment of the Woodruff and other notes delivered to the plaintiffs; and that the involuntary petition in bankruptcy filed against Rabinowitch by and in the name of plaintiffs was filed pursuant to the instructions of Craig. The record also shows that before the Tumanskys would accept the Woodruff notes they instructed their attorney to interview Woodruff as to the validity of his notes. This interview, the testimony showed, was had in the presence of Craig, Woodruff, Sherman, who was plaintiffs' attorney, and one Weinblatt, and the testimony showed that Woodruff admitted he gave his notes for valuable consideration and had no defenses thereto. It afterward developed that the valuable consideration received by Woodruff for his note to Craig were Craig's notes in an equivalent amount. There is nothing to contradict this except a stipulation that Woodruff, who did not appear at the trial, would, if he did appear, testify that he received no consideration for his notes. It is significant, however, that the stipulation did not go so far as to declare that Woodruff would testify that he did not admit that there was consideration for his notes, and that he had no defenses thereto, at the time of the interview mentioned. The only intimation in the record, other than the stipulation referred to, that there was no consideration and that plaintiffs had notice of such fact, is the averment in Weinblatt's affidavit in support of a motion for new trial, that he had told plaintiffs prior to the time they accepted the Woodruff notes, that there was no consideration therefor. Weinblatt did not testify at the trial, and the averments of the affidavit are not evidence.

[1-4] The trial court, on this testimony, found as a fact that there was consideration for the Woodruff notes, and so far as this court is concerned, that finding is conclusive. Code Civ.Proc. § 1962, subd. 3; 10 Cal.Jur. § 15, pp. 628–631. It is well settled that note for note is valuable consideration. Ramish, Inc., v. Woodruff, 2 Cal.(2d) 190, 206, 40 P.(2d) 509, 96 A.L.R. 1146; Ambrose v. Hammond Lumber Co., 43 Cal.App. 597, 185 P. 691. We are satisfied that there was consideration from Craig to Woodruff in the apartment house transaction. Generally speaking, a deed executed in blank as to the grantee is void and passes no title. Trout v. Taylor, 220 Cal. 652, 32 P.(2d) 968. The evidence in this case shows that the deed was delivered in blank to the escrow holder and by him delivered in blank to Craig. The escrow instructions, however, specifically gave authority to the escrow agent to insert the name of the grantee. This fact takes the instant case out of the rule enun-

ciated by Trout v. Taylor, supra, and the line of cases that it follows. The escrow instructions were specific, and why the escrow agent did not insert the name of a grantee does not appear. It is fair to assume that a grantee's name was not inserted because the grantees had not made up their minds how, or in whose name, they desired to take the property. The escrow instructions, it will be recalled, specifically provided that the named grantees would take the deeds in their own names or in the name of their nominee. We believe that, since they accepted the deed in its blank form, they received authority from the escrow agent to insert the name of the grantee, and that the escrow agent had the power to delegate this authority. Civ.Code, § 2349. Further, the conditions of the escrow having been fulfilled, the escrow agent actually held the note as a trustee for Craig and Wallace. Law v. Title Guarantee & Trust Co., 91 Cal.App. 621, 627–630, 267 P. 565. Under such circumstances, the escrow holder may at any time insert the name of a grantee upon proper instructions from Craig and Wallace.

The trial court made adequate findings on all the issues; the evidence supports these findings, and we find no error in the record.

The judgment is affirmed, and the appeal from the order denying motion for new trial is dismissed, no appeal being authorized by law from such an order.

We concur: HOUSER, P. J.; DORAN, J.



14 Cal.App.2d 113

JEFFERIS et ux. v. CITY OF MONTEREY PARK.

Civ. 10352.

District Court of Appeal, Second District, Division 1, California.

May 15, 1936.

1. Municipal corporations ⇐845(4)

In action against city for submerging of lot during storm because of fill on newly raised street and inadequacy of storm drains, evidence that lot fell twenty-five feet from front to rear, where water formerly ran throughout year in ditch about twelve feet wide and six or eight feet deep, justified finding that there was natural water course or channel as distinguished from swale.

2. Municipal corporations ⇐840

In action for submerging of lands during storm because of sixteen-foot fill on newly raised street and negligent failure to install sufficient drains, city, having so completely obstructed natural water course, *held* deprived of defense based on act of God.

3. Municipal corporations ⇐845(7)

In action against city for submerging of lands during storm, evidence of damages *held* not insufficient where total award was only $1,100, notwithstanding contractor's testimony that cost of repairing buildings alone would exceed $1,900.

4. Appeal and error ⇐110

Appeal from order denying new trial in civil case is unauthorized.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Percy D. Jefferis and wife against the City of Monterey Park. From a judgment for plaintiffs and an order denying a motion for a new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

F. F. Gualano, of Monterey Park, for appellant.

John Dennison and John H. Foley, both of Los Angeles, for respondents.

DESMOND, Justice pro tem.

Appeal from a judgment in favor of plaintiffs and from an order denying motion for a new trial.

During the year 1933, defendant city raised the street level of a thoroughfare known as Newmark street approximately 25 feet. Newmark street runs in an easterly direction from a north and south street known as Atlantic avenue. One block north of Newmark street, parallel with it, and extending in the same direction, is Garvey avenue. Between Garvey avenue and Newmark street, plaintiffs' property faces west on Atlantic avenue about 140 feet north of Newmark street. It has a

decided slope, falling about 25 feet to the rear of the lot, a distance of 160 feet. Prior to the improvement of Newmark street, the county of Los Angeles formed a drainage district in the neighborhood of these streets and adjoining territory, and installed a storm drain extending southerly for several miles from a point north of Garvey avenue, and crossing or passing beneath intervening streets, including Newmark street. The drain pipe measures some 6 or 7 feet in diameter, and was laid at the rear of plaintiffs' property, lateral connections being made at various points, and catch-basins being installed along the course of the improvement. The fact that a storm drain was deemed necessary indicates that at this location a considerable body of water moved, at least occasionally. The trial court found "that from time immemorial there was a natural water course extending in a general northerly and southerly direction from a point a considerable distance north of Garvey avenue which was located approximately 900 feet north of Newmark street and extends in a southerly direction along the rear of plaintiffs' premises and across Newmark street extending southerly some miles distant beyond the southerly limits of Monterey Park."

By reason of the blockade or dam formed by a 16-foot fill on Newmark street and the failure of the storm drain with its laterals and catch-basins to adequately handle the rush of waters running down the natural water course, found by the court to exist, a great volume of water was thrown upon plaintiffs' land in the heavy storm of New Year's Eve, 1934, with the result that their home and outbuildings were almost submerged, damage resulting to the buildings and their contents.

It is contended on this appeal that various findings made by the court are not supported by or are contrary to the evidence; therefore that the judgment based thereon should be set aside.

Particular exception is taken to the finding that there existed a natural water course which was obstructed by the newly laid-out Newmark street. The importance of this finding becomes apparent when we consider the decisions in Conniff v. San Francisco, 67 Cal. 45, 7 P. 41, 43, and Corcoran v. City of Benicia, 96 Cal. 1, 30 P. 798, 31 Am.St.Rep. 171. In the San Francisco Case the municipality was held liable for damages resulting when water backed up on plaintiff's land by reason of an embankment 15 feet high, built by defendant in the grading of Montgomery avenue. The court commented thus upon the facts and the law:

"The facts proved show that the embankment stopped the flow of the waters in the channel of usual escape, formed by the operation of natural causes, so that they were thrown back and detained on the lot of plaintiff, and caused the damage complained of. Can this be done? Conceding that a municipal corporation is not responsible for damage caused by the gathering of the surface waters, not running in a natural channel, produced by the raising of a street to the grade established by law, it does not follow that it would not be responsible herein. Here a natural channel is stopped,—one which, it may be properly inferred, had existed for a long series of years,—and the water thus dammed is forced to flow over a lot 200 feet distant from the channel. It is well settled that a municipal corporation has no right, in the absence of valid legislative authority, changing what would otherwise be the legal rights of the parties, to stop up a natural channel through which waters run, by an embankment made in grading a street, under its general power to grade and improve streets." (Cases cited.) See, also, Richardson v. City of Eureka, 96 Cal. 443, 31 P. 458.

In the Benicia Case it was held that the city could not be held responsible "for damages caused by the gathering of 'the surface waters not running in a natural channel, produced by the raising of a street to the grade established by law,'" citing 2 Dillon on Municipal Corporations, § 1039, and various cases. Conniff v. San Francisco and Corcoran v. City of Benicia still express the law of California on the subjects involved, both being referred to in a recent valuable article appearing in 7 Southern California Law Review, 293 et seq., where Prof. David has collected and discussed the California cases bearing upon the question of municipal liability for "Obstruction of Water Courses, and Diversion of Surface Waters."

[1] Appellant contends that no natural water course or channel existed here, but a swale, similar to that described in Sanguinetti v. Pock, 136 Cal. 466, at page 471, 69 P. 98, 89 Am.St.Rep. 169, where the country around and about the lands of defendant was level, and a witness testified that the

general depression in the neighborhood of plaintiff's land was about 80 feet in width, 2½ miles long, and had a depth varying from 6 inches to 2½ feet. But, in the instant case, a witness testified that water formerly ran throughout the year in a ditch at the rear of his lot (adjoining the plaintiffs'), which ditch was about 12 feet wide, with steep banks about 6 or 8 feet high. It appeared also that water which flowed through this channel had been used at a lower point for irrigation, and Mrs. Jefferis testified that even after the storm drain had been installed there was water flowing in this water course past plaintiffs' premises. We have already noticed that there was a fall of 25 feet from the front to the back of plaintiffs' property, and this fact, together with other evidence, some of which we have just mentioned, justified the trial court, in our opinion, in finding here, not a swale, but a natural channel or water course, under a proper definition, such as appears in Hellman, etc., Bank v. Southern Pac. Co., 190 Cal. 626, 632, 214 P. 46.

[2] As to the objection raised to the finding of negligence on the part of defendant city, we merely call attention to the fact that in constructing the embankment that raised Newmark street to the official grade, the city officials and employees failed to install (even though they may have designed) sufficient drain ways or culverts to permit the escape of waters from plaintiffs' land, a situation similar to that existing in the Conniff Case, supra, and Weisshand v. City of Petaluma, 37 Cal.App. 296, 174 P. 955, where the landowner recovered from the municipal corporation. Appellant argues that the severity of the storm constituted an act of God, relieving the city of responsibility. But the case cited in support of this argument says, "Nor is a ditch or canal owner responsible for that which is *solely* the result of the act of God, or inevitable accident. It is only when human agency is combined with the act of God and neglect occurs in the employment of such agency that a liability for damage results from such neglect." Nahl v. Alta Irr. Dist., 23 Cal.App. 333, 337, 137 P. 1080, 1081. (Italics ours.)

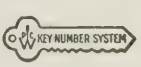
We infer from this that one who obstructs a natural water course as completely as noted in the present case is deprived of the defense based upon superhuman cause. See Judge Myers' instruction on this subject at page 636 of 190 Cal., 214 P. 46, in Hellman, etc., Bank v. Southern Pac. Co., supra.

[3] Appellant finally contends "that the evidence produced by plaintiffs as to their damages was insufficient." We do not take this view, noting that a contractor, called by plaintiffs, testified that merely repairing plaintiffs' buildings would cost $1,936.34, whereas the total award by the court for all damages to buildings and contents was limited to $1,100.

[4] The appeal from the order denying a new trial, not being authorized in this, a civil case, is dismissed.

Judgment affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



14 Cal.App.2d 53

BETZER v. OLNEY et al.

KOFAHL v. GLENS FALLS INDEMNITY CO. et al.

Civ. 1753.

District Court of Appeal, Fourth District. California.

May 14, 1936.

Hearing Denied by Supreme Court July 13, 1936.

1. Licenses ⇐26

Sureties on statutory brokers' bond *held* not liable for fraud of brokers in sale of securities deposited by customer as security for loan and in obtaining further security thereafter, such transaction being "loan transactions" not within terms of bond or statute pursuant to which bond was executed (St. 1931, pp. 943, 944, § 6, subd. 3).

[Ed. Note.—For other definitions of "Transaction," see Words & Phrases.]

2. Licenses ⇐26

Inclusion in judgment on brokers' bond of items representing individual obligations of person whose business was taken over by brokers *held* not to affect liability of sureties for brokers' fraud in transaction after business had been taken over and bond had been executed (St.1931, pp. 943, 944, § 6, subd. 3).

3. Pleading ⇐381(3)

In action on brokers' bond, refusal to permit proof of sureties' claim of laches based on denial of opportunity to file claim against brokers' bankrupt estate *held* within discretion of trial court, where time for filing claims in bankruptcy court had not expired when action was brought and application for permission to amend to assert defense was made on last day of trial without notice to adverse parties (St.1931, pp. 943, 944, § 6, subd. 3; Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

4. Trover and conversion ⇐44

Measure of damages in trover action is value of property at time and place of conversion with interest from that time, unless there are special circumstances requiring different measure of damages to be applied.

5. Licenses ⇐26

In action on brokers' bond for conversion of stock deposited by customer to cover purchase of other stock, value of converted stock, as of date when customer learned of conversion, rather than as of date prior to which all conversions had occurred, *held* proper measure of damages (St.1931, pp. 943, 944, § 6, subd. 3; Civ.Code, § 3336).

6. Bankruptcy ⇐143(1)

Brokers' bond executed pursuant to statute is contract, and right of person entitled to claim thereunder is individual right given to person for whose benefit contract was made, rather than right in common given to collective and unidentified group, and hence right to recover on bond is not part of estate of bankrupt broker so as to entitle brokers' trustee in bankruptcy to administer proceeds thereof (St.1931, pp. 943, 944, § 6, subd. 3; Bankr.Act § 47a, 11 U.S.C.A. § 75(a).

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Actions by R. S. Betzer against T. M. Olney, James R. Dorrance, and W. P. Smith, and others, wherein defendants T. M. Olney and James R. Dorrance filed cross-complaint, and L. H. Kofahl, trustee of the estate of W. P. Smith & Company, bankrupt, intervened. Judgment for plaintiff and cross-complainants, and defendant W. P. Smith and others and the intervener appeal.

Affirmed in part, and reversed, with instructions, in part.

J. W. Heard, Jr., of Bakersfield, and Thomas E. Davis, of San Francisco, for appellants and respondents Commerce Casualty Co. and Glens Falls Indemnity Co.

Calvin H. Conron, Jr., of Bakersfield, for appellant Kofahl.

Harvey & Johnston, of Bakersfield, for respondent Betzer.

Edward West and J. K. Lilly, both of Bakersfield, for respondents Olney and Dorrance.

BARNARD, Presiding Justice.

This is an action to recover upon a broker's bond for $5,000, issued in accordance with the requirements of subdivision 3 of section 6 of the Corporate Securities Act (St.1917, p. 677), as amended (Stats.1931, pp. 943, 944). The action involves three transactions had by the plaintiff and cross-complainants, respectively, with the brokerage firm of W. P. Smith & Co., for which firm the corporate defendants had furnished the bond in question. The trustee of the bankrupt estate of W. P. Smith & Co. filed a complaint in intervention, claiming the right to administer any amount recovered upon the bond. The court found in favor of the three claimants, finding that Betzer was entitled to $3,363.43, Olney to $1,710.86, and Dorrance to $2,812.50. The amount of the bond was prorated between the three claimants, and judgment was entered awarding Betzer $2,132.32, Olney $1,084.64, and Dorrance $1,783.04. From this judgment the sureties on the bond and the intervener have appealed, the two appeals having been consolidated.

With respect to the three transactions in question the following facts appear from the court's findings: On February 6, 1932, Betzer borrowed $875 from the brokers and deposited with them as security for the loan 66 shares of Standard Oil stock. On February 9, 1932, the brokers sold these shares and appropriated the proceeds. On April 13, 1932, Betzer deposited with the brokers an additional 61 shares of said stock as further security for the loan of $875 and as security for another loan of $450. On April 15, 1932, the brokers sold these shares and appropriated the proceeds. Betzer discovered the fact that his stock had been converted and sold on July 19, 1933, at which time the brokerage firm went into insolvency.

On January 5, 1932, Olney borrowed $2,200 from W. P. Smith and as security for

the loan deposited with Smith 90 shares of Pacific Gas & Electric stock. On January 19, 1932, Smith sold 50 shares of said stock and appropriated the proceeds. On April 7, 1932, the brokerage firm of W. P. Smith & Co., which had succeeded to the business of W. P. Smith, sold the remaining 40 shares of this stock and appropriated the proceeds. On April 30, 1932, the brokers demanded additional security for the loan and Olney deposited with them an additional 24 shares of said stock as such further security. On the same day the brokers sold these shares and appropriated the proceeds. The copartnership knew of the sale of the first 50 shares at the time it took over the business of W. P. Smith and the account of Olney. On January 23, 1933, Olney ordered the brokers to sell 10 shares of the stock at $30 per share and they pretended they had done so and paid him $294.04 as the net proceeds. On February 5, 1933, Olney ordered the brokers to sell the remaining 104 shares at $30 per share, and on July 6, 1933, they reported that they had done so but no payment was made to him. Discovery of these conversions was made on July 19, 1933.

On March 17, 1932, Dorrance deposited with the brokers 100 shares of Texas Corporation stock to cover the purchase of 50 shares of Standard Oil stock. On March 28, 1932, the brokers sold these 100 shares and appropriated the proceeds. On April 19, 1932, Dorrance paid the brokers $300, which amount they also appropriated. These conversions were discovered by Dorrance on July 19, 1933.

The bond in question was dated February 3, 1932, and it was admitted in the pleadings that it was in effect from and after that date and until December 31, 1932. The bond covered the copartners doing business as W. P. Smith & Co. and in its conditions largely followed the language of subdivision 3 of section 6 of the Corporate Securities Act, as amended, in which the requirements for such a bond are set forth.

The first point raised by the corporate appellants, who were sureties on this bond, applies to the first two transactions referred to and is that these were loans and not brokerage transactions within the meaning of the Corporate Securities Act, and that the same were not covered by this bond, which was issued in compliance with the requirements of this act. With respect to such a bond this act provides as follows: "Said bond shall be conditioned upon the strict compliance with the provisions of this act, the faithful performance by said broker of all his obligations under the terms and conditions of any installment purchase contracts involving the sale of a security, the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities, by said broker, his agents and employees. Said bond shall be further conditioned upon the payment of all damages suffered by any person damaged or defrauded or by reason of the violation of any of the provisions of this act, or by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of this act. Any person who sustains an injury covered by such bond, may in addition to any other remedy that he may have, bring an action in his own name upon said bond for the recovery of any damages sustained by him."

The respondents Betzer and Olney set up one cause of action based upon fraud and deceit on the part of the brokers in fraudulently representing that they must have additional security for these loans because of a decrease in the market value of the stock and in demanding and receiving such additional security, although the original stock pledged had already been sold. These respondents now contend that even though these transactions were originally loans which were not within the provisions of the Corporate Securities Act or the bond given in compliance therewith, the subsequent fraud and actions of the brokers in selling the securities thus pledged and in demanding and obtaining further security, bring the transactions within the purview of the act and of the bond. It is their contention that they come within the provisions of the statute requiring the bond to be conditioned upon the "honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities," and "the payment of all damages suffered by any person damaged or defrauded * * * by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of this act." They state in their brief: "It is the plain intent of the legislature to broaden the conditions of the broker's bond for the general protection of the public dealing with such bro-

kers, and to cover any fraudulent or unlawful transaction damaging members of the public dealing with the brokers and at their mercy, whether such fraud or wrong be a direct violation of the terms of the act or not."

In considering a bond issued in compliance with the requirements of this act, the court said, in Sharp v. E. D. Leavitt & Co., 111 Cal.App. 634, 295 P. 1082, 1083: "We have quoted heretofore substantially the provisions of the bond in question, which follows the requirements of the act, and it is sufficient to say that the conditions required to be in the bond are tied directly into transactions under the act, which the lot deal is not. 'Strict compliance with the provisions of this act,' 'faithful and honest performance of all obligations and undertakings in the purchase or sale of securities,' 'payment of all damages suffered by any person damaged or defrauded by reason of the violation of any of the provisions of this act, or by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of this act,' is the language used, and the lot deal could not by any stretch of the imagination be held to be within the provisions of the act or a violation of any of them, or to be a transaction 'contemplated by the provisions' of the act."

In Roberts, Thomas & Co. v. Allen, 215 Cal. 595, 12 P.(2d) 451, 452, it is said: "It will be noted that under said act a broker's bond is required for the purpose of protecting persons injured by failure of a broker to perform 'obligations and undertakings in the purchase or sale of securities.' We take it to be evident that negotiations for the purchase or sale of securities, must be pending and that the injured party must be the buyer or the seller therein before the provisions respecting a bond may be held to apply."

In Walsh v. Standard Acc. Ins. Co., 215 Cal. 587, 12 P.(2d) 16, the contention was made that a broker, in agreeing to buy certain stock, was acting merely as an individual and not as a broker, but it was held that the surrounding circumstances sufficiently disclosed that he was acting in that particular transaction as a broker and not as an individual.

There is nothing in the record before us to indicate that it is any part of the usual business of a broker to loan money on the security of stocks when the purchase or sale of other stocks is not involved. The act here in question does not purport to cover such a transaction, and the requirements for a bond definitely limit the conditions thereof to the faithful performance of "obligations and undertakings in the purchase or sale of securities" and to damages suffered by reason of the violation of the provisions of the act itself.

Turning to the evidence as to these two transactions, Betzer testified that he asked the First National Bank for a loan on his stock, that they offered him a loan for ninety days, that he wanted a loan for a year, that they said they were unable to make such a loan and referred him to W. P. Smith & Co., and that he borrowed the money from them on a yearly basis and gave them the stock as security. He further testified that in April he received a letter from W. P. Smith & Co. saying stock prices were going down; that they would have to have more collateral or they would sell the stock. In response to this letter he borrowed more money and put up other stock as additional security on both loans. Olney testified that he told Smith that he had placed some stock as security with a bank, but the loan had been called; that he did not care to sell the stock on account of the low prices then prevailing; and that he wanted a loan to take up the loan with the bank. Smith made this loan and took over the stock as security therefor.

[1] With respect to the injured parties in the first two transactions mentioned, neither was the buyer or seller of stock through these brokers and no negotiations for the purchase or sale of securities were pending in so far as they were concerned. Neither desired to buy or sell any stock, and neither knew that his stock was being sold. In our opinion these were purely loan transactions which were not covered by the terms of the act or by the bond in question. The brokerage firm did not need a broker's license, or such a bond as this, in order to make such a loan, and the fact that they happened to have a license as brokers, and had posted a bond pertaining to the same, cannot affect the situation or impose a new and different obligation upon the sureties on this bond.

The other points raised by the corporate appellants need be considered only in so far as they affect the Dorrance claim.

The contention that the bond in question, although executed on February 3,

1932, was not effective until a license was issued to the brokers, which did not occur until February 20, 1932, is not material on this claim because the same originated in the purchase of stock on March 17, 1932.

[2] It is next contended that there is evidence in the record which would justify an inference that the partnership of W. P. Smith & Co. did not take over the business theretofore conducted by W. P. Smith until about April 1, 1932, that "the judgment includes a number of items representing the individual obligations of Smith," and that it was error to charge any such items against the surety for the partnership. This contention is without merit in so far as Dorrance's claim is concerned. The bond covered the copartners and, in any event, was in effect from February 20, 1932. The partnership agreement was recorded on February 16, 1932. The brokers could sell stock only by virtue of the license issued, and they sold this stock to Dorrance on March 17, 1932. If the argument that the judgment included individual obligations of Smith was intended to refer to the Dorrance claim, the evidence, with the reasonable inferences therefrom, is sufficient to support the findings to the contrary.

[3] It is argued that the court erred in refusing to permit the sureties to interpose and prove the defense of laches. They offered an amendment on the last day of the trial which set up the claim of laches in that this action was not brought until after the expiration of six months from the time the brokers were adjudicated bankrupt, and that these appellants were deprived of their right to file their claim in the bankruptcy court. It may first be observed that the record indicates that the time for filing claims in the bankruptcy court had not expired when this action was brought. It not only appears that this defense could not have been successfully maintained, but the application for permission to amend was made on the last day of the trial and without notice to the adverse parties. See section 473, Code of Civil Procedure, as amended by St.1933, p. 1851. Under the circumstances, the granting of such permission was a matter of discretion for the trial court. Scholle v. Finnell, 167 Cal. 90, 138 P. 746; Cameron v. Ah Quong, 175 Cal. 377, 165 P. 961; Rogers Brothers Co. v. Beck, 43 Cal.App. 110, 184 P. 515.

[4, 5] Finally these appellants contend that the court adopted the wrong measure of damages. The court took the value of the stock as of July 19, 1933, when a receiver was appointed for W. P. Smith & Co. and when Dorrance first learned that his stock had been converted. It is contended that all conversions of this stock occurred prior to April 30, 1932, and that its value on that date should be taken as the measure of damage. They rely on that part of section 3336 of the Civil Code, which provides that the damage for wrongful conversion of personal property is presumed to be its value at the time of conversion, with interest. They overlook the part of this section which immediately follows and which reads: "or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted." The general rule is thus given in 26 R.C.L. at page 1148: "The measure of damages in an action in trover is the value of the property at the time and place of conversion, with interest from that time, unless there are special circumstances which require a different measure of damages to be applied." There were such special circumstances here. Dorrance had borrowed money on his stock shortly before the conversions took place for the very reason that he did not desire to sell it. He did not want to sell it at any time up to July 19, 1933, and perhaps not then. Under such circumstances it would be a manifest injustice to take the value as of the date of conversion, and we think the facts bring this case squarely within the second provision of the code section which is above quoted. The date when a receiver was appointed and when the conversion was discovered may be taken as a time when a failure to make delivery occurred and the value of the stock at that time was properly taken in measuring the liability on this bond. Edwards v. Jenkins, 214 Cal. 713, 7 P.(2d) 702.

With the claims of the respondents Betzer and Olney eliminated, the respondent Dorrance was entitled to recover the full amount of his loss, as found by the court.

With respect to the appeal of the plaintiff in intervention, the appellant relies upon a part of section 47a of the Bankruptcy Act, as amended in 1910, 11 U.S.C.A. § 75 (a), as giving to the estate of

the bankrupt the right to administer any amounts recovered upon this bond. That section provides as follows: "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

It is argued that this provision vests in the trustee all the rights, remedies and powers of a judgment-creditor with respect to any claim involving the bankrupt, that the provision of the Corporate Securities Act under consideration gives a creditor certain powers, rights, and remedies against the bond before bankruptcy, and that it follows that the trustee succeeds to these rights. While it is conceded that the bankrupt, prior to going into bankruptcy, had no right to or interest in any possible recovery on this bond, it is argued that this portion of the Bankruptcy Act goes beyond the rights previously held by the bankrupt and gives to the trustee any rights which may have accrued to any creditor of the bankrupt. The appellant attempts to distinguish the right to recover under this bond from other cases involving individual contractual rights held by particular secured creditors which admittedly do not pass to the trustee. It is argued that the right to recover under this bond is created by law and not by contract, and that this is not an individual right but a right held in common by all members of a certain class.

[6] While the law has led to the giving of this bond the bond itself is a contract, and the right of a person entitled to claim thereunder is created by contract and is an individual right given to any person for whose benefit the contract was made. In our opinion, this is a definite contractual right given to each person coming within the provisions of the bond, and the same is not a right in common given to a collective and unidentified group.

In discussing the effect of the above provision of the Bankruptcy Act, Gilbert's Collier on Bankruptcy (2d Ed.) p. 733, says: "* * * as to property not in the custody of the court, that the trustee shall stand in the position of a judgment creditor holding an execution returned unsatisfied, entitles him to proceed against the assets in the same manner as a judgment creditor. It was to obviate the prior limitation upon the right of a trustee to attack unrecorded conditional sales contracts and other like liens, that the amendment was passed. The purpose of the amendment was to give to the trustee the rights of a lien or judgment creditor, thereby enabling him to protect general creditors from unrecorded liens, unlawful transfers, spurious claims and other dissipations of the assets of the estate, which a lien or judgment creditor might have prevented had bankruptcy not intervened."

In 7 of Corpus Juris, at page 114, it is said: "Accordingly the title of the trustee is not limited to property which belongs absolutely to the bankrupt, but also extends to property which, by reason of state statutes, is considered as belonging to him as far as the rights of his creditors are concerned, or in which he has a transferable interest."

The discussion of this provision of the Bankruptcy Act, to be found in Collier on Bankruptcy (13th Ed.) vol. 2, pp. 1053 to 1058, includes the following: "The purpose of the amendment was to give to the trustee the rights of a lien or judgment creditor, enabling him to protect general creditors from unrecorded liens, unlawful transfers, spurious claims and other dissipations of the assets of the estate, which a lien or judgment creditor might have prevented had bankruptcy not intervened. The class of cases, unprovided for by the original act, and intended to be reached by the amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens."

The Corporate Securities Act and a bond given in pursuance thereof give to one coming within their provisions a definite contractual right to recover on the bond. Such a right is neither directly nor indirectly a part of the assets of the bankruptcy estate, and we think this provision of the Bankruptcy Act was not intended to cover such a claim and that a recovery on such a bond is not within its terms, express or implied. Under the terms of the Corporate Securities Act any recovery on the bond is the property of a particular claimant whose position is somewhat anal-

ogous to that of one holding a mechanic's lien or any of the other liens which are not affected by the bankruptcy of the original debtor. In so far as this appeal is concerned, we find no error in the judgment.

That part of the judgment which denies recovery to the plaintiff in intervention is affirmed. That part of the judgment which is in favor of the plaintiff and cross-complainants is reversed, with instructions to the trial court to enter judgment in favor of the defendant sureties as against the plaintiff Betzer and the cross-complainant Olney, and in favor of the cross-complainant Dorrance as against the defendant sureties, in accordance with the views herein expressed.

We concur: MARKS, J.; JENNINGS, J.



14 Cal.App.2d 105

SCOTT v. FLANAGAN et al.

DAVIS v. FLANAGAN et al.

Civ. 5508, 5509.

District Court of Appeal, Third District, California.

May 15, 1936.

Rehearing Denied June 18, 1936.

1. Appeal and error ⇐931(1)

Reviewing court, in examining sufficiency of evidence to support questioned finding, will accept as true all evidence tending to support finding as well as all inferences reasonably leading to same conclusion.

2. Trial ⇐140(1)

Determination of credibility of witnesses is within exclusive province of jury.

3. Evidence ⇐598(1)

Jury is not bound to decide in conformity with declaration of any number of witnesses which do not produce conviction in their minds against a less number; a presumption or other evidence satisfying their minds.

4. Appeal and error ⇐999(1)

An appellate court should not lightly disturb verdict of a jury.

5. Appeal and error ⇐1002

Reviewing court would not disturb jury verdict for plaintiffs in automobile collision case based upon conflicting evidence, where trial judge had denied motions for nonsuit, directed verdict, judgment notwithstandng verdict, and for new trial.

6. Appeal and error ⇐699(4)

Failure to give certain instruction *held* not error, where there was no evidence that such instruction, which was not found in transcript, was ever submitted to trial judge (Code Civ.Proc. § 607a).

7. Appeal and error ⇐977(3)
New trial ⇐6

Granting of new trial rests largely in discretion of trial court, and will not be disturbed if it can be upheld upon any ground shown by record.

8. New trial ⇐99

To justify granting of new trial on ground of newly discovered evidence, such evidence must be new and material and not cumulative.

9. New trial ⇐104(3)

Refusal of trial court to grant new trial in automobile collision case on ground of newly discovered evidence consisting of photograph taken some time after accident, *held* not error, since merely cumulative.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Actions by Bernard H. Scott and by Mrs. Rayford Davis, as administratrix of the estate of Berta A. Rideout, deceased, against Andrew Paul Flanagan and another. Judgments for plaintiffs, and defendants appeal.

Judgments affirmed.

Cooley, Crowley & Supple, of San Francisco, and Louis T. Milburn, of Mariposa, for appellants.

C. Ray Robinson and L. A. MacNicol, both of Merced, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

These appeals are from judgments in actions for damages awarded for the death of Donald Scott, aged 19 years, and Berta Rideout, a young woman of 22 years of age, who were killed as a result of a colli-

sion between a Ford automobile in which they were riding, and an oil truck belonging to the Gilmore Oil Company, on the Merced-Yosemite highway, at about 1:30 o'clock in the afternoon of August 11, 1934.

Andrew Paul Flanagan, one of the appellants herein, was operating the tank truck loaded with about 400 or 500 gallons of gasoline, and proceeding in an easterly direction toward Mariposa. At the point of collision the highway was straight for a long distance in both directions with a slight incline from the west toward the east. The highway consisted of a 20-foot macadam surface with a white line down the center and a 12-foot shoulder of dirt and gravel on each side. The Ford car was proceeding westerly at about 40 or 45 miles an hour, with three occupants, Donald Scott, Berta A. Rideout, and Cecelia Davis.

There is a conflict in the evidence as to where the collision occurred, but, when the cars came to rest after the accident, the Gilmore truck was on its left or south side of the highway against the right of way fence and practically on top of the Ford, which was completely wrecked. Scott and Berta Rideout were killed instantly, and Cecelia Davis died a few moments after reaching the hospital, without being able to make any statement of the cause of the accident.

The physical facts seem to indicate that the Ford was hit on its left side about the center, and the right front corner of the truck was damaged and crushed back. Various marks and scratches on the surface of the highway were noted and described, the most conspicuous being a semicircular hole in the macadam about 4 feet north of the center line, made probably by the disc or hub of the left front wheel of the Ford, from which the spokes had been torn by the impact.

It is the principal contention of appellants that the evidence does not justify or support the verdict and judgment. It is their theory that the Ford, just before the accident, was being driven on its left or south side of the highway, and in suddenly turning back across the path of the oncoming truck the two vehicles collided.

In support of this theory certain witnesses testified to finding tire marks upon the highway indicating that an automobile had been driven from 12 to 18 inches south of the south half of the pavement and on the dirt shoulder, at a point about 40 feet from the point of collision, and had swerved sharply toward the north and across the highway toward the north. We do not recall that any of the eyewitnesses, other than Flanagan, testified, however, that the Ford was driven over on to the dirt shoulder to the north of the white line. The jury therefore may have assumed that the tire marks testified to by certain witnesses were made by cars that passed after the accident. Flakes of red enamel from the truck were also found about 18 inches south of the white line. Mr. Risley and Miss Hoffman, who were coming from Yosemite Valley to Merced, testified they were following behind the Ford about 40 or 50 feet, and that the Ford was over on its left or wrong side of the road, and had so traveled for at least 100 feet just immediately prior to the accident. They further testified that just before the collision the Ford suddenly swerved back toward the center and its right side of the highway when about 40 feet from the point of collision, and struck the right front corner of the truck. Others testified to skid marks of the truck, indicating the application of brakes on the south side of the highway about 2 feet from the white line.

Respondents contend that there was a direct conflict in the evidence as to whether the truck of appellant oil company was on the wrong side of the road or whether the car of decedents was on its wrong side, and that the physical facts support the contention the truck was on its left side of the highway. Inasmuch as certain of the evidence, the photographs received as exhibits, the verdict of the jury, the ruling of the trial judge on a motion for nonsuit, and for a directed verdict, and on a motion for judgment notwithstanding the judgment, and motion for a new trial, tend in varying degrees to support the contention of respondents, an appellate court will not readily disturb the conclusion of the court and jury.

[1] It requires the citation of no authority, of which there are many in California, that a reviewing court, in examining the sufficiency of the evidence to support a questioned finding, will accept as true all evidence tending to support the finding of the jury as well as all inferences which might reasonably lead to the same conclusion. That much of the evidence of respondents was disputed is not here important. We are now interested only in that

testimony which, if believable, would lead by logical steps to the result found by the jury.

Respondents established by testimony of Flanagan and by M. P. Strong, branch manager of the Gilmore Oil Company of the district wherein the accident occurred, at the time of the accident, that the mechanical brakes on the truck, which applied to the rear wheels, were defective, and that the company had been notified of that fact in written weekly reports for three successive weeks, immediately preceding the accident.

[2, 3] Neither the court nor jury apparently gave the testimony of Risley or Miss Hoffman much weight. It is, however, within the exclusive province of the jury to determine the degree of credibility they will give each witness. They have the opportunity of considering the manner in which the witness testifies, the character of his testimony, the bias or prejudice, if any, manifested; the interest or lack of interest in the issues, his motives, his intelligence whether good or bad, clear or indistinct, or whether or not the evidence is contradictory. Neither is a jury bound to decide in conformity with the declaration of any number of witnesses, which do not produce conviction in their minds against a less number, or against a presumption or other evidence satisfying their minds.

Risley testified he was riding in the front seat of the Chevrolet automobile following behind the Ford about 40 or 45 miles an hour. He first saw the truck as it came over the crest of the hill at about 25 miles an hour and the collision occurred about 450 feet easterly from the crest. Some time prior to seeing the truck on the crest of the rise, the Ford, according to the witness, had crossed the white line and continued for more than 100 feet to travel upon its left or south side of the highway with its right wheels about two feet south of the center line. Suddenly the Ford swerved toward its right, and the cars collided. At first the witness said the Ford struck the left front side of the truck and the impact occurred near the center of the highway on the right side thereof. After being temporarily excused from the stand to permit a witness to be called out of order, Mr. Risley was recalled, and, when again asked as to the collision, he said it occurred south of the white line, and the left front of the Ford struck the truck on the right front end, causing the Ford to turn over and skid across the highway. The witness also placed the cars in such a position that the truck, going at approximately 25 miles an hour, would have to travel some 400 feet, while the Ford was traveling less than 100 feet at the rate of 40 miles an hour. The witness also testified that, although they themselves were traveling about 40 miles an hour, they brought their car to a stop within 10 feet of the end of the truck after the collision. We refer to these discrepancies to show that the jury may have had some ground to reject the testimony of the witness and also that of Miss Hoffman, the driver of the car in which Risley was a passenger. She testified she did not see the truck until the instant of the impact. She placed the Ford entirely on the south side of the white line, its left wheels about 2 feet south of the white line, and that the left side of the Ford and the right side of the truck came together. The photographs in evidence seem to clearly indicate the Ford was struck on its left side about midway between the front and rear wheels, and the damage to the truck was to the right front corner of the radiator, fender, and wheel. Officer Bertken, who arrived very soon after the accident, testified he found no marks of the Ford south of the center line; that the gouges and scratches on the pavement were about 4 feet from the center on the north side of the highway and extended 3 or 4 feet toward the north shoulder.

Flanagan, the driver of the oil truck, appears from the record before us to have been rather evasive and indefinite. He was an eyewitness to the accident, but counsel for respondents had considerable difficulty in getting a definite, unequivocal answer to simple questions. His testimony was replete with such expressions as "It must have been that way"; "Yes, it looks like that"; "I think so"; "Not exactly"; "Probably"; "perhaps"; "probably approximate"; and other similar qualifying language. He testified he was driving with his outside wheels on the south shoulder of the highway as he proceeded in an easterly direction. He saw the Ford approaching about 100 or 200 yards ahead, driving on its proper side of the highway with its left wheels on the white line. When the Ford was about 50 or 75 feet away, it suddenly cut across the path of the truck, going over on to the dirt shoulder and cutting back. The driver of the truck testified he swung slightly to the north or toward his left as the cars collided. He had no recollection

when he applied the brakes prior to the collision. There appears some discrepancy between the testimony of Flanagan, Risley, and Miss Hoffman as to when the Ford crossed to its left over the white line. The latter two witnesses said the Ford was over the line before the truck came over the crest, whereas Flanagan said he saw the Ford on its proper side of the highway until it was about 50 or 75 feet away, when it swerved suddenly to its left across his pathway. At that time he testified the truck was traveling on the south side of the highway with its right wheels just on the macadam. "Just a split second" before the impact he swung the truck toward the left, from a point 3½ feet from the center line to a point 18 inches from the center, and the impact occurred. In that event, while the truck was traveling that distance toward its left, the Ford was traveling 50 to 75 feet to the right, although the speed of the truck was about 25 miles an hour and that of the Ford of 40 to 45 miles an hour. We mention these matters merely to show the conflict in the testimony of the only three persons who were eyewitnesses to the accident to illustrate the difference and confusion in their testimony, and as giving some foundation for the lack of credence apparently placed therein by the jury.

[4, 5] It is a very definite rule that an appellate court shall not lightly disturb a verdict of a jury. We have not had the opportunity afforded the jury to observe the witnesses, or observe their demeanor upon the witness stand. Here, too, there was presented to a most able and experienced trial judge a motion for a nonsuit and a directed verdict, both of which motions were denied. After the jury had resolved the various conflicts in favor of respondents, a motion was made for judgment notwithstanding the verdict, and also a motion for a new trial likewise denied. These various motions were fully argued by able counsel on both sides. Were the trial judge, who has presided over many intricate trials of issues of law and fact, not entirely satisfied with the findings of the jury, he would have undoubtedly seen the weakness of the evidence adduced by plaintiff, and would have corrected any mistakes of the jury in the many opportunities presented to him in the various motions made. We are satisfied that a real conflict in the evidence existed, and the jury, having resolved those conflicts in favor of plaintiffs, and the cause having been reviewed and reconsidered by the trial judge, the judgment based upon that verdict will not now be disturbed by us upon review.

[6] Appellants complain because a certain instruction was not given by the court. There is no evidence that the instruction was ever submitted to the trial judge nor is it found in the transcript either among the instructions given or those refused. Section 607a of the Code of Civil Procedure provides how instructions shall be delivered to the judge presiding at the trial and served upon the opposing counsel. It does not appear that the instructions ever reached the trial judge.

Appellants also claim Berta Rideout was the driver of the Ford, and was guilty of negligence as a matter of law, which caused the collision. In the first place, the jury rejected the theory of appellants that the Ford was being driven upon the wrong side of the highway. Also appellants have failed to establish that Berta Rideout was either driving the car or that she had direction or control over its operation.

Mr. Risley testified it was impossible to tell where the decedents had been seated in the car. He could not tell who had been the driver. Other witnesses testified to facts of similar import.

There are alleged errors claimed by appellant in regard to the giving of certain instructions and errors and admission of evidence, but, after examination, we do not find them to have any materiality in regard to the outcome of this case.

[7-9] It is also claimed the trial court erred in refusing to grant a new trial upon the ground of newly discovered evidence. This evidence consisted of a photograph taken some time after the accident, purporting to show wheel tracks found on the highway in support of the contention of appellants that the Ford swung across the path of the approaching truck. It is a well-established rule that the granting of a new trial rests largely in the discretion of the trial court, and will not be disturbed if it can be upheld upon any ground shown by the record. Smith v. Royer, 181 Cal. 165, 166, 183 P. 660. Where the motion is based upon the ground of newly discovered evidence, it must appear that the evidence is new, material, and not cumulative. This proffered evidence, consisting of a single photograph, appears to be cumulative, and upon that ground alone the court was warranted in denying the motion.

This case seems to have been thoroughly tried and the facts fully and fairly submitted to the jury, and thereafter the matter was carefully considered and reviewed by a trial judge of wide experience and recognized ability, who discovered no grounds to justify a new trial. After examining the record, this court has come to the same conclusion. Neither do we find any error justifying reversal. The judgments appealed from are therefore affirmed.

We concur: THOMPSON, J.; TUTTLE, Justice pro tem.



14 Cal.App.2d 160

SMITH v. SCHWARTZ et al.

Civ. 9656.

District Court of Appeal, First District, Division 1, California.

May 19, 1936.

Hearing Denied by Supreme Court July 16, 1936.

1. Automobiles ⇐200

Where automobile collision proximately caused by negligence of both drivers results in injury to third party, injured party may recover damages from either or both drivers, although negligence of one may have been greater than that of other.

2. Automobiles ⇐201(6)

For one driver to establish that independent negligence of other was sole proximate cause of collision resulting in injury to third party, it must appear that his own negligence was so disconnected in time and nature as to make it plain that damage occasioned was in no way natural or probable consequence of his negligence.

3. Appeal and error ⇐1010(1)
Automobiles ⇐245(64)

Where evidence as to circumstances of collision resulting in injury to third party is conflicting, or more than one conclusion may be reasonably drawn therefrom, question as to whether negligence of one driver or both was proximate cause of collision is generally question for trier of facts, and its determination supported by evidence cannot be disturbed on appeal.

4. Automobiles ⇐244(35, 37)

Evidence sustained finding that act of motorist in failing to apply brakes to automobile, which was exceeding speed limit on wet highway, when he observed approaching automobile being driven in uncertain manner, with which he collided when such automobile started to make left turn at intersection, constituted negligence which was proximate cause of accident (St.1931, p. 2121, § 113(a), (b)(7).

5. Negligence ⇐93(3)

Fact that negligence of father of 8 year old child, driving automobile in which child injured in collision was riding, was a proximate cause thereof, would not relieve other motorist from liability to child for his negligence which was also proximate cause thereof, since father's negligence could not be imputed to child.

6. New trial ⇐99

Applications for new trial on ground of newly discovered evidence are not looked upon with favor, and, to justify granting thereof, it must appear that such evidence could not with reasonable diligence have been produced at former trial, that it is neither cumulative nor solely of impeaching character, and that different judgment would result if presented.

7. Appeal and error ⇐977(3)

Action of trial court in granting new trial will not be disturbed except upon clear showing of abuse of discretion.

8. New trial ⇐150(1)

Trial court *held* not to have abused discretion in denying motion for new trial on ground of newly discovered evidence consisting of statements made by witnesses claimed to be inconsistent with their testimony at trial where no affidavits were made by such witnesses, since such statements amounted to no more than hearsay and related merely to matters of impeachment.

9. New trial ⇐108(4)

Alleged newly discovered evidence, in action by child injured when automobile in which she was riding with her father collided with another automobile, that odor of liquor was detected on father's corpse after accident, *held* not ground for new trial where child testified that her father had not been drinking on day of accident, since person must have knowledge of intoxicated condition

of driver to be charged with contributory negligence in riding with him.

10. New trial ⇐150(2)

Averments in affidavit of defendants' attorney supporting motion for new trial made on information and belief *held* mere hearsay where unsupported by affidavits of persons from whom attorney obtained information, and therefore not ground for new trial.

11. New trial ⇐26

Alleged irregularity based upon remark made by trial judge in open court after evidence was closed, referring to conversation between courtroom clerks as to testimony of one of witnesses, *held* not ground for new trial where it did not appear that complaint was made until after rendition of adverse verdict.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Lorraine Smith, by and through her guardian ad litem, Gertrude Dittnock, against Morris J. Schwartz and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Kirkbride, Wilson & Brooks and Kirkbride & Wilson, all of San Mateo, for appellants.

Geo. K. Ford, of San Francisco, Leonard B. Fowler, of Madera, Francis N. Foley, of San Mateo, and Simpson Finnell, Jr., of San Francisco, for respondent.

KNIGHT, Justice.

Two automobiles, one driven by the defendant Morris J. Schwartz and the other by Frederick Smith, collided on the Bayshore highway in Burlingame where said highway is intersected by Winchester avenue. Smith's infant daughter Lorraine, eight years old, was riding with him at the time, and as a result of the collision Smith was killed and the child suffered very severe permanent injuries. Thereafter, through her guardian ad litem, she brought this action to recover damages for the personal injuries she sustained, and the trial court sitting without a jury entered judgment in her favor for $7,000, from which defendants have taken this appeal.

No complaint is made about the amount of damages allowed, and evidently the award is quite moderate considering the large amount of surgical and hospitalization fees which have already been paid and incurred, and the extremely painful and permanent character of the injuries inflicted, which necessarily will require much more surgical treatment in the future. But as ground for reversal defendants urge insufficiency of the evidence to sustain the trial court's finding as to liability for the accident; also error in ruling upon the admissibility of evidence and in denying defendants' motion for new trial. The record, in our opinion, does not sustain any of the foregoing contentions.

The Bayshore highway has four traffic lanes, two for the south-bound traffic and two for the north-bound traffic. The accident happened between 4 and 5 o'clock in the afternoon. It had been raining and the highway was wet. The Schwartz car was traveling southerly down the inner or fast lane of said highway, and the Smith car was traveling in the opposite direction, northerly, along the inner or fast lane of the same highway. As the Smith car reached a point nearly opposite Winchester avenue, which intersects the Bayshore highway from the west but does not extend across it, Smith attempted to make a left turn into Winchester avenue and while doing so the Schwartz car crashed into the side of the Smith car with the result already stated. In challenging the trial court's finding as to liability for the accident, defendants contend that plaintiff's father was negligent in the operation of his car, particularly in that he attempted to make a left turn across the highway without first ascertaining whether it could be done with safety, and without giving a hand signal until only about ten feet before attempting to execute the turn; and that such negligence on his part was the sole proximate cause of the collision.

[1-3] Where, however, a collision between two automobiles is proximately caused by the negligence of both drivers and results in the injury to a third party, the injured party may recover damages from both drivers or from either of them, even though the negligence of one may have been greater than the negligence of the other. Jordan v. Great Western Motorways, 213 Cal. 606, 2 P.(2d) 786; Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 268 P. 951; Fishman v. Silva, 116 Cal.App. 1, 2 P.(2d) 473; Hill v. Peres, 136 Cal.App. 132, 28 P.(2d) 946. And in

order for one driver to establish that the independent negligence of the other was the sole proximate cause of the collision, it must appear that his own negligence was so disconnected in time and nature as to make it plain that the damage occasioned was in no way the natural or probable consequence of the negligence of him thus seeking to tbe relieved from liability. Springer v. Pacific Fruit Exchange, supra; Fishman v. Silva, supra. Furthermore, it is held generally that where the evidence as to the circumstances of the accident is conflicting or more than one conclusion may be reasonably drawn therefrom, the question of whether the negligence of one driver or both was the proximate cause of the collision is one of fact to be determined by the jury, or by the court if no jury is present, and if there be evidence to support such determination, it cannot be disturbed on appeal. Dougherty v. Ellingson, 97 Cal.App. 87, 275 P. 456; Fishman v. Silva, supra; Hill v. Peres, supra. See, also, cases cited in note 4 to § 139, p. 394, vol. 8, Cal.Jur.Ten Year Supp.

As is usual in the trial of actions involving intersection collisions, there is much conflicting testimony here as to speed, distance, and other important factors which must be considered in determining responsibility for the happening of the accident; nevertheless, the record discloses substantial evidence showing that at the time of the accident defendants' car was being driven over the wet highway at a speed of between fifty and fifty-five miles an hour, which was in excess of the maximum speed limit fixed by the California Vehicle Act. Section 113 (b) (7), St. 1923, p. 553 as amended by St. 1931, pp. 2099, 2120. Moreover, section 113 (a) of said vehicle act declares that a person driving a vehicle on a public highway shall do so at a careful and prudent speed not greater than is reasonable or proper, having due regard to the traffic, surface, and width of the highway, and shall not drive at such a speed as to endanger the life, limb or property of any person; and it appears from Schwartz' own testimony that he observed the Smith car approaching the intersection at a distance of more than 250 feet; that as it neared the intersection it was being driven, so he claimed, in an uncertain and peculiar manner, out of its own lane and into and along his lane for a distance of twenty-five or thirty feet and then back again into its own lane; and that in the face of the apparent danger all Schwartz did was to remove his foot momentarily from the gasoline accelerator; that he did not take the precaution to apply his brakes until he was within twenty-five feet of the Smith car, when, so he claimed, Smith for the first time gave a hand signal and started to make the left turn; and it was impossible then to retard the speed of his car sufficiently to avoid a collision.

[4, 5] In view of such evidence, showing as it does failure on the part of Schwartz to comply with the traffic regulations above mentioned, it cannot be reasonably held as a matter of law, contrary to the findings of the trial court, that his car was not being negligently operated and that such negligence was not a proximate cause of the accident, for the simple reason that such evidence reasonably supports the conclusion which the trial court evidently drew therefrom that if Schwartz had been driving within the lawful speed limit and had taken the precaution to apply his brakes upon observing the unusual and apparently dangerous approach of the Smith car, a collision would have been averted. To invoke the language of the Supreme Court in deciding the case of Rabe v. Western Union Tel. Co., 198 Cal. 290, 296, 244 P. 1077, 1079: "Who may say, but the triers of fact, that if the law had been observed the injury would nevertheless have happened, or that the failure to comply with the law did not contribute proximately to the injury." It follows, therefore, that under the circumstances stated, the fact that Smith also may have operated his car in a negligent manner, which proximately contributed to the cause of the collision, does not relieve defendants from liability for their negligence because aside from the legal doctrine above referred to, it has been definitely established that where, as here, an action is brought by an infant in its own right to recover damages for personal injuries sustained while riding in its father's car, and the infant is not an active participant in the accident, but was merely passively present, the negligence of the father in the operation of the car cannot be imputed to the infant. Caraveo v. Pickwick Stages System, 113 Cal.App. 443, 298 P. 516.

[6, 7] Nor in our opinion have defendants shown any abuse of discretion on the part of the trial court in denying the motion for new trial. One of the principal

grounds urged therefor was newly discovered evidence. It has been often said, however, that applications for new trial on the ground mentioned are not looked upon with favor; that to justify the granting thereof the moving party must make a strong case; that it must appear that the evidence which he claims to have discovered could not with reasonable diligence have been obtained and produced at the former trial; also, that such evidence is neither cumulative nor solely of an impeaching character; and that a different judgment would result if the new evidence were presented. And as already indicated, the action of the trial court will not be disturbed except upon a clear showing of an abuse of discretion. Arnold v. Skaggs, 35 Cal. 684; Monnette v. Title Ins., etc., Co., 107 Cal.App. 313, 290 P. 668; Putnam v. Pickwick Stages, 98 Cal. App. 268, 276 P. 1055; Estate of Cover, 188 Cal. 133, 204 P. 583.

[8, 9] Defendants' motion was based on two affidavits, one made by the attorney who conducted defendants' case, and the other by one Hunt. It appears therefrom that subsequent to the trial they interviewed several witnesses who had testified in the case as to the circumstances attending the accident, and the affidavits purport to set forth certain statements made by said witnesses which the affiants claim are inconsistent with the testimony given by said witnesses at the trial. Another witness so interviewed was the undertaker who took charge of Smith's remains immediately following the accident, and it is claimed that in said interview he revealed for the first time that he had detected the odor of liquor on the corpse. It will be seen, therefore, that the alleged newly discovered evidence related merely to matters of impeachment, and therefore was not of a character to warrant a new trial. Waer v. Waer, 189 Cal. 178, 207 P. 891; Hanton v. Pacific Electric Ry. Co., 178 Cal. 616, 174 P. 61. Furthermore, no affidavits were made by the undertaker nor any of the other witnesses; consequently the averments by said attorney and Hunt as to what they claimed said witnesses had stated to them amounted to no more than hearsay and carried no probative force. Arnold v. Skaggs, supra. In the case just cited the court goes on to point out that in asking for a new trial on the ground of newly discovered evidence, it is not sufficient for the moving party to state in his affidavit what, as he has learned, certain persons know about the matter, and how, as he believes, they will testify. He must produce the affidavits of the witnesses as to what they know and as to what they will testify; that the affidavit of the party himself is but hearsay testimony, which cannot be received, unless for good cause shown, the affidavits of the witnesses cannot be obtained in time, or in such further time as may be granted for that purpose. No such cause was here shown. Then again, so far as the alleged statement of the undertaker is concerned, it is apparent that even though he were to so testify at a second trial, such testimony would not have the effect of defeating plaintiff's right of recovery for the reason that it is only when a person riding as a passenger in an automobile has actual knowledge or must have known of the intoxicated condition of the driver that the passenger may be charged with contributory negligence in riding with him. Lynn v. Goodwin, 170 Cal. 112, 148 P. 927, L.R.A.1915E, 588. And in the present case the child testified that her father did not drink very often and that she knew he had not been drinking on the day of the accident because she had been with him most of the day.

[10, 11] It is also contended in support of said motion that the trial judge committed certain irregularities before the case was decided. In this regard it was averred in the affidavit of said attorney, not directly but on information and belief, that the judge visited the scene of the accident; that later the clerk and bailiff of said court did likewise and obtained certain information which said attorney avers, also on information and belief, was communicated to the judge. Obviously the averments so made on information and belief, and which are unsupported by any affidavits of the persons for whom said attorney claims to have obtained the information, amounted to no more than hearsay and therefore were of no evidentiary value. Arnold v. Skaggs, supra. The only other alleged irregularity complained of is based upon a remark which said attorney claims was made by the trial judge in open court after the evidence was closed and prior to the argument, wherein he referred to a conversation which was supposed to have taken place between two courtroom clerks as to the testimony given by one of the witnesses in the case. It

does not appear, however, that counsel for defendants considered the matter as of sufficient moment to make complaint about it until the case was decided against defendants; and in our opinion it is not of sufficient importance now to require further attention.

With respect to the numerous assignments of error based upon the rulings on the admissibility of evidence, it will suffice to say that after having examined the same we find nothing therein which would justify a reversal, nor, in our opinion, are they of such serious nature as to call for detailed discussion.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



14 Cal.App.2d 249

NOACK v. ZELLERBACH et al. (two cases).

Civ. 9718.

District Court of Appeal, First District, Division 1, California.

May 22, 1936.

1. Appeal and error ⇐1221

Under Constitution, judgment of District Court of Appeal pronounced on January 10, 1936, and opinion on which it was based, became final on March 9, 1936, when Supreme Court denied hearing, precluding District Court of Appeal from thereafter altering its judgment to conform with its opinion (Const. art. 6, § 4c).

2. Appeal and error ⇐1180(1)

Judgment which has been reversed is without any validity or force, and parties stand in same position as if no judgment had been rendered, and are entitled to same rights they had originally.

3. Appeal and error ⇐1180(1)

Unqualified reversal of judgment as to some of defendants set cause as to such defendants at large for retrial, notwithstanding that judgment with respect to another defendant was reversed with directions.

Appeal from Superior Court, City and County of San Francisco; John J. Van Norstrandt, Judge.

On motion to recall remittitur and to amend and correct the judgment on appeal.

Motion denied.

For prior opinion, see 53 P.(2d) 986.

Marshall B. Woodworth, of San Francisco (Russell P. Tyler, of San Francisco, of counsel), for appellant Noack.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for respondent Zellerbach and others.

KNIGHT, Justice.

The plaintiff, Charles F. Noack, moves to recall the remittitur issued in the above-entitled cause and to "amend and correct" the judgment on appeal which is embodied in the concluding paragraph of the court's opinion, upon the ground that the judgment on appeal does not conform to the rulings of the court as expressed in its opinion. Noack v. Zellerbach et al. (Cal. App.) 53 P.(2d) 986, 989.

The complaint in the action contained two counts. The first was for the recovery of the value of fish confiscated by two deputy fish and game commissioners. The second was for loss of profits which plaintiff claims he would have made in catching and selling like fish, but for certain threats made by three other deputies that he would be arrested and his fish confiscated if he brought them into the state jurisdiction during the closed season. The answering defendants in the action were I. Zellerbach, one of the three members of the commission, and the three deputies who made the alleged threats. The remaining two commissioners were named parties defendant, but evidently were not served with summons; and the two deputies who confiscated the fish were not sued. The trial court held that plaintiff was entitled to recover against the commissioner, I. Zellerbach, under the first count for the value of the confiscated fish, but was not entitled to recovery under the second count as against either the three deputies who made the threats or the commissioner. Judgment in the trial court was entered accordingly. The commissioner, Zellerbach, appealed from that part of the judgment rendered against him on the first count, and plaintiff appealed from that part of the judgment rendered against him

on the second count, and on the appeal it was held that the commissioner, Zellerbach, was not liable on either count; but in arriving at such conclusion the court in its opinion went on to say, among other things, that "since the confiscation and threats were not justified, * * * the deputies were liable in tort for damages caused plaintiff thereby." The judgment on appeal was as follows: "The judgment [of the trial court] is reversed, and the trial court is ordered to correct its conclusion of law as to his [Zellerbach's] liability for the value of the salmon so that it will conclude that he is not so liable and thereupon enter judgment in his favor on both counts of the complaint. In re Estate of Lee, 200 Cal. 310, 253 P. 145; Quigley v. Nash, 1 Cal.(2d) 502, 36 P.(2d) 112; Bayside Land Co. v. Dabney, 90 Cal.App. 122, 265 P. 564."

[1] Plaintiff contends in support of his present motion that because of the view expressed in the opinion that the deputies who made the alleged threats were liable to plaintiff for damages caused thereby, the judgment on appeal should have directed also that the trial court correct its conclusions of law and enter judgment in plaintiff's favor and against them accordingly. Assuming that the state of the record on appeal would have so warranted, such directions were not given; and even though this court were inclined now so to direct, it is quite evident we have no such power for the reason that this court has long since lost jurisdiction either to alter or amend its judgment on appeal or any part of the opinion upon which it is based. As declared in substance by section 4c of article 6 of the State Constitution, the judgment of the District Court of Appeal, so far as that court is concerned, becomes final in all civil cases upon the expiration of thirty days after the same shall have been pronounced, and becomes final also so far as the Supreme Court is concerned unless within thirty days after the judgment becomes final in the District Court of Appeal the Supreme Court shall order the cause to be heard and determined in that court. The record in the present case discloses that the judgment on appeal was pronounced on January 10, 1936, and that on March 9, 1936, the Supreme Court made its order denying plaintiff's petition for a hearing of the cause before that court. Obviously, therefore, said judgment on appeal and the opinion upon which it is based thereupon became final as to both reviewing courts.

[2, 3] Plaintiff further contends that if the judgment on appeal is allowed to stand in its present form it will in effect deprive plaintiff of the right to retry the second count against the three deputies who made the threats, notwithstanding that the opinion on appeal declares they are liable in tort for damages caused plaintiff by said threats, because no specific order of reversal was made as to them. We are not in accord with this view. There was but one judgment rendered in the trial court, which, by the opening clause of the judgment on appeal, is ordered reversed; and if the judgment on appeal had gone no further, the cause would have been set at large for retrial as to all defendants on all issues, for the reason that where a judgment is reversed without qualification it is entirely vacated and without any validity or force; the proceeding is left where it stood before the erroneous judgment was entered; and the parties stand in the same position as if no such judgment had been rendered, and are entitled to the same rights they had originally. Ferran v. Mulcrevy (Cal.App.) 48 P.(2d) 984; 2 Cal. Jur. 996, 967, and cases cited therein. But the judgment rendered on appeal did go further. It directed that with respect to Zellerbach's liability the trial court's conclusions of law be corrected so as to declare that he was not liable on either count "and thereupon enter judgment in his favor on both counts * * *." These directions, however, as will be seen, were restricted to the liability of Zellerbach, and in no way affected or purported to affect the unqualified reversal of the trial court's judgment as to said three deputies. Consequently, as to them the cause of action stated in the second count was set at large for retrial. Central Sav. Bank v. Lake, 201 Cal. 438, 257 P. 521; Monson v. Fischer, 219 Cal. 290, 26 P.(2d) 6.

The motion is denied.

I concur: CASHIN, J.

TYLER, P. J., deeming himself disqualified, did not participate.

14 Cal.App.2d 225

COAST MUT. BUILDING-LOAN ASS'N v. SECURITY TITLE INS. & GUARANTEE CO.

Civ. 9657.

District Court of Appeal, Second District, Division 1, California.

May 20, 1936.

Hearing Denied by Supreme Court July 16, 1936.

1. Insurance ⇐426½

Title policies are subject to rules generally applicable to contracts of insurance.

2. Insurance ⇐146(3)

Provisions of title policy, including exceptions to insurer's liability, must be construed as a whole so as to give insured protection which he reasonably had right to expect; hence ambiguities and uncertainties in policy must be resolved in insured's favor.

3. Insurance ⇐426½

Where party, who forged owner's signature to deed, obtained loan secured by trust deed on property, and title policy, procured by lender, was issued simultaneously with recordation of forged deed and trust deed, and owner prevailed in subsequent action to quiet title to such property, insurer could not defeat lender's action on policy on ground that owner's rights were not "shown by public records" within policy.

4. Insurance ⇐146(3)

Insurer which prepared title insurance policy and all documents used in connection with its issuance cannot defeat ambiguity therein by construction, if reasonable construction upholding insurance does not violate language used and parties' clear intention.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by the Coast Mutual Building-Loan Association against the Security Title Insurance & Guarantee Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

George H. Woodruff and Clyde R. Burr, both of Los Angeles (Leander O. Hatch, of Los Angeles, of counsel), for appellant.

Clarke & Bowker, Robert M. Clarke, Gwartney & Gall, H. J. Gwartney, and Herbert Gall, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by defendant from a judgment of the superior court of Los Angeles county, in an action upon a policy of title insurance, insuring plaintiff's title to a promissory note and trust deed as a first lien upon real property.

Plaintiff loaned the sum of $10,000 upon a promissory note secured by trust deed of real property, in connection with which transaction the defendant wrote its policy of title insurance, by which it insured plaintiff "as the owner or owners of the indebtedness described in and secured by the mortgage, trust deed or other lien or encumbrance referred to in Schedule A herein, and the successor or successors in interest of said indebtedness (hereinafter called the Insured), against all damage or loss of principal, interest or other sums secured by said mortgage, trust deed or other lien or encumbrance, which the said Insured shall sustain by reason of defects in the title of the maker or makers of the said mortgage, trust deed or other lien or encumbrance securing said indebtedness existing at the date of the recording thereof, to the real property described and pledged to the payment of said indebtedness; or by reason of liens or encumbrances at said date affecting the title to said real property or the priority of said mortgage, trust deed or other lien or encumbrance; or by reason of any defect in, or invalidity of such mortgage, trust deed, or other lien or encumbrance, or any assignment thereof of record at the date of this policy; excepting only the defects, liens, encumbrances and other matters hereinafter mentioned in Schedule B, and in the Conditions and Stipulations of this Policy, which said Schedules A and B, and Conditions and Stipulations are hereby made a part of this Policy. The Company does further guarantee and covenant that said indebtedness secured as aforesaid is a first lien or charge against said real property prior and superior to all other liens and charges thereon, except as shown under said Schedule B."

The policy further provided as follows: "Liability of the Company: Except as otherwise shown herein by Schedule B, and subject to the terms hereof, the Company hereby insures a marketable title to the estate or interest of the Insured, as described in Schedule A, which may be an estate or interest in a mortgage, deed of trust, or other lien or indebtedness shown as an en-

cumbrance upon the fee simple title. The Company may and will, at its own cost and expense, defend the Insured in all actions or proceedings founded (1) on a record claim of title or encumbrance prior in date and time to this Policy and hereby insured against, or (2) on a claim of invalidity or insufficiency of the records to sustain the record title as hereby insured, by reason of forgeries, copyist's errors, invalid wills, rights of after born children, false personations, deeds executed by minors and incompetent persons, rights of husband and wife, identity of persons, legal rights of parties, or other latent defects in recorded instruments purporting to convey or create liens on land or improvements. The Company will not be liable for loss or damage by reason of transfers, encumbrances or defects recorded or created subsequent to the date hereof, or created or suffered by the Insured claiming such loss or damage, or resulting in no pecuniary loss to the Insured."

Said schedule A described the note and trust deed. Schedule B, so far as material here, read as follows: "Showing estates, interests, defects or objections to title, and liens, charges and encumbrances, affecting said premises or the estate or interest insured, which do or may now exist, and against which the Company does not insure or agree to indemnify: * * * Rights or claims of parties in possession, or based upon overlapping improvements, or upon adverse possession of all or any portion of said property, which rights or claims are not shown by said public records."

Plaintiff sustained losses as a result of the loan and events which followed, by reason of the following facts: The real property belonged to one Katherine Mintener, who at the time of and subsequent to said transaction was, in person and by her tenants, in actual possession of all of the real property. One Tingley, having procured her signature to a document, forged and altered the same into a grant deed of the real property to a fictitious grantee, Larry E. Ketch; he then negotiated a loan of $10,000 with the plaintiff herein and executed in the name of Ketch the note and trust deed. The deed and trust deed were recorded at the same instant, and the policy of insurance was issued simultaneously therewith. Thereafter Katherine Mintener brought an action to quiet title against the plaintiff, defendant, and others, which said action plaintiff called upon defendant to defend, which defendant declined to do. Plaintiff thereupon employed counsel to defend the action, and expended therein the sum of $1,220.47. The plaintiff in that action prevailed, and her title was quieted against the lien of the trust deed. In addition to the amount expended in defending the action, plaintiff suffered a loss on account of the money loaned on the trust deed in the amount of $7,847.92, and for these aggregate amounts judgment was given in favor of plaintiff herein.

The defense is that plaintiff's loss was one which was not insured against, and in support thereof reliance is placed upon the exceptions which we have quoted from schedule B of the policy. Defendant's position may be stated as follows: At the time the policy was issued, Katherine Mintener was in possession of the land; at that identical moment the forged deed was recorded, from which facts it is argued that the rights and claims of Katherine Mintener were not shown on the public records at the time the policy was issued, and therefore were not insured against.

[1, 2] The entire case turns upon the construction to be placed upon said exception in the policy. Katherine Mintener's title was, and long had been, of record. Did it cease to be shown of record, within the meaning of the policy, upon the recording of a forged deed purporting to convey the title to another? In the decision of this question we are to be guided by well-established rules relating to the construction of insurance policies. Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had a right to expect, and to that end doubts, ambiguities, and uncertainties arising out of the language used in the policy must be resolved in his favor.

"The courts have also announced a rule * * * to the effect that when the language employed in an insurance contract is ambiguous, or when a doubt arises in respect to the application, exceptions to, or limitations of, liability thereunder, they should be interpreted most favorably to the insured, or to the beneficiary or mortgagee to whom the loss is payable as his interest may appear. Such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed. Where the language

and terms of a policy are framed and formulated by the insurer, every ambiguity and uncertainty therein should be resolved in favor of the insured." 14 Cal.Jur. p. 445.

The rule thus stated is supported by an unbroken line of authorities, a few of which are the following: Pacific, etc., Co. v. Williamsburgh, etc., Co., 158 Cal. 367, 111 P. 4; Granger v. New Jersey Ins. Co., 108 Cal.App. 290, 291 P. 698; Narver v. California State Life Ins. Co., 211 Cal. 176, 294 P. 393, 395, 71 A.L.R. 1374; Pacific Union Club v. Commercial, etc., Co., 12 Cal.App. 503, 107 P. 728; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213, 107 P. 292.

[3] What is meant by the phrase "shown by said public records"? Under the construction urged by defendant, it means that, when a forged deed is recorded which purports to convey away the title of the record owner, such title or such rights and claims as the true owner may have are no longer shown by the records. We cannot give it that construction. The rights and claims of Katherine Mintener were founded upon a complete record title. They existed and were shown of record after as well as before the recordation of the forged deed. Her title was clouded, it is true, but it was otherwise unaffected, and she had an absolute right, based upon her ownership, shown of record, to have the cloud removed. Meley v. Collins, 41 Cal. 663, 10 Am.Rep. 279; Haight v. Vallet, 89 Cal. 245, 26 P. 897, 23 Am.St.Rep. 465; 23 R.C.L. 200.

If she had conveyed the land, with the forged deed of record, her grantee would have taken good title—clouded, but not inadequate or defective. So it cannot be said in a true sense, or without reliance upon technical niceties of construction, that the rights and claims of Katherine Mintener were not shown of record when the policy was written. Furthermore, defendant was insuring the title, not merely certifying to the apparent state of the title. The assured was indemnified against defects in the title to the trust deed or in the title of the maker thereof to the land. A title resting upon a forged deed is most certainly defective. The policy insured against forgeries, that is to say, forged instruments were among the defects contemplated, for the insurer undertook to defend the title of the insured against claims of invalidity "or insufficiency of the records to sustain the record title, as hereby insured, by reason of forgeries * * * or other latent defects in recorded instruments purporting to convey or create liens on land or improvements." No exception was made as to forged instruments purporting to have been executed by the owner of the realty in possession at the time of the issuance of the policy. Having insured against forgeries, defendant seeks to have the court give the forged deed the practical effect of a valid deed so as to construe an exception of the policy in such manner as to excuse defendant from liability on account of the forgery. We seriously doubt that the exception stated in the policy was ever intended to relieve the insurer of liability arising out of forgeries against owners in possession. Let us apply defendant's construction to familiar situations. It is a very common thing for an owner in possession to deed his land to a grantee who, at the time of recording the deed, procures a policy of title insurance indemnifying him against defects in the title, including forgeries. If he has been made the victim of a forgery, must he stand the loss? And if, upon acquiring title, he has given a mortgage or trust deed on the land, must the holder thereof, whose title is likewise insured as a first encumbrance, stand the loss? Undoubtedly a policy insuring against defects in the title would so exempt the insurer if the exception was stated in plain language, but it could not be given that effect if to do so required that hidden meanings and ambiguities be construed in favor of the insurer and against the insured. If the policy in question attempts to create such an exemption, it does not state it in terms that would be so understood in the business world. Of this we have no doubt. That the exception in question does not relieve the insurer is not only a justifiable construction but also a more reasonable one.

It is a very common thing for real property to be in the possession of those whose rights are not disclosed by the records, and, as title companies certify and insure the state of the title from the public records, it is customary for them to protect themselves against liability arising out of rights of persons in possession which are based upon unrecorded instruments. Common instances are tenancies under oral or unrecorded leases and rights of those in pos-

session under unrecorded contracts of purchase. Such cases clearly are contemplated by the provisions of said schedule B. Other rights are mentioned in the schedule, such as those based upon overlapping improvements or upon adverse possession. Claims such as these readily come to mind in reading the exceptions, but we do not see how it can be said that to the ordinary mind, or to the minds of those who would insure under such a policy, the language we have quoted from schedule B would convey the idea that, upon the recordation of a forged deed, the rights and claims of the true owner of the land would cease to be a matter of record and that the insurer would thereby become relieved of its obligation to indemnify the insured against losses arising out of the assertion of the title of the owner.

[4] Policies of title insurance furnish no exception to the general rules of construction. As said in Marandino v. Lawyers' Title Ins. Corp., 156 Va. 696, 159 S.E. 181, 182: "Such policies [title insurance policies] are subject to the rules generally applicable to contracts of insurance, among which are, that being drawn by the company doubtful questions should generally be decided in favor of the insured, and that exceptions and reservations are strictly construed." The following expression of the court in Narver v. California State Life Ins. Co., supra, is directly applicable: "The insurance company, having prepared the policy and all documents used in connection with its issuance, should not be heard to put such a construction upon an ambiguity, caused by it, as will defeat the policy and take from the beneficiary the very purpose and object of the insurance, if a reasonable construction upholding the insurance can be had that does no violence to the language used and the clear intention of the parties. Pacific Heating & Ventilating Co. v. Williamsburgh, etc., Co., 158 Cal. 367, 111 P. 4; Welch v. British American Assur. Co., 148 Cal. 223, 82 P. 964, 113 Am.St.Rep. 223, 7 Ann.Cas. 396. * * * In the case before us it would have been a simple matter for the appellant to have used such language in the several documents constituting the contract of insurance, so that there would have been no question of its meaning. The company did not do so, and it cannot complain because the trial court, following the usual rule of construction, resolved such ambiguities against it and in favor of the insured."

The construction given the contract by the trial court is consistent with the intent of the parties and the general scheme of the policy, and is fully sustained by the authorities.

It is unnecessary to state other reasons why the exception of the policy should not be given the technical construction contended for by the defendant.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



14 Cal.App.2d 213

SPARKS v. BUCKNER, Sheriff.

Civ. 1734.

District Court of Appeal, Fourth District, California.

May 19, 1936.

Hearing Denied by Supreme Court July 16, 1936.

1. Sheriffs and constables ⇨118

Sheriff has no authority to release property under attachment, except in due course of law, and, if he does and the debt is lost, he is responsible to plaintiff in attachment for amount of debt (Code Civ.Proc. §§ 540, 689).

2. Sheriffs and constables ⇨118

Sheriff has no authority by virtue of his office to release property under attachment before return of writ, except upon giving of undertaking as provided by statute, sheriff's powers and duties being ministerial in their nature, and sheriff being "officer of the court" required to render obedience to mandates of court (Code Civ.Proc. § 540).

[Ed. Note.—For other definitions of "Court Officer," see Words & Phrases.]

3. Sheriffs and constables ⇨98(1)

Sheriff in execution of orders and process of court will be protected if same are issued by competent authority and are regular on their face, but will not be protected as to matters which may not properly be called process or orders of court.

4. Sheriffs and constables ⇨118

Sheriff who negligently released attached property without receiving proper release

bond *held* liable to judgment creditor for loss sustained, notwithstanding sheriff obtained court's approval of bond furnished by sheriff which was in fact a bond indemnifying sheriff against claims of third-party claimants to the property (Code Civ.Proc. §§ 540, 689; Civ. Code, § 2836).

5. Sheriffs and constables ⇐157(4)

Bond, obtained by sheriff who released attached property, which indemnified sheriff against claims of third-party claimants to the property, was inadequate to charge surety with obligation to pay amount of judgment, when property was released, as respects liability of sheriff and his general bondsman for loss sustained by judgment creditor (Code Civ.Proc. §§ 540, 689).

6. Principal and surety ⇐59

Liability of surety must be determined by precise terms of undertaking, and cannot extend beyond its terms (Civ.Code, § 2836).

7. Sheriffs and constables ⇐157(4)

Statutory bond indemnifying sheriff against claims of third-party claimants to attached property erroneously obtained by sheriff instead of bond to authorize release of attached property *held* not valid as common-law release bond as regards liability of sheriff and his general surety for loss sustained by judgment creditor because of sheriff's release of attached property (Code Civ.Proc. §§ 540, 689; Civ.Code, § 2836).

8. Sheriffs and constables ⇐157(4)

Where sheriff negligently released attached property after obtaining bond which did not contain undertaking to pay any judgment that the judgment creditor might recover, judgment creditor had no cause of action on such bond, and sheriff and his general bondsman were liable for loss sustained by judgment creditor by reason of release of the attached property (Code Civ.Proc. §§ 540, 689; Civ.Code, § 2836).

9. Sheriffs and constables ⇐157(4)

Where attachment was levied creating an actual lien not subject to defeat by bankruptcy adjudication, sheriff and his general bondsman were liable for loss sustained by judgment creditor due to sheriff's release of attached property without obtaining proper bond, notwithstanding bankruptcy of judgment debtor (Code Civ.Proc. §§ 540, 689).

10. Sheriffs and constables ⇐166

In judgment creditor's action against sheriff who negligently released attached property without obtaining proper bond and after obtaining bond to indemnify him against claims of third-party claimants to the attached property, sheriff and his general bondsman were proper parties defendant; surety who gave bond upon which attached property was released not being necessary or proper party (Code Civ.Proc. §§ 540, 689).

11. Sheriffs and constables ⇐168(1)

In judgment creditor's action against sheriff who released attached property without obtaining proper bond for loss sustained after judgment debtor became bankrupt, allegations of maximum amount that would be received from bankrupt estate *held* sufficient on which to base amount judgment creditor could recover, notwithstanding calculations were not carried through showing exact amount judgment creditor would receive from bankrupt estate (Code Civ.Proc. § 540).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by C. T. Sparks against W. V. Buckner, as Sheriff of Kings County, and another. From an adverse judgment, the plaintiff appeals.

Reversed.

Clark Clement, of Lemoore, for appellant.

H. Scott Jacobs and John F. Pryor, both of Hanford, for respondents.

MUNDO, Justice pro tem.

This is an action against the sheriff and his official bondsman for negligence in releasing property taken by the sheriff under attachment without receiving a sufficient bond for the release of the attached property.

The complaint alleges that plaintiff filed an attachment suit against Peppers Fruit Company; that an attachment was levied by the sheriff upon the property of said company; that this property had a value of $5,000; that two days after the levy the sheriff received from the Peppers Fruit Company, as principal, and Columbia Casualty Company, as surety, by mistake an indemnity bond, which bond, instead of being a bond for the release of said attachment, was a bond against an imaginary third party claim against said property, and thereupon, without receiving any other bond, or without any order of court or

written instructions from plaintiff for the release of said attachment, the sheriff released the property from attachment; that plaintiff recovered a judgment of $1,498.73 against said Peppers Fruit Company; that no part of the judgment has been paid; that the judgment is final; that the said Peppers Fruit Company ever since the rendering of said judgment has been, and now is, insolvent, and is in the hands of a receiver; that plaintiff was, by an order issued out of the United States District Court in said receivership proceedings, restrained from enforcing the payment of said judgment against the receivership estate; that said order further provided that plaintiff may enforce said judgment against the Columbia Casualty Company on its undertaking to prevent attachment in said action and/or against the sheriff; that, because of said order, plaintiff's application to the clerk of the superior court for an execution was refused; that plaintiff duly filed his claim with the trustee in bankruptcy; that the amount which will be received by plaintiff from said bankrupt estate will be only nominal; that, as the direct and proximate result of the sheriff's acts and by the omission of his official duty in releasing the property from the attachment, plaintiff has been damaged in the amount of said judgment and interest.

The defendants demurred on the following grounds: (1) That the complaint does not state a cause of action; (2) that there is a defect or misjoinder of parties defendant, for the reason that the complaint shows that the Columbia Casualty Company, the company that executed the bond to the sheriff, should be a party defendant in said action; (3) that the complaint is uncertain for the reason that it cannot be determined therefrom what amount will be paid to plaintiff on his claim against Peppers Fruit Company in the bankruptcy proceedings, and for that reason it cannot be determined what the amount of the judgment should be against defendants in the present action.

The court sustained the demurrer with leave to amend. Plaintiff not having amended, a judgment of dismissal was entered. Plaintiff filed this appeal.

It appears from the record filed herein that the defendant in the attachment suit intended to post a bond under the requirements of section 540 of the Code of Civil Procedure, to secure the release of the attachment, but instead he delivered to the sheriff a bond in the form required by section 689 of the Code of Civil Procedure, which form is used where property is claimed by a third party.

No third party claim was ever filed in the case. The bond was approved by the judge of the superior court before it was taken by the sheriff. The bond was in the following form:

"Indemnity Bond to Sheriff.

"Know All Men By These Presents:

"That We, Peppers Fruit Company, Inc., as Principal and the Columbia Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to transact its business of suretyship under the laws of the State of California, as Surety, are held firmly and bound unto W. V. Buckner, Sheriff of Kings County, State of California, in the penal sum of Fifteen Hundred ($1500.00) Dollars, Gold Coin of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

"Sealed with our seals and dated this 22nd day of July, A. D. 1932.

"The condition of the above obligation is such, that whereas, under and by virtue of a writ of attachment issued out of the Superior Court of Kings County, State of California, said Sheriff was required to attach and safely keep all the property of said defendant within said County of Kings, State of California, not exempt from execution, or so much thereof as might be sufficient to satisfy the plaintiff's demand, the amount of which was stated to be Twelve Hundred and seventy two and 36/100 Dollars ($1272.36), and

"Whereas, the Sheriff, did pursuant to the requirements of said writ, attach the following described property, to wit: Material and equipment.

"Whereas, upon the taking of said property by virtue of said writ of attachment on July 20th, 1932, made a verified claim in writing to the ownership of the same as provided by law; and

"Whereas, said Plaintiff required said Sheriff to retain said property in his custody under said writ.

"Now, Therefore, if the said principal and surety, their heirs, executors, administrators, successors and assigns, shall well

and truly indemnify and save harmless the said Sheriff, his heirs, executors, administrators and assigns, of and from all damages, costs, charges and expenses, including all counsel fees which the said Sheriff, his heirs, executors, administrators, or assigns may incur in consequence of the legal enforcement of payment of the penalty of this bond, or in defending any action brought against him for the recovery or for the taking or conversion of said property claimed as aforesaid, and against all loss or liability which said Sheriff, his heirs, executors, administrators or assigns shall sustain or in anywise incur, for or by reason of the attaching, seizing or taking of said property by said Sheriff, or by reason of the withholding of the same from the rightful owner thereof under and by virtue of said writ of attachment, then this obligation to be void, otherwise to remain in full force and effect.

"And it is expressly provided that it shall be lawful for the said Sheriff, his heirs, executors, administrators or assigns, to bring suit against the principal and surety hereto, or either of them, or their or either of their executors, administrators or assigns, immediately upon the rendition of any judgment against the said Sheriff, his heirs, executors, administrators or assigns and that said Sheriff shall not be required first to pay the said judgment or counsel fees in order to entitle him or his legal representatives to maintain such suit and recover judgment thereof; and the Court wherein said judgment may be rendered against said Sheriff for the taking, or conversion or withholding, or sale, or disposition of said property, or any part thereof, may, on motion of said Sheriff, and with or without notice to said principal and surety, or any or either of them, for the amount of such judgment recovered against said Sheriff, and for costs and reasonable counsel fees.

"Peppers Fruit Co. Inc.
"T. H. Peppers, Pres.
"Columbia Casualty Company,
"By Roy Frederick,
"Attorney-in-fact.

"[Seal]
"State of California,
"County of Kings.—ss.

"On this 22nd day of July, A. D. 1932, before me, J. L. C. Irwin, a Notary Public in and for the County of Kings, personally appeared Roy Frederick, Attorney-in-fact of the Columbia Casualty Company, to me personally known to be the individual described in and who executed the within instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth and saith, that he is the said Attorney-in-fact of the company aforesaid, and that the seal affixed to the within instrument is the corporate seal of the said company, and that the said corporate seal and his signature as such Attorney-in-fact were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

"In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Hanford, State of California, the day and year first above written.

"J. L. C. Irwin,
"Notary Public in and for said County of Kings, State of California.
"[Seal]

"[Endorsed:] Approved this 22 day of July, 1932, K. Van Zante, Judge of the Superior Court, Kings County, California."

Respondents contend that this indemnity bond is a sufficient bond under section 540 of the Code of Civil Procedure, and that the sheriff was not negligent in taking such a bond for the release of the attachment after the bond had been formally approved by the judge of the superior court from which the attachment issued.

The writ of attachment is directed to the sheriff, and it requires him to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demands against the defendant. He is required to do this "unless such defendant give him security by the undertaking of at least two sufficient sureties which must first be approved by a judge of the court issuing same * * * or deposit a sum of money with the sheriff, in an amount sufficient to satisfy such demand against such defendant, besides costs, or in an amount equal to the value of the property of such defendant which has been or is about to be attached; in which case to take such undertaking or sum of money." Code Civ. Proc. § 540.

[1-4] The sheriff has no authority to let the property under attachment go out of his hands, except in due course of law;

and, if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. Hesser v. Rowley, 139 Cal. 410, 413, 73 P. 156; Sanford v. Boring, 12 Cal. 539. There is no authority given by virtue of his office to release property before the return of the writ, except upon the giving of the undertaking, as provided in section 540 of the Code of Civil Procedure. His powers and duties are ministerial in their nature. He is an officer of the court, and should render obedience to the mandates of court unless the process or order appears upon its face to be illegal or that it was issued without jurisdiction (23 Cal.Jur. 294); and in the execution of orders and process of court he will be protected if same are issued by competent authority and are regular on their face. Burlingame v. Traeger, 101 Cal.App. 365, 281 P. 1051. This rule of protection, however, does not extend to matters which may not properly be called process or orders of court. The sheriff would have no right to question a valid order of the court, nor would he be required at his peril to look behind the order if it appears to be regular on its face and issued by a court of competent jurisdiction. But here there was no order; the court did not order the execution of any process nor order the sheriff to do a single thing. The judge merely approved a bond which was presented to him by the sheriff. It might have been negligence on the part of the sheriff to have taken a bond which had not been approved by a judge; and it seems reasonable to say that he would be equally as negligent if he took a bond to the judge for approval when the bond upon its face appears to be the wrong form of bond. It is the duty of the sheriff to see that he has in his hands a proper bond before he releases property under attachment. A proper requirement would be for him to check the form of the bond and satisfy himself that the particular bond is regular on its face and applicable to the situation at hand. If he has any doubt as to the sufficiency of the bond in this regard, he may require the defendant to put the bond in proper form. The ex parte approval of the bond by the judge should not operate to relieve the sheriff of his responsibility to make certain that the bond is in proper form.

The condition of the bond which was taken by the sheriff in this case indicates that the sole obligation of the surety company is to indemnify the sheriff against conversion of property belonging to a third party claimant. The bond indemnifies the sheriff against loss or liability sustained "by reason of the attaching, seizing or taking the said property by said sheriff or by reason of the withholding of same from the rightful owner thereof under and by virtue of said writ of attachment."

The bond does not obligate the surety company to pay any judgment that might be rendered in the attachment suit. It is true that the circumstances attending the taking of this bond indicate an intention to furnish a bond which would comply with the requirements of section 540 of the Code of Civil Procedure, but even with the aid of these circumstances the bond cannot be read to express the condition required by this section of the Code. The section does not prescribe the particular form of bond. It does, however, contemplate an undertaking which will be taken instead of defendant's property, "and is for the benefit of the plaintiff, who is the party in interest, and not for the protection of the Sheriff. It is the mode prescribed by the statute for securing the demand pending the action. If the Sheriff takes a sufficient statutory undertaking, his duty in the premises is discharged, and he has no further responsibility in the matter." Curiac v. Packard, 29 Cal. 194. In Christal v. Kelly, 88 N.Y. 285, the court, in explaining the purpose of a statute similar to ours, said: "It was intended for the benefit of defendants whose property had been, or might be, attached under process, to enable them to substitute for the property which had been or might be attached, security for the payment of any judgment which might be recovered in the action, and thereby relieve their property from the actual or apprehended lien of the process." The statute, in this respect, is for the benefit of the defendant, but the bond required by the statute is for the benefit of the plaintiff, and is security for the judgment which may be given to him.

[5, 6] It is clear that the bond here under consideration is inadequate to charge the surety company with the obligation to pay the amount of the judgment, if the property was released. The bond was for the security of the sheriff rather than for the benefit of the plaintiff. Under section 540 the liability of the surety is the amount of plaintiff's demand in the first instance, and in the second case it is the value of the property attached. The liabil-

ity of the surety must be determined by the precise terms of their undertaking, and such liability cannot be extended beyond the terms of its contract. Curtin v. Harvey, 120 Cal. 620, 52 P. 1077; section 2836, Civ. Code.

[7] In all the cases cited by respondents in which a purported statutory bond, not complying specifically with the statute, has been held to be good, there was a direct promise in the bond to pay the judgment. Respondent's contention that the bond is sufficient as a common-law bond is not tenable. It does not in substance contain a promise to pay the judgment if the property was released, but is conditioned exactly as respondents say on page 21 of their brief: "To indemnify the sheriff against damages, expenses, loss and liability which may result from the conversion of the property or by reason of the withholding of the same from the rightful owner." The bond recites that "said *plaintiff* required said sheriff *to retain* said property in his custody under said writ." This is exactly what the plaintiff would do in the event a third party were claiming the property under attachment, but why should the plaintiff in this case require such a thing. Indeed, he would not; and he would have no right to require the sheriff to withhold the property. He has under section 540 nothing to do with the release of the property; that is a matter between the sheriff and the defendant. The sheriff must take a bond which would have the effect of guaranteeing the payment of plaintiff's demand. It is not a case of *retaining* property; it is a case of *releasing* property. Turner v. Fidelity & Deposit Co., 187 Cal. 76, 200 P. 959. The bond is not a common-law bond, but is the statutory bond required by the Code of Civil Procedure, § 689; and it does not satisfy the requirements of section 540 of the Code of Civil Procedure. The obligations of the bonds required by these two sections are different and not interchangeable. The sections contemplate entirely different situations.

Respondents cite the case of Bridges v. Price, 95 Cal.App. 394, 273 P. 72, as authority for the argument that section 540 is a part of this bond as effectually as if the provisions of the Code section were in words inserted in it. The situation which obtained in the Bridges Case is not at all the situation here, and therefore the law of that case is inapplicable.

[8] Respondents' next contention is that the plaintiff can sue directly on this indemnity bond, although the bond runs to the sheriff. This would be true if the Columbia Casualty Company had undertaken to pay any judgment that plaintiff might recover, but, as it is, no such obligation exists, and consequently no cause of action exists in favor of the plaintiff and against this company. Curiac v. Packard, supra.

It is argued by respondents that the judgment of plaintiff against Peppers Fruit Company was of no value, because of the order of the federal court prohibiting the issuance of an execution. And, they say, the sheriff should not answer in damages to plaintiff who may have been injured through his negligence in a case where the damages would have been sustained notwithstanding the malconduct of the sheriff.

[9] The attachment levied, as it was in this case, created an unconditional right of payment out of the property levied on, an actual lien not subject to defeat by bankruptcy adjudication of any sort. In re New Amsterdam Motor Co. (D.C.) 180 F. 943. "The bankruptcy law recognizes all valid liens that existed four months prior to bankruptcy proceedings." In re Beaver Coal Co. (C.C.A.) 113 F. 889, 891. If this lien had not been released by the sheriff, it would have been recognized and enforced in the bankruptcy court. Had the attachment been released upon a proper undertaking, the undertaking would stand as a substitute for the lien. In Harding v. Minear, 54 Cal. 502, the court makes this statement: "If the proceedings in bankruptcy would not have had the effect, under the Bankrupt Law, of discharging the attachment which had been levied upon the property of the defendant if an undertaking had not been given, they will not have the effect of releasing the undertaking which was given." See Tormey v. Miller, 31 Cal.App. 469, 160 P. 858. In either event the plaintiff would have been secured; he would have the lien in the one instance or its substitute in the other. In the latter instance the sureties on the bond would not be exonerated by an adjudication of bankruptcy of the defendant Peppers Fruit Company. Credit Association v. Griffin, 32 Cal.App. 598, 163 P. 695. The damage, it seems to us, would relate to the release of the attachment by the sheriff without taking a bond which would bind the surety company to pay any judgment plaintiff might re-

cover in the attachment suit. As it was, he lost his attachment lien and with it the right to have this lien recognized in the bankruptcy court, and he got no substituted security against which he could rely for the satisfaction of his demand.

[10] There is no defect or misjoinder of parties defendant, for the reason that the plaintiff has no cause of action against the Columbia Casualty Company. The bond ran, not to the plaintiff, but to the sheriff. As we have seen, the obligation of the bond cannot be extended beyond its terms. Whether or not the sheriff has a cause of action against the Columbia Casualty Company on the undertaking is no concern of plaintiff's and does not make that company a necessary party defendant to plaintiff's cause of action. The only cause of action stated in the complaint, and we believe it to be sufficiently stated, is against the defendant Buckner for negligence. His general surety and not the Columbia Casualty Company is a proper party to be joined by plaintiff as a party defendant in this action which is based on the negligence of the defendant Buckner.

Paragraph 11 of plaintiff's complaint alleges:

"That on the ——— day of July, 1933, said Peppers Fruit Company was duly adjudged a bankrupt in said United States District Court.

"That a trustee in bankruptcy in said proceedings was duly appointed; that the plaintiff C. T. Sparks, duly filed his claim therein for the whole of said judgment and interest.

"That plaintiff is informed and believes, and therefore alleges that the liquidation of the physical assets of said bankrupt will gross about $8,500.00; that in addition there will be collected from a bonding company as a part of the assets of said bankrupt the further sum of $4,800.00; that the general claims filed in said bankruptcy proceedings are in excess of the sum of $200,000.00; that the amount, therefore, which will be received by said C. T. Sparks from said bankrupt estate will be only nominal."

[11] Respondents contends that the court would be unable, on the facts as alleged, to determine the amount of the judgment to be rendered against the defendants. The uncertainty complained of is more apparent than real. Plaintiff has set forth the maximum amount that would be received from the bankrupt estate. In no event could the defendants claim credit for more than the maximum amount. The fact that the calculations are not carried through to show what the exact amount would be does not make the complaint uncertain, when all the figures are given from which it may be easily ascertained.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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6 Cal.2d 457

McDONALD v. McDONALD.

S. F. 15164.

Supreme Court of California.

May 27, 1936.

Rehearing Denied June 26, 1936.

1. Marriage ⇐3

Marriage contracted in Nevada between boy of 18 and girl of 16 who were residents of California and who were married without their parents' consent was valid in California, since marriage was valid in Nevada (Civ. Code, §§ 63, 82, subd. 1; Comp.Laws Nev. 1861–1900, § 483).

2. Marriage ⇐3

Even though boy of 18 and girl of 16, who were residents of California and who were validly married in Nevada without parents' consent, had left California for purpose of evading California law, such purpose would not invalidate marriage in California for lack of parents' consent (Civ.Code, §§ 63, 82, subd. 1; Comp.Laws Nev.1861–1900, § 483).

3. Marriage ⇐3

Each state may follow its citizens into another state and regulate status of its own citizens, especially such status as marriage.

4. Marriage ⇐3

Lex loci contractus governs as to validity of marriage, in absence of statute in state of residence of parties, expressly and clearly regulating marriage of its residents abroad, except when marriage is regarded as odious by common consent of nations, such as where marriage is polygamous or incestuous by laws of nature.

5. Marriage ⇐58(1)

Marriage cannot be annulled unless there was something legally wrong with marriage in its inception (Civ.Code, § 82).

6. Marriage ⇐58(1)

Marriage between boy of 18 and girl of 16, residents of California, who were validly married in Nevada without parents' consent, *held* not subject to annulment for having been contracted without parents' consent (Civ.Code, §§ 63, 82, subd. 1; Comp.Laws Nev. 1861–1900, § 483).

WASTE, C. J., and SHENK, J., dissenting in part.

In Bank.

Appeal from Superior Court, San Mateo County; Franklin M. Swart, Judge.

Action by Alecia McDonald against James McDonald III for separate maintenance, in which defendant filed a cross-complaint for annulment of the marriage between them. From judgment in favor of plaintiff, after demurrer to cross-complaint was sustained without leave to amend, defendant appeals.

Affirmed.

Prior opinion, 42 P.(2d) 362.

Rehearing denied; WASTE, C. J., and SHENK and NOURSE, JJ., dissenting.

U. S. Webb and Hester W. Webb, both San Francisco (Joseph W. Bingham, of Stanford University, of counsel), for appellant.

Edward West, of Bakersfield, and Silas W. Mack and John Milton Thompson, both of Monterey (John E. Gunther, of San Francisco, of counsel), amici curiae.

C. Harold Caulfield and Edward D. Keil, both of San Francisco, for respondent.

LANGDON, Justice.

In an action by the wife for separate maintenance, the husband filed a cross-complaint for an annulment of the marriage upon the ground that at the time of the marriage the defendant and cross-complainant was a minor, 18 years of age, and therefore under the legal age of consent. The trial court sustained the wife's demurrer to the cross-complaint, without leave to amend. From the judgment entered in favor of the plaintiff wife, the defendant husband appeals.

The parties married in the state of Nevada, the husband being at that time but 18 years of age and the wife but 16 years old. Neither had the consent of parent or guardian. If the marriage had taken place in this state, it would have been subject to annulment for failure of the parties to procure such consent. Civ. Code, § 82, subd. 1. But the marriage was valid in Nevada. The statute of that state relating to marriage and divorce (Compiled Laws of Nevada 1861–1900, § 2, p. 112 [section 483]) provides, in so far as is material here, "that male persons under the age of twenty-one years, and female persons under the age of eighteen years," in order to marry, shall first obtain the consent of parents or guardians. The Supreme Court of Nevada, construing the statute, held that, notwithstanding the proviso, as the statute did not expressly, nor by implication, render a marriage in disregard of its prescribed formalities void,

a marriage entered into in that state while the parties were under the prescribed ages and without the required consent is, nevertheless, a valid binding contract. Fitzpatrick v. Fitzpatrick, 6 Nev. 63. Later the court, affirming that decision, again held that such a marriage is valid. State v. Zichfeld, 23 Nev. 304, 46 P. 802, 34 L.R.A. 784, 62 Am.St.Rep. 800.

[1] Section 63 of the Civil Code of California provides: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." Consequently, the marriage of these parties, being a valid marriage in the state of Nevada, is a binding and valid marriage in this state.

[2-4] Appellant seeks to avoid the application of the cited Nevada cases to his case on the ground that the parties there involved were residents of that state, and had not gone to Nevada for the purpose of evading the laws of another state. Even though the parties here, residents of and domiciled in California, went to the state of Nevada to be married, and with the avowed purpose of evading our laws relating to marriages, such a motive, if in the minds of the parties, would not change the operation of the well-settled rule that a marriage which is contrary to the policies of the laws of one state is yet valid therein if celebrated within and according to the laws of another state. That question is persuasively discussed in Norman v. Norman, 121 Cal. 620, 624, 54 P. 143, 42 L.R.A. 343, 66 Am.St.Rep. 74. Motive in the minds of parties will not change the operation of the rule. Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509. Each state may follow its citizens into another state and regulate the status of its own citizens, especially such a status as the marriage relation. For an example of such legislation relating to marriages, see General Statutes of Massachusetts, c. 106, § 6. The Legislature of California has not enacted a statute that such marriages shall have no validity here. In the absence of such a statute of the domicile of the parties, expressly and clearly regulating marriages abroad, the lex loci contractus governs as to the validity of the marriage. An exception, of course, arises when the marriage is regarded as odious by common consent of nations; e. g., where it is polygamous or incestuous by the laws of nature. Matter of Seymour, 113 Misc. 421, 185 N.Y.S. 373, 381, wherein a careful consideration of this subject will be found. A helpful discussion of these phases of the question will be found in Bishop on Marriage and Divorce, sections 879-885, inclusive. See, also, Restatement of the Law of Conflict of Laws, § 121, and comments.

The two decisions of the Nevada court, supra, must be given full weight in considering the question here. The contention of appellant that they pertain only to divorce actions is set at rest by the language of the court, particularly in the Zichfeld Case, supra.

[5, 6] Appellant further asserts, however, that even if the marriage was valid in Nevada, and, under section 63 of the Civil Code, valid in this state, nevertheless, the parties being citizens and residents of this state, the provisions of section 82 of the Civil Code are applicable, and that the marriage is therefore subject to being annulled, the same as any other "valid" California marriage which falls within the purview of section 82 of the Civil Code. This argument is predicated upon certain language appearing in some of the California cases to the effect that, as to marriages performed in California of persons under the legal age of consent, without the consent of parents or guardians, such marriages are "legal" or "valid for all purposes" until annulled. In re Ambrose's Guardianship, 170 Cal. 160, 149 P. 43; Campbell v. Campbell, 78 Cal.App. 745, 248 P. 762; People v. Souleotes, 26 Cal.App. 309, 146 P. 903. All that was intended by that language was that such marriages are voidable and not void. This does not mean that, in determining whether a particular marriage contract is voidable, the law of the forum is decisive and that the law of the place of contract is to be disregarded.

Appellant's argument overlooks the nature of an annulment proceeding. A marriage cannot be annulled unless there was something legally wrong with it in its inception. Under the very language of section 82 of the Civil Code, an annulment is granted for causes "existing at the time of the marriage." A marriage valid in all respects when contracted can never be annulled. The meaning of the phrase "good until annulled" or "valid until annulled," used in the above cases, is simply that in the case of voidable marriages

(as distinguished from void marriages) a right of action to dissolve it for some cause existing at the time the marriage was contracted has no effect on the relationship until such right is exercised. A familiar analogy exists in the law of contracts. Thus a contract may be voidable and subject to rescission, because of some infirmity in its procurement, but, unless attacked by notice of rescission or by suit, will not be avoided, but will remain binding. Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708. So with voidable marriages. The parties may or may not exercise their legal right to have them annulled, and, if they do not exercise such right, the marriages are binding; but, when annulment is sought, it can be granted only if there was some element of invalidity in the contracting of the marriage. Thus, in Millar v. Millar, 175 Cal. 797, 806, 167 P. 394, 398, L.R.A. 1918B, 415, Ann.Cas.1918E, 184, it is stated: "Strictly speaking the word 'divorce' means a dissolution of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of marriage, no valid marriage ever existed. This is true even though the marriage be only voidable at the instance of the injured party, or in the words used in Estate of Gregorson, 160 Cal. [21] 25, 116 P. 60, L.R.A.1916C, 697, Ann.Cas.1912D, 1124, 'capable of being annulled.' And the decree of nullity in such a proceeding determines that no valid marriage ever existed." See, also, Goodrich, Conflict of Laws, p. 302.

If we were to hold, in accordance with appellant's present contention, that, even though this marriage was valid in all respects in Nevada, and therefore, under section 63 of the Civil Code, valid in all respects here, but could be annulled for causes provided by our law, but not permitted by Nevada law, we would be holding that, although this marriage was valid in all respects, nevertheless it was a marriage which never existed. Such a doctrine would repudiate, not only the entire concept of annulment, but would also indirectly repudiate the doctrine of Conflict of Laws, universally recognized and embodied in section 63 of the Civil Code.

The Restatement of the Law of Conflict of Laws, § 136, expressly covers the situation we are here considering and embodies what we consider to be fundamental and universally accepted concepts. It provides: "The law governing the right to a decree of nullity is the law which determined the validity of the marriage with respect to the matter on account of which the marriage is alleged to be null."

On page 174, in connection with section 115, the Restatement comments: "A decree of nullity from the beginning is not a dissolution of the marriage but is a judicial declaration that no marriage has ever existed. Therefore, in determining whether such a decree will be rendered, the court at the forum will be governed by the principles of the marriage law of the state which under the appropriate Conflict of Laws rule, determines the validity of the marriage in question. Under the rule stated in section 121 a marriage is in most particulars governed by the laws of the place of marriage; and if invalidity is claimed in one of these particulars the decree of nullity will be granted only upon the application of the principles of marriage law of that state." See, also, Pearson v. Pearson, 51 Cal. 120; Norman v. Norman, 121 Cal. 620, 54 P. 143, 42 L.R.A. 343, 66 Am.St.Rep. 74.

If appellant's contention were to prevail, it would necessarily follow that an ordinary private contract entered into in New York, and valid for all purposes in that state, would be "valid" here, but still could be rescinded here for grounds existing under our law and not existing under New York law. It would also follow that, in the law of torts, although an action could be maintained in this state by a guest against his host on a tort committed in another state, where the right of action is recognized by the law of that other state, nevertheless the defendant may defend that under the law of the forum recovery is denied, thus repudiating such cases as Loranger v. Nadeau, 215 Cal. 362, 10 P.(2d) 63, 84 A.L.R. 1264. Examples could be multiplied. Under appellant's reasoning, by recognizing the validity of the foreign law until the subject reaches our borders, and then denying the validity previously recognized, we would effectually eliminate from our jurisprudence the entire field of Conflict of Laws.

The other points raised do not warrant discussion.

The judgment is affirmed.

We concur: CURTIS, J.; CONREY, J.; THOMPSON, J.

WASTE, Chief Justice.

I concur and dissent.

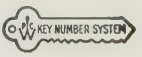
I concur in the conclusion announced in the majority opinion, that the marriage of these parties was a valid marriage in the state of Nevada. I do not agree that such marriage is immune from attack under the provisions of section 82 of the Civil Code, which provides that marriages may be annulled for the causes there specified. Were we here dealing with an ordinary contract, the conclusion reached by the majority of the Justices would find support; but we are dealing with a marriage contract, a contract of exceptional nature, which relates to the status of the parties to the contract, a status in which the state of California is primarily interested. I am of opinion that the language in the cases has a wider meaning and, in view of the fact that it relates to the marital status of citizens of the state, is subject to a different interpretation than that given to it by the other opinion. That language is to the effect that, as to marriages performed in California of persons under the legal age of consent, without the consent of parents or guardians, such marriages, not having been declared by law to be illegal, are legal and valid for all purposes until annulled. In re Ambrose's Guardianship, 170 Cal. 160, 149 P. 43; Campbell v. Campbell, 78 Cal.App. 745, 248 P. 762; People v. Souleotes, 26 Cal.App. 309, 146 P. 903; 16 Cal.Jur., p. 913.

Neither the state of Nevada nor the state of California has declared marriages contracted in the respective states by persons under the age of consent, without the prescribed consent of parents or guardians, to be illegal. Consequently, such marriages are valid, even though, it has been held, disobedience of the statute may entail penalties on the licensing or officiating parties. In re Ambrose's Guardianship, supra. See, also, 2 Schouler on Marriages and Divorce (6th Ed.) § 1122.

I am of the view that the parties contracted a marriage legal and binding until annulled or dissolved. Section 82 of the Civil Code, relating to marriages contracted as this one was, presupposes that they may, on proper grounds, be annulled and set aside. California, by enactment of section 63 of the Civil Code, accords full recognition to the rules and laws of comity by providing that this marriage, valid in Nevada, is valid here. This state, however, has exercised its unquestioned prerogative to legislate concerning the marital status of its citizens domiciled here by expressly providing that such marriages may be annulled when the proper ground is established.

The demurrer of plaintiff to defendant's cross-complaint was improperly sustained, and the judgment should have been reversed.

I concur: SHENK, J.



6 Cal.2d 455

In re GLUCKMAN.

GLUCKMAN v. MARYSVILLE-YUBA CITY PUBLISHERS, Inc.

Sac. 5031.

Supreme Court of California.

May 27, 1936.

Newspapers ⇨3(2)

Where name, good will, and bona fide paid circulation list of established newspaper were purchased by another newspaper published in different town in same county, owner of consolidated papers *held* entitled to have first newspaper as consolidated with second declared to be newspaper of general circulation for county for purpose of publication of legal notices (Pol.Code, § 4462).

In Bank.

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Proceeding in the matter of the petition of Arthur W. Gluckman, owner and editor of the Wheatland Herald, a newspaper, for a decree establishing the status of said newspaper as one of general circulation, wherein the Marysville-Yuba City Publishers, Inc., filed objections. Judgment for petitioner, and the objector appeals.

Affirmed.

Rich, Weis & Carlin, of Marysville, for appellant.

Ray Manwell, A. J. de Lorimier, and E. P. McDaniel, all of Marysville, for respondent.

WASTE, Chief Justice.

The "Wheatland Herald," a newspaper published at the city of Wheatland in the county of Yuba since 1889, sold the name, good will, and bona fide paid circulation list of the paper to the owner and publisher of "The Marysville Star," a newspaper established, printed, published, and circulated in the city of Marysville located in the same (Yuba) county. The Herald was thereafter not printed and published in the city of Wheatland. The two papers, thus consolidated, have been, ever since such consolidation, established, printed, published, and circulated under the name "The Marysville Star and Wheatland Herald" in Marysville and in Yuba county. The announced purpose of the consolidation was that the "Marysville Star" might acquire a legal status to print legal notices "without waiting one year to establish such status."

In a proceeding instituted by the owner of the consolidated papers to have the "Wheatland Herald" declared to be a newspaper of general circulation for the county of Yuba, which would also include the city of Marysville, the owner and publisher of a rival newspaper of general circulation, printed and published at Marysville for a great many years, filed objections to the granting of the petition. After due hearing on the petition and the objections, the trial court made its findings that the "Wheatland Herald as consolidated with the Marysville Star is a newspaper of general circulation" within the meaning of the appropriate section (4462) of the Political Code, and entered judgment for the petitioner to that effect. The rival newspaper has appealed.

We are of the view that there is ample support for the findings in the evidence produced at the hearing. The only question for consideration appears to be whether or not a legal consolidation of the two papers was effected by the facts found. We are of the opinion that there was. That view is confirmed by our reading of the opinion of this court in Anglo London Paris Co. v. Johnson, 194 Cal. 123, 228 P. 7, which supports the argument of respondent. We are also of the view that the decisions from other jurisdictions are not based on sufficiently parallel facts to be helpful in our consideration.

Under the facts found, the substantive purpose of the requirement of legal status for the publication of legal notices in a paper of general circulation will be as fully subserved as if such publication appeared in each of the two papers so consolidated. Anglo London Paris Co. v. Johnson, supra. See, also, in this connection Sage v. Central R. Co., 99 U.S. 334–347, 25 L.Ed. 394.

The decree appealed from is affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.



14 Cal.App.2d 299

WHITTEN et al. v. YOUNG et al.

Civ. 5512.

District Court of Appeal, Third District, California.

May 26, 1936.

1. Estoppel ⇐37

Railroad's conveyance of premises carried with it title to premises thereafter acquired by it under patent issued by the United States (Act Cong. July 25, 1866, 14 Stat. 239; Civ.Code, § 1106).

2. Mines and minerals ⇐44

Party claiming under lease, based on a mining location made after issuance of patent to property involved, was not "in privity with" the United States government, and could not attack the patent collaterally on ground of fraud or mistake, in that land was known mineral land at time patent issued (Act Cong. July 25, 1866, 14 Stat. 239).

[Ed. Note.—For other definitions of "In Privity with Each Other," see Words & Phrases.]

Appeal from Superior Court, Butte County; Arthur Coats, Judge.

Action by Herbert W. Whitten and others against R. C. Young and others. Judgment for plaintiffs, and the named defendant appeals.

Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

Ware & Ware, all of Chico, for respondents.

Herbert W. Whitten, in pro. per.

Mr. Justice pro tem. STEEL delivered the opinion of the court.

This is an appeal by defendant and appellant Young from a judgment in favor of plaintiffs and respondents permanently enjoining appellant from exercising any acts of possession, and from removing ore from the premises involved, together with damages for the unlawful removal of such ore during the time appellant was in possession.

The facts may be summarized as follows: The action primarily is in the form of an action to quiet title to certain lands in the county of Butte, included within which is a 20-acre tract, being the premises in dispute here.

Respondents claim title pursuant to a decree quieting title made in 1916, also the uninterrupted use and possession and the payment of all taxes levied or assessed upon the premises since such decree. In 1922 a patent issued upon the premises in question by the United States to the Central Pacific Railway Company under an Act of Congress of July 25, 1866 (14 Stat. 239).

Appellant bases his claim, first, as a copartner of lessees under a written lease dated July, 1933, and executed by the respondents herein to George Mostica and C. Callaway, and, second, by virtue of a certain lease agreement dated August, 1932, executed to him by George Archibald and others, based on a mining location alleged to have been made by the lessors upon said property.

The evidence discloses that since the decree quieting respondents' title they have exercised the usual acts of dominion over the property, including the payment of all taxes and the actual mining thereof during the first two or three years of their occupancy. In July of 1933, respondents executed a lease and option to purchase the premises to Mostica and Callaway, who thereupon entered into possession and performed certain mining operations thereunder. In December of the same year it appears the lease aforesaid was canceled by written, mutual consent of the parties indorsed thereon, and the lessees thereupon assigned to respondents certain equipment and personal property then upon the premises and executed and delivered to respondents a quitclaim deed to said premises.

Appellant claims to have been instrumental in obtaining this lease; that he entered upon the property as a cotenant with the lessees Mostica and Callaway; that he thereupon asserted an interest in the property, which claim or interest was brought to the attention of the plaintiff Whitten.

The evidence fails to establish any recognition by the respondents, or either of them, of the rights claimed to have been asserted by appellant, either as lessee, cotenant, copartner, or otherwise. On the contrary, the record discloses that respondents refused to accept royalties tendered by appellant, or negotiate with him at all with reference thereto.

As to the second claim asserted by appellant, as arising by virtue of the mining location lease, the testimony shows that in August, 1932, one Frank and George Archibald, together with two associates, entered into a lease agreement with appellant whereby a portion of the premises involved herein and referred to as "Associated 4 Claim" were demised to appellant for a period of years, with rental payable upon a royalty basis. It may be mentioned that the Archibalds first entered upon the premises in the early part of 1931, after having first sought and obtained the permission of respondent Whitten so to do, and thereafter located the claim referred to. Certain development work was done under this arrangement, ore removed and shipped to the smelter up until July, 1933, when the Mostica-Callaway lease came into existence, after which appellant claims to have operated as a copartner under said last-mentioned lease.

We find nothing in the record sufficient to establish any rights accruing to appellant as against the respondents herein, in so far as the Mostica-Callaway lease is concerned. The lease specifically provides against sale, assignment, or transfer of any interest of lessees, or subletting said premises, or any part thereof, without first having obtained the written consent of lessors. No claim is made that such consent was given.

[1] Appellant attacks the legal sufficiency of respondents' title, and contends that it

has not been connected up with the railway company as patentee.

While there is no documentary evidence in the record of such conveyance, respondent Whitten testified that prior to the quiet title suit in 1916, the Central Pacific Railway Company conveyed the premises in question to plaintiffs' predecessors in interest. This was not disputed. The rule is well settled that a grant carries an after-acquired title or claim of title. Section 1106, Civ.Code. Even a quitclaim deed, while not ordinarily passing an after-acquired title, has been held to have this effect in similar cases, upon the ground that the title transferred by the patent relates back to the initiation of the proceedings to acquire the government title, and consequently inures to the benefit of the person to whom the holder of the certificate of purchase conveyed. Wholey v. Cavanaugh, 88 Cal. 132, 25 P. 1112; Stanway v. Rubio, 51 Cal. 41.

[2] Appellant further contends that the patent is now subject to collateral attack upon the ground the land was known mineral land at the time the patent issued.

In the leading case of Burke v. Southern Pacific R. Co., 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527, the law has been definitely settled that the mineral reservations in patent are void, and that the patent is conclusive as to the character of the land against a collateral attack. The Burke Case, supra, does not hold, however, that mineral lands known to be such, at or prior to issuance of patent, pass to the patentee. It may be reasonably accepted that if the existence of such minerals were called to the attention of the authorities charged with determining the character of the land, the patent would not issue, or, as the Burke Case holds, if granted, would render it subject to a direct attack by the United States, or those in privity with the government, on the ground of fraud, mistake, irregularity, or to declare a trust thereunder.

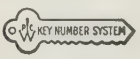
The foregoing seems to be the only basis for an attack, once the patent issues. Vore v. Ephraim, 173 Cal. 245, 248, 159 P. 719.

One claiming under a mining location made after the issuance of patent is not in privity with the government, and may not attack the patent collaterally on the ground of fraud or mistake. Vore v. Ephraim, supra. Appellant cites the case of Brown v. Luddy, 121 Cal.App. 494, 9 P.(2d) 326, in support of his position. That case, however, dealt with a patent issued under an act of Congress entitled, "The Stock-Raising Homestead Act of December 29, 1916" (43 U.S.C.A. §§ 291–301), and is not applicable to the facts in the instant case.

In Brown v. Luddy, supra, the case of Van Ness v. Rooney, 160 Cal. 131, 116 P. 392, is cited among other cases, and it may be said that considerable confusion and uncertainty existed as to the law in California upon the subject at that time and prior to the decision of the United States Supreme Court in Burke v. Southern Pacific R. Co., supra, and the later decision of our Supreme Court in the case of Vore v. Ephraim, supra, which definitely settled the law in this state upon the subject considered.

The judgment is affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.



14 Cal.App.2d 391

PEOPLE v. RIVETT.

Cr. 1493.

District Court of Appeal, Third District, California.

June 1, 1936.

Criminal law ⇐1182

Where no brief was filed by accused who appealed from conviction of burglary and accused failed to appear at time case was called for hearing, judgment was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Lloyd Rivett was convicted of burglary in the first degree, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Humboldt county of the

crime of burglary of the first degree, a felony.

The transcript on appeal was filed in this court April 2, 1936. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on June 1, 1936. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.



14 Cal.App.2d 405

DeMARTINI v. McDONNELL.

McDONNELL v. DeMARTINI et al.

Civ. 5487.

District Court of Appeal, Third District, California.

June 2, 1936.

Evidence ⊂=359(4)

In action by woman for personal injuries including fractures of pelvis, admission of X-ray photograph of pelvis of normal woman about age, size, and figure of plaintiff *held* proper to enable physician to explain X-ray photograph of plaintiff already in evidence.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Aida R. DeMartini against B. McDonnell, wherein defendant filed a cross-complaint against plaintiff and another. Judgment for plaintiff, and defendant appeals.

Affirmed.

Neumiller & Ditz, and Dudley W. Sheppard, all of Stockton, for appellant.

Honey & Mayall, of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, while standing in a safety zone, in the city of Stockton, was struck by an automobile driven by defendant, inflicting serious injuries upon her, among others being fractures of the pelvis. An action to recover damages for these injuries thus inflicted resulted in a judgment in favor of plaintiff. From this judgment defendant appeals upon the ground that the court erred in admitting in evidence without proper foundation an X-ray film of a pelvis without establishing whether the same depicted a pelvis of a man, woman, or child, without showing that the pelvis of plaintiff was normal before the accident, and without showing that the X-ray of the pelvis of plaintiff and the X-ray offered for comparison were taken from the same angles or positions. We believe the contention of appellant is without merit.

Dr. Dozier, the attending physician for plaintiff, while on the witness stand, was describing the fractures found in the pelvis of plaintiff and then was presented to him an X-ray photograph of a pelvis, and the following took place: "Q. Now, Doctor, we are ready for those X-ray pictures. First, will you tell us what that is, Doctor? A. That is a picture of a pelvis, X-ray picture of a pelvis. Q. Would you state whether or not this is a normal pelvis? A. * * * I see no abnormalities in that pelvis; that is the shape and size and shows up very well for a demonstration, if you want it to. It is just a normal pelvis. We tried to get a woman approximately Miss DeMartini's size and build. It is a normal pelvis." Thereupon the attorney for the appellant interposed: "Objected to. It has no proper place here. Who has the X-rays of the pelvis of the lady in question? These X-ray negatives speak for themselves." Whether or not this objection was sufficient we need not here determine. It was however, overruled and the trial court properly admitted the exhibit for the purpose of illustration.

Whether or not the pelvis of the plaintiff was a normal pelvis prior to the accident was a matter for appellant to determine upon cross-examination. The use of skeletons, charts, and diagrams are common in trials to show the normal structure of the human body and we cannot see why the use of X-ray films of a normal bone arrangement may not be likewise used for illustration and comparison.

Respondent cites as authority for the introduction of this illustrative X-ray the

case of Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660, wherein plaintiff was allowed to introduce an X-ray picture of a normal foot for the purpose of comparison. Appellant attempts to weaken the effect of that case as applied to the present case, claiming that it does not appear in the cited case that there was a failure to lay a proper foundation, by that meaning that it should appear before the X-ray could be admitted for illustration and comparison that it was of a person of the same sex, of approximately the same age, weight, and size, and taken photographically in the same manner as the X-ray with which it was being compared. We have examined the transcript and record of the Bruce Case and find that the physician who examined Bruce about a year after the injuries were received was permitted to describe the injuries he found in the foot of Bruce and also permitted to produce X-rays he had taken of the foot. He also produced an X-ray of a normal foot for comparison. To this latter X-ray appellant objected on the ground it did not appear when it was taken; that it was not taken in the presence of appellant or its counsel; that it was not taken by the witness himself nor under his supervision. The objection was overruled, the trial judge, Hon. Curtis D. Wilbur, holding that, the doctor having stated that he recognized the film as a picture of a normal foot, and that he could explain the photograph of plaintiff's foot better by comparing it with a photograph of a foot he knew to be normal, it was proper to admit the same for that purpose. That is the situation that is here before us. The X-ray photograph was that of the pelvis of a normal woman about the age, size, and figure of plaintiff herein, and was properly admitted for the purpose of enabling the witness to explain to the jury an X-ray photograph already in evidence.

Respondent also cites the case of McGrath v. Fash, 244 Mass. 327, 139 N.E. 303, which also dealt with the introduction of an X-ray plate of a normal person to assist the jury in understanding the nature and extent of plaintiff's injuries.

Finding no error, the judgment should be affirmed and it is so ordered.

We concur: STEEL, J. pro tem.; THOMPSON, J.

14 Cal.App.2d 171

HUBBERT v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10880.

District Court of Appeal, Second District, Division 2, California.

May 19, 1936.

Rehearing Denied July 16, 1936.

1. Master and servant ⇐417(7)

Industrial Accident Commission is exclusive judge as to credibility of witnesses and weight of evidence, and no finding of fact supported by substantial evidence will be disturbed.

2. Master and servant ⇐414, 417(7)

Industrial Accident Commission is bound by rule that uncontradicted evidence, not inherently improbable, may not be arbitrarily rejected and there must be real and substantial conflict in evidence to render findings of commission immune to inquiry by reviewing court.

3. Master and servant ⇐361

Deceased who was employed to supervise waterproofing of concrete vat and assisted in manual labor at agreed wage of $7 per day, plus expenses and plus one-half of the profits *held* "employee" and not "partner" so that deceased's accidental death was compensable under Workmen's Compensation Act (St.1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Employee" and "Partner," see Words & Phrases.]

4. Insurance ⇐152(3)

Where compensation policy ran to deceased and another as individuals, death of deceased who was employee of the other *held* covered by policy even if terms of policy as to insurance carrier's liability for deceased's death were indefinite, in view of conclusive presumption under Workmen's Compensation Act that policy carried by employer contained all statutory provisions (St.1917, p. 831, as amended).

5. Master and servant ⇐361

Deceased who received wages for working irrespective of profits of business, even if he had partnership relationship with employer on job on which deceased was working when he received fatal injuries *held* "working member" of business and hence an "employee" within Workmen's Compensation Act (St.1931, p. 2068, § 8(b).

Proceeding under the Workmen's Compensation Act by Maude Hubbert for the death of Leo H. Hubbert, her husband, claimant, opposed by A. O. Miller, doing business as the A. O. Miller Company, employer, and the Travelers Insurance Company, insurer. To annul the findings of the Industrial Accident Commission of the state of California, the claimant brings writ of review.

Award vacated and annulled and matter remanded to the Industrial Accident Commission for further proceedings.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Commission.

GOULD, Justice pro tem.

In a proceeding before the Industrial Accident Commission, petitioner's claim for a death benefit based upon the death of her husband, Leo H. Hubbert, was denied. By writ of review, she seeks to annul the commission's findings and award.

A. O. Miller, doing business as A. O. Miller Company, entered into a written contract to waterproof a concrete vat for the Aztec Brewing Company of San Diego. By the undisputed testimony before the commission Hubbert was employed by Miller, under the latter's control, to supervise the job and assist in the manual labor, at an agreed price of $7 per day, plus expenses and plus one-half of the profits. All the positive evidence as to the nature of the relationship between Miller and decedent in so far as the Aztec job was concerned was that Hubbert was an employee. This was not contradicted by any direct evidence. There was a showing, however, that the two men had been engaged in partnership jobs at various times over a period of fifteen years, and that at one time they were associated together as the Angelus Waterproofing Company. The commission concluded that as to the Aztec job Hubbert was not an employee but a partner of Miller. This conclusion is attempted to be sustained on this application upon the argument that the commission could not give full credence to the testimony, on account of the relationship which was shown to exist between the two men, particularly their previous partnership enterprises.

[1-3] There is, of course, no dispute as to the elementary proposition that the commission is the exclusive judge as to the credibility of the witnesses and the weight of evidence before it, and no finding of fact will be disturbed if there is any substantial evidence to support it. But if there is no evidence to support a finding the proceeding becomes subject to the court's review. Market Street Railway Co. v. Industrial Accident Comm., 193 Cal. 178, 224 P. 95. It has been held that uncontradicted evidence, not inherently improbable, may not be arbitrarily rejected by the courts [Cowan v. Hill, 109 Cal.App. 656, 293 P. 871], and the Industrial Accident Commission is bound by the same rule, this court having specified that there must be a real and substantial conflict in the evidence to render the findings of the commission immune to inquiry by a reviewing court [Gamberg v. Industrial Accident Comm., 138 Cal.App. 424, 32 P.(2d) 413; Thoreau v. Industrial Accident Comm., 120 Cal.App. 67, 7 P.(2d) 767]. In the instant case, in the absence of any evidence to the contrary, and with all the direct evidence supporting the claim of petitioner that her deceased husband was an employee of Miller, we are constrained to hold that there is no evidence to support the finding, that the deceased was Miller's partner.

[4] The commission also concluded that deceased was not protected by the policy of insurance issued by respondent Travelers Insurance Company to cover the Aztec enterprise. The policy ran to Miller and Hubbert as individuals, not naming them as a copartnership. Hence, upon the theory that they were in fact copartners, the commission found that deceased was not protected. Holding as we do, that the commission was in error in its finding that Hubbert was not an employee of Miller, disposes of the contention that the insurance policy does not cover his case. It then follows that the insurance carrier was primarily liable to the employee to pay the compensation for which the employer is liable. And even if, as argued herein, the terms of the policy as to the insurance carrier's liability are indefinite, the Workmen's Compensation Act itself provides that it is a conclusive presumption that the policy contains all the provisions required by the act. United States F. & G. Co. v. Industrial Accident Comm., 195 Cal. 577, 234 P. 369.

[5] Moreover, even assuming that deceased had a certain partnership relation with Miller upon the Aztec job, he was at

least a "working member" of the partnership, and the Workmen's Compensation Act specifically provides (section 8, subd. (b), St. 1917, p. 835, as amended by St. 1931, p. 2068, that such working member, receiving wages irrespective of profits (as by the undisputed evidence was deceased's position in this case), "shall be deemed an employee within the meaning of this section."

The decision and award is vacated and annulled and the matter remanded to the commission for further proceedings not inconsistent with the views hereinabove expressed.

We concur: WOOD, J.; CRAIL, P. J.



14 Cal.App.2d 312

SMEDBERG v. BEVILOCKWAY.

Civ. 10173.

District Court of Appeal, First District, Division 2, California.

May 27, 1936.

1. Bankruptcy ⇐176

Word "debt," in statute declaring debtor insolvent when unable to pay his debts, means not merely contractual obligation, but any obligation to pay money, including obligation arising out of tort, so as to entitle bankruptcy trustee to recover from bankrupt's husband value of automobile given him by bankrupt, on ground that transfer thereof left her insolvent and without assets to pay judgment against her for personal injuries caused by her negligent operation of automobile (Civ.Code, §§ 1427, 1428, 1708, 3429, 3430, 3450).

[Ed. Note.—For other definitions of "Debt," see Words & Phrases.]

2. Bankruptcy ⇐305

Bankruptcy trustee, recovering judgment against bankrupt's husband for sum credited to him by automobile dealer for automobile, given him by bankrupt, when he purchased new automobile, *held* properly allowed interest on such sum from time of such credit.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Esther Smedberg, as trustee in bankruptcy of Margaret Bevilockway, against Arthur H. Bevilockway. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 7 Cal.App.(2d) 578, 46 P.(2d) 820.

Torregano & Stark, of San Francisco (August B. Rothschild, of San Francisco, of counsel), for appellant.

Marvin Sherwin, of Oakland, for respondent.

STURTEVANT, Justice.

The defendant Arthur H. Bevilockway and Margaret Bevilockway are husband and wife and were at the times hereinafter mentioned. For some time prior to April 26, 1932, Margaret Bevilockway was the owner of a Buick automobile. She carried indemnity insurance issued by the Independent Indemnity Company. By the terms of the policy that company agreed to pay not to exceed $20,000 for injury to one person and not exceeding $40,000 for injury to two persons. While driving her automobile on the 26th day of April, 1932, Mrs. Bevilockway collided with a motorcycle on which H. A. Brooks was riding and he suffered certain personal injuries. On the 6th day of July, 1932, he commenced an action in the superior court to recover damages, and thereafter, on the 25th day of January, 1933, a judgment was entered in favor of H. A. Brooks and against Margaret Bevilockway in the sum of $8,837.35. No part of that judgment has been paid. On the trial of that action Independence Indemnity Company came forward and conducted the trial for the insured, but subsequent to the entry of the judgment the insurance company was declared a bankrupt and went into liquidation.

In December, 1932, Margaret Bevilockway, as a gift and without any consideration, transferred her automobile to the defendant, who in turn transferred it to the Howard Automobile Company, which gave him credit for it in the sum of $700 and sold to the defendant a new automobile. When Mrs. Bevilockway transferred her car to her husband, the two spouses owned a house and lot valued at $4,500 and which was mortgaged to the Equitable Life In-

surance Company for $3,000. Mrs. Bevilockway was the owner of certain lots in San Mateo county of the value of $20. She was also the owner of certain personal property which was exempt and which she claimed to be exempt in the bankruptcy proceedings. The evidence discloses that the claim against the insurance company had been presented, but the record does not disclose what value, if any, it had. The record does not disclose that any sum whatsoever was due or owing by Mrs. Bevilockway at the time she transferred her automobile excepting the claim of H. A. Brooks as hereinabove set forth.

On June 8, 1933, Margaret Bevilockway filed a voluntary petition in bankruptcy and later was declared a bankrupt and still later this plaintiff was appointed trustee in bankruptcy and commenced this action to recover $700 alleged to be the value of the automobile so given to her husband. In the plaintiff's complaint it was alleged that "Margaret Bevilockway by reason of said transfer became and ever since has been insolvent and without any assets with which to pay said judgment or any part thereof." On the trial the court made findings in favor of the plaintiff and against the defendant. The defendant has appealed, and at this time he claims there was no evidence to support the finding on the allegation just quoted.

[1] The defendant quotes section 3450 of the Civil Code, which provides as follows: "A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means, as they become due." He then asserts that: "A debt is but one type of obligation or liability. It is distinguished from other types of obligations in that it arises out of a *contract*. To constitute a debt it is not necessary that the amount be determined but the amount must be determinable without intervention of a court or jury. An obligation arising out of tort on the contrary cannot be fixed in amount except by action of a court or jury." The defendant cites several authorities and he could cite others that the word "debt" as it occurs in some statutes has the meaning for which he contends, however, it will not be disputed that the word "debt" has different meanings in different statutes. The instant case rests on the provisions of title 1, part 2, division 4, of the Civil Code, §§ 3429 to 3433, inclusive. Section 3429 provides: "A debtor, within the meaning of this title, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent." Section 3430 provides: "A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money." Section 1427 of the Civil Code provides: "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." Section 1428 provides: "An obligation arises either from: (1) The contract of the parties; or (2) The operation of law. An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding." Section 1708 of the Civil Code provides: "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." An examination of the facts above recited discloses that Mrs. Bevilockway was under the obligation not to injure H. A. Brooks, that she was charged with the violation of said obligation, that the charge ripened into a judgment, and that from the date of the accident until the date she filed her petition in bankruptcy the burdens of that obligation continued. It further appears that the said burden is designated by our statute as an "obligation" and that the same designation is continued through the several provisions of the Civil Code including title 1 under which the instant case is being maintained. Under these circumstances we think that the word "debt," as used in section 3450 of the Civil Code, has a broader meaning than as claimed by the defendant.

In Melvin v. State, 121 Cal. 16, 53 P. 416, 419, the court considered the meaning of the word "debt" as used in various statutes and particularly as used in title 1, part 2, division 4, of the Civil Code. The court then said: "In all these provisions we think it plain that the construction to be put on the statute is, not that the spouses were simply to enjoy immunity from such contracts for sums of money due by certain and express agreement, which fixed the amount due, independent of extrinsic circumstances,—from such contracts as would have supported an action of debt at common law,—but rather that the word 'debt' is to be used in its modern legal significance, as including any sort of obligation to pay money, and that it signifies what either of the spouses owes."

In Chalmers v. Sheehy, 132 Cal. 459, at page 465, 64 P. 709, 711, 84 Am.St.Rep. 62, the court said: "Mr. Freeman says 'that one having a claim for a tort is a creditor before the commencement of an action thereon as well as after, and as such creditor is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of his action.' * * * The principle has been applied to other forms of torts or causes of action arising ex delicto, and it is held that the injured party becomes a creditor when the cause of action accrues." In the light of the foregoing authorities the finding attacked was supported by the evidence.

[2] The defendant complains because the trial court allowed interest on the $700 from the time it was credited to the defendant. We find no merit in the contention. The point has been directly adjudicated. Wright v. Salzberger, 121 Cal.App. 639, 646, 9 P.(2d) 860.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



14 Cal.App.2d 303

Ex parte STEIN.

Cr. 1500.

District Court of Appeal, Third District, California.

May 26, 1936.

1. Receivers ⊂=36

Where complaint fails by its allegations to show required conditions have been complied with, order for appointment of receiver is void for all purposes (Code Civ.Proc. § 564).

2. Receivers ⊂=3

Person appointed as receiver by superior court with power to sell goods of alleged debtor at public auction or private sale in creditor's suit therefor, on ground defendant's indebtedness to creditor and others could be satisfied in this manner, could be convicted of conducting business of auctioneer without a license, since superior court had no jurisdiction, in action brought for mere appointment of receiver, to appoint receiver so as to authorize him to make public sale without license (Pol.Code, § 3286; Code Civ.Proc. § 564).

Original proceeding in the matter of the application of Morris Stein for a writ of habeas corpus.

Writ discharged and petitioner remanded.

William Klein and Reed M. Clarke, both of San Francisco, for petitioner.

R. R. Fowler, City Atty., and A. J. Carlson, both of Modesto, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The petitioner was convicted in the police court of the city of Modesto, of conducting, carrying on, and managing the business of auctioneer without paying the license fee therefor, a misdemeanor, and was sentenced to pay a fine, and, in default thereof, to be imprisoned in the county jail of the county of Stanislaus until such fine was paid. The fine not being paid, defendant was committed to jail and now seeks his release by this writ of habeas corpus.

It is the contention of petitioner that he was appointed receiver in a certain action pending in the superior court of the county of Stanislaus, and that such order appointing gave him the power to conduct a public sale. Section 3286 of the Political Code provides: "No auctioneers' license is required for the selling of any goods at public sale belonging to the United States, or to this state, or for the sale of property by virtue of any process issued by any state or federal court," and it is by virtue of that provision petitioner herein justifies his action in conducting such a sale without procuring a city license.

An examination of the record shows that a complaint was filed in the superior court entitled "Harry Lipman, plaintiff, v. Charles Daunt and Nellie Daunt, defendants," wherein it was set forth that defendants therein were indebted to plaintiff and certain other creditors in a sum exceeding $500; that said indebtedness was due and unpaid and it was desirable and necessary that the stock in trade of said defendants be subjected to the payment of said claims.

It was further alleged in the complaint that, if a receiver were appointed with authority to carry on the business and

dispose of the stock of merchandise, it would be possible to obtain funds sufficient to pay off said indebtedness, and prayed for the appointment of such receiver. Upon this petition or complaint an order was made appointing petitioner herein receiver, and authorized him to take possession of the stock of goods of Daunt and sell the same at public auction or private sale, and in the course of said sale to supply other articles which might be necessary in order to carry on the sale effectively and to realize the largest possible sum therefor.

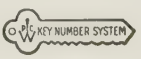
[1, 2] It does not require the citation of extended authority to establish that the trial court was without power to make such order appointing petitioner receiver. The appointment of a receiver is an equitable remedy, and there is no such thing as an action brought for the mere appointment of a receiver. Section 564 of the Code of Civil Procedure prescribes when a receiver may be appointed, but does not purport to create rights where there was no prior right of action but merely provides a remedy for the existing conditions.

The courts have on numerous occasions refused to sanction the procedure here attempted. In Murray v. Superior Court, 129 Cal. 628, 62 P. 191, an order was made appointing a receiver for an insolvent corporation. The Supreme Court set the order aside, pointing out the superior court had no jurisdiction to grant an application on the facts set forth in the complaint. The corporation had not been dissolved, had not sought to be declared insolvent, nor have its assets distributed among its members. Neither did the complaint seek to remove the directors or contain any allegations of fraud. The object and purpose of the action was to take the business and assets from the corporation and turn them over to a stranger. The court did not possess the power to thus take the property and deliver it to a third person. Where a complaint fails by its allegations to show that the conditions required by law have been complied with, an order for the appointment of a receiver is void for all purposes. The following cases so hold: McCutcheon v. Superior Court, 134 Cal.App. 5, 24 P.(2d) 911; Ellis v. Superior Court, 138 Cal. App. 552, 33 P.(2d) 60; Bibby v. Dieter, 15 Cal.App. 45, 113 P. 874 (holding that such appointment may be attacked collaterally); Col Co. v. Superior Court, 196 Cal. 604, 606, 238 P. 926; First National Bank v. Superior Court, 12 Cal.App. 335, 107 P. 322.

The allegations in the complaint in the instant case fail to state facts that would confer jurisdiction upon the superior court to appoint a receiver, and the court was without power under such circumstances to make the order of appointment.

The writ is discharged and the petitioner remanded.

We concur: PLUMMER, J.; THOMPSON, J.



14 Cal.App.2d 384

KRAMER v. SLOVENIAN LADIES SOC. OF ST. MARY.

Civ. 10077.

District Court of Appeal, First District, Division 2, California.

June 1, 1936.

1. Beneficial associations ⇐10(4)

Benefit society *held* authorized to expel member who refused to pay fines imposed for misconduct at society banquet, which fines were assessed at regular meeting after discussion in which member in effect admitted her guilt, as against contention that procedure leading up to expulsion was illegal and contrary to by-laws, where by-laws did not expressly cover situation and provided that matters not noted in rules should be determined at regular meetings.

2. Beneficial associations ⇐13(2)

Where by-laws of benefit society provided for fining members found guilty of improper conduct during entertainments, provided for right to fine members 25 cents to $5 for transgression of rules, and provided that member who attempted to injure sister member, physically or mentally, should pay fine of $5, society *held* authorized to fine member who broke dishes and insulted officers and members at society banquet $4.65 for breakage, $5 for insulting officers, and $5 for insulting members, as against contention that fines could not exceed total of $5.

3. Beneficial associations ⇐10(4)

Where member of benefit society in effect admitted her guilt of charges subjecting her to fines and refused to pay fines, member could be expelled without proving charges or appointing special committee to investigate charges, although by-laws provided that charges against accused member must be proved before expulsion, and that all accusations should be referred to special committee.

4. Beneficial associations ⇐10(6)

In reviewing disciplinary proceedings by benefit society, court will disregard technicalities, unless accused has been denied full opportunity to defend and society has not exercised good faith.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Petition by Bara Kramer for a writ of mandate to compel the Slovenian Ladies Society of St. Mary to reinstate petitioner as a member. From a judgment denying the writ, petitioner appeals.

Affirmed.

Manuel F. Sylva, of San Francisco, for appellant.

Otto G. Kuklinski, of San Francisco, for respondent.

SPENCE, Justice.

Petitioner filed her petition in the superior court seeking a writ of mandate to compel the defendant society to reinstate her as a member. From a judgment denying the writ, petitioner appeals.

The defendant society is a benefit society paying certain sick benefits and funeral benefits. Petitioner had been a member thereof for 22 years, and during that period had paid dues in the sum of approximately $288, and had received $90 in benefits. On November 25, 1933, the defendant society held a banquet at which about 200 members attended. Cocktails, wine, and beer were served. Petitioner became intoxicated, and was finally removed from the hall by a police officer. While at the banquet, petitioner had broken dishes and other property of the value of $4.65, and had used vile language calling the officers and other members of the society certain names in the Slovenian language; said names being the equivalent of "chippies and whores."

Thereafter, petitioner was present at a regular meeting of the society on December 28, 1933. At said meeting an anonymous letter was received accusing petitioner of various acts of misconduct at said banquet. The reading of said letter resulted in a general discussion of the charges made against petitioner. Petitioner entered into the discussion, stating that she did get intoxicated at the banquet, but that she had no recollection of what had happened. She further stated that a friend of hers had told her that she had done the things to which reference had been made. She offered to apologize and to pay for the breakage. Upon motion the society decided to take action in the matter, and requested petitioner to leave the meeting. Petitioner temporarily left the meeting. It was then determined that petitioner "must pay $4.65 for breakage, $5.00 for insulting the officers and $5.00 for insulting its members, a total of $14.65 and if the fine be not paid within thirty days, that petitioner be expelled." Petitioner was then requested to return to the meeting, and, upon doing so, she was informed of the action which had been taken. Thereupon petitioner repeated that she was willing to apologize and to pay the sum of $4.65, "but that she absolutely refused to pay the $5.00 fine for insulting the officers and the $5.00 fine for insulting its members at said banquet." Petitioner failed to pay, and after the lapse of about three months, she was expelled because of such failure.

[1] Petitioner contends that the procedure leading up to her expulsion was illegal and irregular and contrary to the by-laws of the defendant society. She therefore claims that she was entitled to the issuance of a writ of mandate to compel her reinstatement. We find no merit in this contention. While the proceedings were informal, it appears that petitioner had ample opportunity to defend herself against the accusations made, but that she did not see fit to make any defense. She admitted in effect that the accusations were true and asked no further opportunity to defend against any of the several accusations.

Turning to the by-laws of the society, we find that the right "to impose fines and expel members" was expressly reserved. It was there provided that: "During entertainments officers and members shall con-

duct themselves courteously. Members found guilty of improper conduct shall be subject to fine." It was also provided: "The society shall have the right to fine its members for transgression of the laws and the rules from 25c to $5.00 with the extreme penalty of expulsion from the society." Another provision read: "A member who attempts to injure a sister member either physically or mentally shall pay a fine of $5.00. If such fine shall not be paid within 30 days she shall be excluded. Repeated violations of this shall result in expulsion without exception."

Petitioner cites certain sections in the by-laws regarding procedure. One section read: "In all cases, charges against an accused member must be proven before said member shall be expelled." Another read: "An accused member shall have the right to defend herself or be defended by another member; she must be absent from the meeting hall while the deciding vote is being taken." Another read: "All accusations shall be referred to a special committee appointed by the Society, consisting of at least seven members. The committee shall investigate all matters and report as soon as possible to the Society, which shall sanction or reject the verdict." In the same article with the two last-mentioned sections, which article is entitled "General Regulations," is found another section reading: "Any matters which are not noted in these rules or regulations shall be determined at the regular meetings of the society."

As we view the situation, the society had before it a case in which the several violations of the laws of the society had been committed by petitioner in the presence of the members at one of its functions. Petitioner was present at the meeting of the society on December 28, 1933, heard the accusations which were made against her, and in effect entered a plea of guilty to said accusations. There were no by-laws of the society expressly covering such a situation, and we believe that under the last-mentioned section of its by-laws, the society had the power to proceed to determine the penalties to be imposed. It did so, and there is nothing to show that it did not act fairly and in good faith. It had the power to expel forthwith, but it decided merely to require petitioner to pay for the breakage and to pay a fine of $5 for insulting the officers and a fine of $5 for insulting the members; the total sum of $14.65 to be paid within 30 days. Thereafter the action expelling petitioner was not taken for approximately three months and then only upon the absolute refusal of petitioner to make the payment required.

[2, 3] While petitioner claims certain irregularities in the procedure, it is quite apparent that her main objection then, as well as now, was her objection to the imposition of any fine over and above the amount of $4.65 to cover the breakage. There was no express requirement in the by-laws for the filing of any formal accusation or the serving of any citation on petitioner. It was not necessary to prove the charges against petitioner or to appoint a special committee to investigate said charges when the truth of such charges was admitted and the adoption of such procedure would have been a mere idle act. Petitioner was not denied the opportunity to defend herself, but conceded then and concedes now that she had no defense. The society had the power to impose fines totally in excess of $5 when the charges against petitioner involved several violations of the laws of the society and petitioner was not fined more than $5 for any one violation.

[4] At best, petitioner's claims of irregularities in the procedure are technical and the language of the court in McConville v. Milk Wagon Drivers' Union, 106 Cal.App. 696, 289 P. 852, 854, may well be applied here. It was there said: "Moreover, as held in the cases hereinafter cited, associations of the kind here involved are not bound to use the strict regularity of legal proceedings, and in reviewing the proceedings taken by such organization relating to the enforcement of its disciplinary laws, the courts will disregard technicalities and not interfere, because of a departure from form, unless it appears that the accused has been denied a full opportunity to defend himself and the organization has not exercised its powers fairly and in good faith." There was no showing in the present case that petitioner did not have a full opportunity to defend herself, or that the society did not act fairly and in good faith.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

14 Cal.App.2d 149

BUTCHER v. THORNHILL et al.

Civ. 1751.

District Court of Appeal, Fourth District, California.

May 18, 1936.

1. Trial ⇐295(9)

Instruction that jurors are not bound to decide on which side preponderance of evidence lies in conformity to any number of witnesses' declarations not producing conviction in jurors' minds *held* not erroneous, in view of instructions stressing preponderance of evidence as evidence having greatest weight; instructions as whole warranting construction as meaning that jury must be satisfied that greater weight of evidence is on side of party having burden of proof.

2. Automobiles ⇐246(48)

Instruction that one's failure to see what he would have seen by exercise of ordinary care warrants conclusion of negligence *held* not erroneous, where record in action for injuries to occupant of truck, struck in rear by motor stage, disclosed sufficient facts to warrant jury in believing that stage driver should have seen truck in exercise of ordinary care.

3. Trial ⇐260(1)

Refusal of instruction, purporting to cover matter amply covered by other instructions, was not error.

4. Automobiles ⇐246(48)

Instruction that statute provides that motor vehicle driver shall not follow another vehicle more closely than is reasonable and prudent was proper, where evidence in action for injuries to occupant of truck, struck in rear by motor stage, clearly warranted inference that stage driver was following truck more closely than was reasonable and prudent (St. 1929, p. 541, § 127).

5. Automobiles ⇐245(81)

Disputed question whether truck, struck in rear by motor stage at night, was unlighted, was for jury, in action for injuries to occupant of truck.

6. Automobiles ⇐168(4), 170(1, 4, 5)

Motor stage driver was bound to anticipate that he might meet other vehicles anywhere on highway, keep proper lookout for them, keep his machine under such control as would enable him to avoid collision with other vehicles, driven with proper care and caution, and slow up or stop, if situation required.

7. Automobiles ⇐150, 168(1)

Motor vehicle operator must keep his machine always under control, so as to avoid collision with others using highway with ordinary care and prudence, and has no right to assume that road is clear, but must be vigilant and anticipate presence of others under all circumstances and at all times.

8. Automobiles ⇐146

Automobile drivers have no special right or privilege in use or enjoyment of public highways, and law imposes on them degree of care commensurate with peculiar hazards attending operation of such vehicles.

9. Trial ⇐267(3)

Giving of requested instruction, as modified merely by change from specific to general reference to facts covered by abstract propositions of law in instruction, *held* not prejudicial error; meaning of instruction not being changed.

10. Trial ⇐243

Instruction that motor vehicle driver had right to presume that persons using highway were obeying law, that every person has right to assume that every other person will perform his duty and obey law, and that it is not negligence for one to assume that he is not exposed to danger which can come only from violation of law or duty by another, in absence of reasonable ground to think otherwise, *held* not erroneous as in conflict with instruction that motor vehicle operator has no right to assume that road is clear, but must anticipate presence of others under all circumstances and at all times.

11. Automobiles ⇐168(1), 172(7)

Motor stage driver had right to assume that he was not exposed to danger which could come only from another's violation of law or duty, such as driving of vehicle without taillights, but was required to keep his machine under control, so as to avoid collision with other vehicles, driven with ordinary care and caution, though without lighted taillights.

12. Trial ⇐260(8)

Instruction that motor stage driver owed no duty to anticipate presence of vehicle without lighted taillight on highway in front of him, but was entitled to assume opposite, *held*

properly refused, in view of other instructions covering essential matters therein.

13. Automobiles ⇐172(7)

Motor vehicle driver must be vigilant and anticipate presence on highway of other vehicles, though without taillights burning.

14. Automobiles ⇐246(60)

Instruction, requested by defendant in action for injuries to occupant of truck, struck in rear by defendant's motor stage, that it is presumption of law, according to which jury is bound to find, unless controverted by other evidence, that stage driver was operating bus with ordinary care and skill at careful and prudent speed, *held* properly refused.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Myrtle E. Butcher, an incompetent person, by James R. Wilson, guardian of her estate and person, against G. W. Thornhill and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, and Borton, Petrini & Conron, of Bakersfield, for appellants.

Ben W. McLendon and Joseph A. Ball, both of Long Beach, for respondent.

MUNDO, Justice pro tem.

On October 14, 1934, at about 12:50 a. m. on a straight portion of highway 99 at a point about 18 to 20 miles north of Bakersfield, Cal., the plaintiff, Myrtle E. Butcher, was riding with other persons in a Ford truck being driven in a northerly direction at a speed of approximately 20 to 25 miles per hour. The pavement was dry; there was no fog or rain. The Ford truck was at all times near the easterly edge of the pavement. It was equipped with two front headlights, a taillight (which may or may not have been lighted), and a side mirror to give the driver a view from the rear. A canvas cover was stretched over the top of the bed of the truck on wagon bows. This cover and bedding material in the back of the truck, according to some witnesses, obscured the taillight. The defendant Gerald W. Thornhill was driving a motor stage for the defendant Pacific Greyhound Lines, Inc., north on said highway and to the rear of the Ford truck. When the stage was, according to evidence adduced by plaintiff, approximately 125 feet from the point of collision, Thornhill had edged the stage over to the left, or westerly, side of the highway as if to pass the Ford truck on its left. A car southbound on the westerly side of the highway was approaching the Ford truck and the stage at a speed of 40 to 45 miles per hour. In order to avoid a collision with the southbound car, the stage driver cut back to the right, or east, side of the highway, striking the left rear of the Ford truck with the right portion of the bumper and the right front fender of the stage, overturning the Ford truck. The left front fender and bumper of the stage also collided with the left side of the southbound car on the left, or westerly, half of the highway, throwing the southbound car into a ditch west of the highway.

The cause was submitted to a jury, which returned a verdict in favor of the plaintiff in the sum of $15,000. Upon this appeal by the defendants it is contended that the trial court committed prejudicial error in giving certain instructions and in refusing others requested by the defendants.

[1] The first instruction complained of is: "The expression 'preponderance of evidence', as used in these instructions, does not necessarily mean the evidence given by the greatest number of witnesses, but is used to denote that evidence that has the greatest weight in convincing the minds and intelligence of the jurors. And in determining upon which side lies the preponderance of evidence in this case, you are instructed that you are not bound to decide in conformity to the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds. The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact except perjury and treason."

Appellants cite the case of People v. Miller, 171 Cal. 649, 154 P. 468, 469, as authority for their contention that the instruction tells the jury that in determining the preponderance of evidence on the question of whether or not the stage driver was guilty of negligence they are not

bound to decide in conformity to the declarations of any number of witnesses unless that number of witnesses produces conviction in the minds of the jurors.

It is claimed that in civil cases the issue does not have to be established to the point where the evidence produces conviction in the minds of the jurors; it is only necessary that the evidence on the one side outweigh or preponderate over the evidence opposed to it. In other words, there may be a preponderance of evidence and yet the jury be not satisfied and convinced in their minds that a party was or was not negligent. "It is one thing," they argue, "to say that the plaintiff must produce evidence which is more convincing than that of the defendant but it is another thing to say that the defendant must produce some evidence for the purpose of actually convincing the mind and intelligence of the jurors."

In Lawrence v. Goodwill, 44 Cal.App. 440, 186 P. 781, 785, the following instruction was given: "By the preponderance of evidence is meant greater and superior weight of evidence which satisfies your mind. By a preponderance of evidence is not necessarily meant a greater number of witnesses, but if the plaintiff has proven the material allegations of his complaint by such evidence as satisfies and produces conviction in the minds of the jury, then he may be said to have proven his case by a preponderance of evidence. When you are satisfied that the truth lies with a single witness or with any number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds."

It was there contended that the instruction was very much similar to an instruction which was given in People v. Miller, supra. The instruction in the Miller Case defined preponderance of evidence as follows: "Preponderance of the evidence means that degree of evidence which proves to a moral certainty or in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds." The court in the Lawrence Case held the two instructions to be dissimilar, yet, while both incorrectly stated the rule, the instruction in the Lawrence Case was much less vulnerable than the one considered and condemned in the Miller Case. Justice Hart, who wrote the opinion, says, after showing the difference between the two cases: "But in this case the instruction does say that by 'preponderance of evidence' is meant 'the greater and superior weight of evidence,' and that superior or greater weight is not to be tested or determined by the fact that the greater number of witnesses may be found on one side, but such weight of the evidence as 'satisfies your minds.' In other words, that language of the instruction might justly be construed to mean (and we cannot say that the jury did not so understand it, since there was not given, as was necessarily done in the Miller Case, an instruction on the degree of proof essential to a conviction in a criminal case) that the jury must be satisfied of the conviction from the evidence, not that the truth was on the side of the party holding the laboring oar, but that the greater weight of the evidence was on his side. Besides the foregoing observations relative to the point in hand, we may also consider that, at the request of the plaintiff, the court instructed the jury upon the degree of the burden resting upon him as follows: 'In civil cases the affirmative of the issue must be proven; the affirmative being upon the plaintiff, upon him therefore rests the burden of proof and he must establish his case by a preponderance of the evidence; that is to say, by the greater weight of the evidence.' This is a correct abstract statement of the rule, and, considered with that portion of the criticized instruction that the weight of the evidence is not alone or necessarily determinable according to the greater number of witnesses on the one side or the other, it must be said that the jury, assuming, as we must, that they were men of ordinarily fair intelligence, must thus have been made to understand that the rule as to the preponderance of the evidence as applied to civil cases does not measure up to the greater requirements of the rule in criminal cases as to the degree of proof which will alone justify a conviction. Thus it will readily be perceived that the situation here with respect to the instruction now in question is altogether different from that which existed in the case of People v. Miller, supra. Furthermore, while it might be that a verdict for the plaintiff might be upheld on appeal under

the rule by which the appellate courts are always to be guided in considering questions of fact, still the evidence appears clearly to justify the verdict here. There is nothing in the character of the evidence on its face which justifies us in holding otherwise. Hence we cannot say that, even with the imperfections of the criticised instruction, the plaintiff was prejudiced by it. In fact, we find a situation here where we are precluded from declaring, after a full and careful review of the entire record, including the evidence, that a miscarriage of justice resulted from the giving of the instruction complained of. Const. art. 6, § 4½." We have quoted at length from the opinion of Justice Hart in the Lawrence Case for the reason that his opinion is particularly applicable to the facts of the present case. The instruction here complained of falls short of stating the rule correctly, but, in the light of other instructions which were given by the court and which stressed the preponderance of the evidence as evidence "having the greatest weight," we say in the language of Justice Hart that the instructions considered as a whole "might justly be construed to mean * * * that the jury must be satisfied of the conviction from the evidence, not that the truth was on the side of the party holding the laboring oar, but that the greater weight of the evidence was on his side."

[2, 3] Appellants next complain that the court instructed the jury: "If one fails to see what he would have seen by the exercise of ordinary care, a conclusion of negligence is warranted." They say that, if the plaintiff was entitled to this instruction, the court should also have given an instruction which would tell the jury specifically that it could not find that the defendant Thornhill was guilty of negligence because he failed to see the truck in time to avoid a collision with it unless the plaintiff produced evidence showing that an ordinarily prudent person situated in the same position as Thornhill was situated could and would have seen the vehicle upon which the plaintiff was riding in sufficient time to have avoided a collision with it. Such an instruction was offered, but the court refused to give it.

The facts disclosed by the record are sufficient upon which the jury could have a belief that in the exercise of ordinary care the defendant Thornhill should have seen the truck. The court, therefore, did not err in giving such an instruction. The instruction which was refused pertains to the plaintiff's burden of proving negligence on the part of the defendant Thornhill. Not only was this proffered instruction improper, but the matter it purported to cover was amply covered by other instructions, and therefore the court's refusal to give it was not error.

[4] Instruction No. 10, given at the request of the plaintiff, is criticized as being unwarranted by the evidence. The instruction is: "Subdivision (a) of section 127, California Vehicle Act (St.1923, p. 558, § 127, as amended by St.1929, p. 541), provides that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicle and the traffic upon and the condition of the highway."

It was a proper instruction, for the evidence clearly entitled the jury to infer that the driver of the stage was following the truck more closely than was reasonable and prudent.

[5-7] Instruction No. 13, given at the request of the plaintiff, is as follows: "You are instructed that it is part of the duty of the operator of a motor vehicle to keep his or her machine always under control so as to avoid collision with other persons using the highway with ordinary care and prudence. The operator would have no right to assume that the road is clear but under all circumstances and at all times must be vigilant and anticipate and expect the presence of others."

Appellants contend that this instruction is erroneous because it makes the driver of a motor vehicle absolutely liable in the event he does not have his machine under such control as will enable him to avoid a collision with another vehicle on the highway. They also complain that the instruction practically deprived them of their entire defense of no negligence on the part of the driver. They say that the court in effect told the jury that Thornhill would have no right to assume that the road was clear, but under all circumstances it was the duty of Thornhill to anticipate and expect the presence of others on the highway, even the presence of vehicles without lights.

In criticizing this instruction appellants assume that it was an admitted fact that the Ford truck was unlighted. That ques-

tion, however, was disputed, and it was a matter for the jury to decide. The instruction specifically refers to "other persons using the highway with ordinary care and prudence." Under the evidence the jury had the right to assume that the Ford truck was being driven with ordinary care. The driver of the stage was bound to anticipate that he may meet other vehicles at any point on the highway, and it was incumbent upon him, in order to avoid a charge of negligence, to keep a proper lookout for them and to keep his machine under such control as would enable him to avoid a collision with other vehicles using proper care and caution, and if the situation requires, he must slow up and stop. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125. In giving this instruction the court stated a recognized principle of law, and it left to the jury the determination of the question of fact whether the conduct of the parties fell within the contemplation of such principle.

It was said in Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471, in which an instruction similar to the one here was given, that such an instruction demands the proper attitude of an operator of a motor vehicle.

[8] "It suggests a fundamental principle that must be observed in order to avoid illegal injury to another. The basis of the instruction is that in the enjoyment of a common right the participant must exercise constant care that the correlative right of others may not be unnecessarily impaired or destroyed. The highways are, of course, established and maintained at public expense for the use and benefit, for lawful purposes, of all the citizens, and it cannot be claimed that the drivers of automobiles have any special right or privilege in the use or enjoyment thereof. The law indeed imposes upon them a degree of care commensurate with the peculiar hazard attending the operation of these modern vehicles." Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Hine v. Leppard, 5 Cal. App.(2d) 154, 42 P.(2d) 389, 43 P.(2d) 595.

[9] Appellants offered instruction No. 14. After certain modifications by the court, it was given to the jury as follows: "A person driving a motor vehicle upon a public highway and in the exercise of ordinary care had the right to presume that those using the highway were obeying the law. The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person."

Appellants insist that the modification of their instruction by the court was prejudicial error and that the giving of the instruction as modified results in a conflict between instructions 13 and 14.

All that the modification amounted to was a change from specific to general reference to facts which were covered by the abstract propositions of law contained in the instruction, and it cannot be said that the meaning of the instruction was changed. The court instructed the jury practically as requested by appellants.

[10, 11] The conflict, according to appellants, is in the court "stating in one breath that the driver of the stage had a right to presume that every other person will perform his duty and obey the law and that in the absence of reasonable grounds to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person and immediately prior thereto the court told the jury that under no circumstances would Thornhill have the right to assume that there were no vehicles on the road ahead of him even though there were no tail lights on the vehicles."

Both instructions were warranted by the evidence and they are not in conflict. Thornhill had a right to assume that he was not exposed to danger which could only come from a violation of law or duty such as the driving of a vehicle without a taillight, yet, on the other hand, he was required to keep his car under control so as to avoid collision with others using the highway with ordinary care and caution. It is possible that even in the exercise of usual and ordinary care, and without a violation of law or duty, a taillight may become extinguished. If the jury believed the testimony of Edith Butcher, Simon Wilson, and James Wilson that they had heard the horn of the stage shortly before the collision, and

had believed the testimony of Melville and Meiss that the stage pulled out to go around the Ford truck, and had believed the testimony of the driver of the car in which plaintiff was riding, Simon Wilson, and his brother James, to the effect that the taillight was burning when they last looked at it around two or three miles out of Bakersfield, the jury might have concluded that it was burning at the time of the accident, or that the driver of the Ford was not guilty of negligence even though the light was out when the collision occurred; and at the same time the jury could have concluded that the driver of the stage did not operate the stage with ordinary care and caution. It was said in Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, 677, that "it cannot be the intention of the law that a watchman must be maintained over the rear light to observe whether it is constantly burning. * * * If one drives a motor vehicle in the night time when he knows, or in the exercise of ordinary care ought to know, that the tail light is not burning, he is guilty of negligence. While ignorance of the law is no excuse, ignorance of the fact, where ordinary care has been exercised, is a sufficient excuse." Nelson v. Signal Oil & Gas Co. (Cal.App.) 51 P.(2d) 885; Hine v. Leppard, supra.

[12, 13] Appellants next complain that the court refused to give their proposed instructions, which were to the effect that there was no duty on the part of Thornhill to anticipate that there would be on the highway in front of him any vehicle without a lighted taillight as required by law, and that he was entitled to assume the opposite to be true. These instructions were properly refused, since the essential matters were covered by other instructions. At any event, it was one thing to say that a driver is not required to anticipate that others will drive on the highway "in violation of law or duty," but to say that a driver is not required to be vigilant and is not required to anticipate and expect the presence of others on the highway, who, though exercising ordinary care, may not have a taillight burning, would be an unreasonable extension of the rule.

[14] Finally, appellants complain because the court refused to give the following instruction: "I instruct you that it is a presumption of law that the defendant Thornhill was operating the Pacific Greyhound bus at the time and place involved with ordinary care and skill and at a careful and prudent speed, not greater than was reasonable and proper, having due regard to the traffic, surface and width of the highway, and that he was not operating the bus at such a speed or in such a manner as to endanger the life, limb or property of plaintiffs or any person, and that he was operating the bus in a lawful manner and unless this presumption has been controverted by other evidence, direct or indirect, you are bound to find according to the presumption."

A similar instruction was refused in Paulsen v. McDuffie (Cal.Sup.) 47 P.(2d) 709, 714, and we believe it was properly refused here. The circumstances are practically identical with respect to reasons for not giving such an instruction. The court in the Paulsen Case says: "In the present action plaintiff was not only alive but was called as a witness and testified fully as to all of his actions just prior to and at the time of his injury. Other witnesses observed plaintiff and gave in detail a complete account of the whole affair which resulted in plaintiff's injury. It is difficult to see how there was any place for a presumption as to the plaintiff's conduct. What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject. That instruction had no place in this case and should not have been given."

On the whole, the instructions were full and fair and were just to both sides.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

14 Cal.App.2d 284

In re DUFFILL'S ESTATE.

DUFFILL v. DUFFILL et al.

Civ. 11002.

District Court of Appeal, Second District, Division 2, California.

May 26, 1936.

Rehearing Denied June 15, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Wills ⇐386

Whether presumption of revocation of will existing where will, which was known to have been in existence and in testator's possession at time prior to testator's death, could not be found after his death was overcome by other evidence *held* for trial court as finder of facts.

2. Appeal and error ⇐1012(1)

It is province of fact finder to determine where preponderance of evidence lies, and reviewing court will not substitute its opinion for that of trial court as to weight of evidence where there is any substantial evidence to sustain trial court's finding.

3. Wills ⇐302(8)

Where proponent of purported will which was allegedly lost or destroyed produced no witnesses who had actual knowledge of will's contents, will *held* not entitled to probate (Probate Code, § 350).

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Application by Martha J. Duffill for the probate of the alleged lost and destroyed will of Albert Duffill, deceased, opposed by Mary Wood Duffill and Phyllis Alberta Duffill, a minor, by W. R. Chamberlin, her guardian ad litem. From an order denying probate, the proponent appeals.

Affirmed.

O. H. Speciale, of San Jose, for appellant.

Vance Booker and Musick & Burrell, all of Los Angeles (Howard Burrell, Frank H. Ferguson, both of Los Angeles, of counsel), for respondent Mary Wood Duffill.

Esmond Schapiro, of San Francisco, for respondent Phyllis Alberta Duffill.

CRAIL, Presiding Justice.

This is an appeal from an order denying probate of an alleged lost and destroyed will. Appellant, the proponent of the will, presents several questions which are framed in language satisfactory to herself and the obvious answers to which are in her favor. But the fact remains that the case is almost exactly on all fours with the case of In re Estate of Ross, 199 Cal. 641, 250 P. 676, and is clearly governed by the law of that case. See, also, In re Estate of Smith, 140 Cal.App. 508, 35 P.(2d) 335; In re Estate of Vetter, 110 Cal.App. 597, 294 P. 438.

Appellant relies largely upon In re Estate of Sweetman, 185 Cal. 27, 195 P. 918, but that part of the Sweetman Case upon which she relies was expressly overruled in Re Estate of Ross, supra.

[1, 2] Appellant contends that where a will, known to have been in existence at a time prior to the death of testator and in his possession at that time, cannot be found after his death, "the presumption of destruction, animo revocandi, is overcome by the continuous declarations of the testator to various friends that he had a will, and that he kept it in a metal strong-box in his house, and that said box almost immediately (about two hours) after testator's death passed into the possession of his widow who was interested in his estate (which is entirely the separate property of testator) adversely and that by concealing the will said widow will inherit as an heir at law a larger portion of the estate than she is provided for in the will." What the appellant seems to forget is that the presumption of revocation is in itself evidence of a substantial nature and that whether this presumption is overcome by other evidence depends upon the weight of the evidence. It is the province of the fact finder to determine where the preponderance of evidence lies, and this court on appeal will not substitute its opinion for that of the trial court as to the weight of the evidence where there is any substantial evidence to sustain the trial court's finding.

[3] There is another element in appellant's case which makes it impossible for her to succeed on appeal. Section 350 of the Probate Code declares that "No will shall be proven as a lost or destroyed will * * * unless its provisions are clearly and distinctly proved by at least two credible witnesses." At the trial appellant produced no witness who had actual knowledge of the contents of the purported will. The court found that the requirements of

this section had not been met. Under the circumstances of this case, this court upon appeal cannot interfere with the finding of the trial court in that regard.

The further contention is made by the appellant that the court erred in denying her motion for a new trial on the ground of newly discovered evidence. The trial court was authorized to exercise its discretion in ruling on this motion and we see no abuse of discretion.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



14 Cal.App.2d 258

In re SHORT'S ESTATE.

PULLIAM v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 5615.

District Court of Appeal, Third District, California.

May 23, 1936.

1. Wills ⇐155(1)

To establish undue influence in execution of will, it must be shown that such influence produced such an effect on mind of testatrix as to overpower her volition at time of execution of will.

2. Wills ⇐166(8)

Evidence of undue influence by residuary legatee, who called attorney to prepare will which was executed while testatrix was seriously ill in hospital shortly before her death, *held* insufficient to justify setting aside will where testatrix was of sound mind at time.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Proceeding in the matter of the estate of Julia M. Short, also known as and called Julia Jaspar Short, deceased, wherein the will of Julia M. Short was contested by Dixie Pulliam, as executrix of the last will and testament of Mary Ellen Jaspar, deceased, substituted for Mary Ellen Jaspar, and the contest opposed by the Bank of America National Trust & Savings Association and another. Judgment for proponents, and contestant appeals.

Affirmed.

E. L. Webber and Nathan F. Coombs, both of Napa, for appellant.

Clarence N. Riggins, of Napa, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us for the second time on an appeal prosecuted by the contestants based upon the ground of alleged undue influence in the making of the will executed by the deceased on the 12th day of April, 1933.

Upon the institution of this action three grounds of contest were alleged: Lack of execution of the will; undue influence; and unsoundness of mind. The trial court granted a nonsuit as to the alleged nonexecution of the will, and also as to the allegation of undue influence. The cause was submitted to the jury on the alleged ground of unsoundness of mind. The jury found in favor of the contestants, and upon appeal this court held that there was no evidence to support the verdict of the jury, and that the testimony introduced in the cause overwhelmingly established the mental capacity of the testatrix to execute a will.

The opinion filed by this court upon the first appeal is reported in Estate of Short, 7 Cal.App.(2d) 512, 47 P.(2d) 555. The facts involved in the case are all summarized in the opinion heretofore filed, and for the sake of brevity are referred to and made a part of this opinion for a statement of the testimony introduced upon the trial.

The will executed by the deceased left the property in trust which was valued at the sum of approximately $18,000, to the Bank of America National Trust & Savings Association, with directions to use both the income and the principal for the care and maintenance of Mary E. Jaspar, the mother of the deceased. At the time of the execution of the will, Mary E. Jaspar was of the age of about eighty-six years, and was both physically and mentally enfeebled, and, as the testimony shows, incompetent to take care of herself. The will

then further provided that the residue, if any, should go to Laura Treadway, a close friend of the deceased.

A résumé of the testimony which we have set out in the opinion heretofore filed, in the Matter of the Estate of Short, shows that the testatrix had in mind the care and protection of her mother, and that some provision, such as leaving the property in trust, should be made in order that her mother might be well protected during the remainder of her life.

Mrs. Jaspar died during the pendency of this action, a fact, of course, which the testatrix could not have had in mind at the time of the execution of the will. The length of time that the mother would survive the daughter could not be measured, but the will provided that during that time the mother should be cared for, not simply by using the income of the estate, but also by using the principal thereof. As we stated in our first opinion, and now reiterate, such a provision was not only natural, but was also a wise provision under the circumstances. We may here add that the testatrix could not, of course, estimate what portion of the estate would be left after the death of the mother, and therefore the value of the residuary portion was problematical. The testatrix also had in mind that her brother would not properly care for the property, and that it would be wasted if devised to him. So far as the testimony set forth in the transcript discloses, there was no personal animosity existing between the brother and sister, or between any members of the family.

The question involved in this case is that of undue influence. We here set forth the allegation of the contestant's complaint, relied upon in this appeal:

"That on the 12th day of April, 1933, the date (of) said purported and supposed will was made, said Julia Short, the decedent, was unconscious during all of said day, and was unable to recognize persons about her bedside, and scarcely had strength enough to move about the bed. That said Julia Short was confined in bed during all of said day, and for many days prior thereto. That Mary E. Jaspar, mother of said decedent, was continuously with said Julia Short an said 12th day of April, 1933, except for a period of more than an hour on the afternoon of said day, when Laura Treadway, the beneficiary under the last will and testament of said decedent, induced and persuaded said Mary E. Jaspar to leave said room in order that said Laura Treadway might be alone in said room with said Julia Short. That during the time said Laura Treadway was in the room with said Julia Short, and while said Julia Short was in said unconscious and weakened condition which rendered her peculiarly amenable and likely to be persuaded by any person and by any influence exercised upon her, said Laura Treadway, knowing such disposition and tendency of the above named decedent to be so influenced, and knowing the impairment of her mental faculties, for the purpose and with the intent of inducing the said decedent to make a will, making the said Laura Treadway the beneficiary thereunder, presented to, and secured the execution by said Julia Short, of a will previously prepared therefor under the instructions and directions of said Laura Treadway."

It is further alleged that the residuary legatee knew of the advanced age of Mrs. Jaspar, and that the complete enjoyment of the property would eventually be vested in her. It is further alleged that Julia Short was not given an opportunity to secure the advice of counsel on her own behalf.

A reading of the testimony summarized in our first opinion, and a re-examination of the testimony called to our attention by the contestants, reveals the fact that the allegations contained in the foregoing excerpts are unsupported by any testimony introduced in this cause. It is clearly shown that the testatrix was of sound mind; that Laura Treadway was not in the room when the will was made; that Laura Treadway never presented a will to the testatrix; that Laura Treadway did not secure the execution of a will by Julia M. Short; that the will was not previously prepared before the visit of attorney Riggins, to Julia M. Short; that the will was prepared by attorney Riggins after previous consultation with Mrs. Short, and in accordance with her directions.

The evidence further shows that Mr. Riggins had been the attorney for Mrs. Short for a considerable time previous to Mrs. Short being taken to the sanitarium, and that Laura Treadway was informed by Mrs. Short's physician that Mrs. Short was not going to get well, and was advised to take Mrs. Short's attorney to the sanitarium in order that Mrs. Short might have an opportunity to put her affairs in

order, and that thereupon Laura Treadway requested attorney Riggins to go to the sanitarium. Mrs. Laura Treadway was not in the room during the time of the preparation of the will, and the testimony further fails to show that Laura Treadway ever mentioned to Mrs. Short, or to any one, as to how Mrs. Short should dispose of her property.

It does not appear from the testimony that Laura Treadway took any part in the execution of the will, other than simply calling Mrs. Short's attorney at the request of Mrs. Short's physician. There is absolutely nothing in this friendly act that can support the inference of undue influence.

The testimony of attorney Riggins set forth in Estate of Short, 7 Cal.App.(2d) 512, on pages 530 and 531, 47 P.(2d) 555, clearly discloses that whatever disposition was made of the property by the testatrix was according to her own wishes and according to her own recommendations and directions given to her attorney. The question of providing for the care and maintenance of the mother was discussed, and attorney Riggins explained the trust provisions that should be contained in the will which would amply provide for the maintenance of the mother and insure her proper care during the remainder of her life. The fact that attorney Riggins did not disclose the provisions of the will to the mother is absolutely of no moment. To have done so would have been a breach of professional duties. The argument of undue influence contained in the contestant's brief upon this point could not be considered as weighing one iota on the question of undue influence alleged to have been exercised by Laura Treadway over the mind of the testatrix. The fact that the deceased requested Laura Treadway to make arrangements for herself and her mother at the sanitarium preceding their going thereto does not justify any inference of undue influence, although it does show a measure of friendship existing between Laura Treadway and the deceased.

The testimony does show that at the time of the execution of the will the testatrix was seriously ill, and that a short time after the execution of the will, died from an attack of heart trouble, which was not the ailment which caused her to go to the sanitarium. But the fact that one is physically ill does not raise any presumption or inference that undue influence has been exercised upon any one who, under such conditions, executes a will. As we have said, the testimony is overwhelmingly to the effect that the mentality of the testatrix was clear and sound, and that she understood exactly the provisions of the instrument which she was executing. By reason of the decision in the former appeal, this is the law of the case and must be accepted as final. Undue influence cannot be predicated simply upon a physical infirmity. Especially is this true where the law of the case establishes the mental capacity of the testatrix.

As said in Estate of Leahy (Cal.Sup.) 54 P.(2d) 704, the mere fact that the residue of the estate was given to a close friend instead of to a blood relative, does not of itself constitute the instrument an unnatural will.

[1, 2] The law is well established that in order to show a will to have been executed through undue influence, it is necessary that the testimony establish not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testatrix. There must be some substantial proof of pressure exercised which overpowered the volition of the testatrix at the time of the execution of the will. There is absolutely no testimony in the record in this case showing any such conditions or actions. We do not need to quote from, but will cite the following cases in support of what we have just said: In re Leahy Estate, supra; Estate of Finkler, 3 Cal.(2d) 584, 46 P.(2d) 149; Estate of Smith, 200 Cal. 152, 252 P. 325; Estate of Holloway, 195 Cal. 711, 712, 235 P. 1012; Estate of Anderson, 185 Cal. 700, 198 P. 407. A quotation from these cases would only unnecessarily lengthen this opinion.

There being no testimony in the record in support of the allegations set out in the contestant's complaint which we have set forth herein, it follows that the trial court was correct in granting the proponent's motion for a nonsuit, and the order and judgment of the trial court admitting the will to probate after granting the proponent's motion for a nonsuit must be, and the same are, hereby affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

WILLIAMS v. GENERAL INS. CO. OF AMERICA et al. *

Civ. 9562.

District Court of Appeal, Second District, Division 1, California.

May 14, 1936.

Hearing Granted by Supreme Court July 18, 1936.

1. Estoppel ⇐110

Exception to general rule that an estoppel to be available must be pleaded arises where there is no opportunity to plead an estoppel.

2. Estoppel ⇐110

Where no opportunity is afforded to plead an estoppel, issue may be raised by the evidence, and in such case it is just as effective and material as if raised by an allegation in the answer.

3. Estoppel ⇐119

Existence of an estoppel is a question of fact which must be passed upon by trial court.

4. New trial ⇐61

Failure to find upon a material issue is a ground for a new trial.

5. Estoppel ⇐110

Where automobile liability policy covered operation of any automobile with owner's permission, except automobile owned in whole or in part by plaintiff, and issue as to whether plaintiff who signed statement after accident that he had purchased automobile on time-payment plan, knew contents of statement, and was estopped from denying ownership, was raised by the evidence, failure to find on such issue *held* reversible error, notwithstanding insurer did not plead estoppel.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Carl R. Williams against General Insurance Company of America and against General Casualty Company. From a judgment for plaintiff, second named defendant appeals.

Reversed and remanded.

C. A. Pinkham and Kidd, Schell & Delamer, all of Los Angeles, for appellant.

Jennings & Belcher and Henry T. Leckman, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of plaintiff and against the defendant General Casualty Company in an action based upon a policy of automobile liability insurance. The policy was in the usual form, but in particular covered the operation of any automobile with the permission of the owner *except one owned in whole or in part by the plaintiff or any member of his household.*

It was alleged that while the policy was in force and effect, plaintiff was operating an automobile with the consent of the owner, which automobile was not owned in whole or in part by plaintiff or any member of his household; that while so driving said automobile, he collided with one Robert Young; that thereafter said Robert Young filed an action and recovered a judgment against plaintiff herein, Carl R. Williams; that said Carl R. Williams had paid said judgment; and that demand had been made upon the defendant insurance company for the repayment thereof under the terms of the policy, which payment was refused.

Plaintiff Williams prevailed at the trial of the instant case, and the defendant insurance company appeals from the judgment.

One question in particular, raised by the appeal, is decisive thereof and its determination necessitates the remanding of the cause for a new trial, for which reason it will be unnecessary to refer to the several other questions involved in the appeal.

Appellant established at the trial that after the accident it was informed thereof by respondent, and that on the day following the accident a representative of the insurance company was sent to interview respondent about the accident. The representative had a portable typewriter and wrote out on the typewriter a statement based on the information then and there obtained from respondent, which statement respondent then and there signed. Said statement contains the following: "The car I was driving was a 1926-Essex Coach which I bought from B. A. Elias on May 7th, 1932, for $20.00 at that time and the balance of $15.00 was to be paid on June 1st, 1932. I was to make what repairs were necessary to the car. B. A. Elias still holds the pink slip on the car and it is still registered in his name. The car has License

*For subsequent opinion see 63 P.2d 289.

number 5-M-2672 and motor number 358353. The car has been in my possession at all times and I have been driving it in my work as a County Health Inspector. I have made several repairs on the car and paid for same myself. Out of the $15.00 balance which I am to pay on June 1st, 1932 there will be possibly 4.50 taken out for a generator. The balance will make the complete payment for the car and the pink slip of ownership will then be delivered to me * * *."

Relying on this signed declaration by plaintiff herein, the insurance company denied liability and did not therefore represent him at the trial of the damage suit resulting from the accident.

[1, 2] Defendant insurance company contends that plaintiff was estopped by reason of his signed statement, upon which the company acted, from denying his ownership of the car. At the trial of the instant case plaintiff, who had been in the insurance and newspaper business, but at the time of the accident was county health inspector, testified that he did not know what was in the signed statement at the time he signed it. The issue of estoppel was adequately raised by the evidence. It is quite true, as contended by respondent, that it is the general rule that an estoppel, to be available, must be pleaded; but to this general rule there is an exception. When it appears that no opportunity is afforded to plead an estoppel, the general rule does not apply. Mentry v. Broadway Bank, etc., Co., 20 Cal.App. 388, 129 P. 470; Guy v. Leech, 47 Cal.App. 704, 190 P. 1067; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252; Hendricksen v. State Subsidiary, Ltd., 3 Cal.(2d) 459, 45 P.(2d) 190; Kenny v. Christianson, 200 Cal. 419, 253 P. 715, 50 A.L.R. 1297. Under such circumstances the issue may be, and generally is, raised by the evidence, which is sufficient. At the time the answer was filed in the instant case, the defendant and appellant had no knowledge that the respondent would testify that the statement was signed by him in ignorance of its contents, and therefore there was no reason for alleging in the answer that the plaintiff was estopped from denying the truth of such signed statement. Although the issue was raised by the evidence, it is just as effective and material as if raised by an allegation in the answer. As declared by Herman, in Estoppel and Res Judicata, vol. 2, § 1305, p. 1448, "Equitable estoppels growing out of acts in pais, constitute an exception to the general rule, and are equally conclusive whether pleaded or given in evidence." The trial court found that plaintiff and respondent was not the owner of the car in question, but did not find on the issue of estoppel.

[3, 4] It seems obvious that this issue was vital and of the very essence of appellant's defense, and that it was therefore material appears to be equally obvious. The existence of an estoppel is a question of fact (Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L.R.A. 419, 101 Am.St.Rep. 84), and it is also well settled that the failure to find upon a material issue is a ground for a new trial (Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 P. 236; Black v. Harrison Home Co., 155 Cal. 121, 99 P. 494; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 P. 151), and, also, it is held that: "It is the duty of the court to find upon all the material issues, regardless of any request of the parties." (Haight v. Tryon, 112 Cal. 4, 44 P. 318). See, also, Sun-Maid Raisin Growers v. Papazian, 74 Cal.App. 231, 240 P. 47; Pereira v. Smith, 79 Cal. 232, 21 P. 739. As was declared in Cargnani v. Cargnani, 16 Cal.App. 96, 116 P. 306, 307: "It is settled beyond controversy that it is the duty of the court to find on all the material issues, and a failure in that respect is ground for a new trial as a 'decision against law.' 'A judgment based upon findings which do not determine all such issues is, in our opinion, "a decision against law" for which a new trial may be had. In such case a re-examination of the facts becomes necessary in order that the issues of fact may be determined.'" In Banning v. Kreiter, 153 Cal. 33, 94 P. 246, 248, a case analogous, in effect, to the case at bar, the defendant claimed an easement of a strip of land for use as an alleyway. This right defendant supported by pleading estoppel, and this estoppel, in turn, arose from the declaration of the authorized agents of plaintiff in selling the property. The court found for plaintiff but failed to find upon defendant's plea in estoppel. The Supreme Court held that this omission was prejudicial error, if there was any substantial evidence to support the plea. After reviewing the evidence, the higher court declared as follows: "Thus it is apparent that there is evidence, substantial and strong, to support the plea of estoppel, and it was therefore error for the court to fail to find upon it."

[5] In the case at bar there is evidence, substantial and by no means weak, to sup-

port appellant's claim of estoppel, and, as in the Banning Case, supra, it was error for the court to fail to find upon it.

The judgment is reversed, and the cause remanded.

I concur: YORK, J.

HOUSER, Presiding Justice (dissenting).

I dissent. Not that abstractly I am not in accord with the controlling legal principles that are declared in the prevailing opinion, but that my perusal of the record herein leads me to the conclusion that such principles may not properly be applied to the facts. Particularly do I accept as a correct declaration of the law the foundational statement contained in the opinion of my associates to the effect that, although as a general rule, in order to be available to a party in an action, estoppel must be specially pleaded, an exception exists when it appears that the party who seeks to benefit by such a plea has had "*no opportunity* * * * to plead estoppel." But it is just there that my first objection to the proposed judgment herein begins to operate. To my mind, at each and every stage incident to the prosecution of the action against the defendant, it was afforded not only ample opportunity to plead estoppel, but as well, if it had been within its power and its ability, to prove the facts necessary to the establishment of such a plea. As a matter of fact, as is practically demonstrated by the record, it did neither.

With reference to its opportunity: It is manifest that at all pertinent times the defendant had in its physical possession the very document or writing upon which its entire defense to the action depended; and that at the outset, the defendant knew, or at least should have known, as a legal proposition, that in the absence of evidence of fraud, or something akin thereto in the evidence, should plaintiff assert the ineffectiveness or nonbinding force of that writing, the only unanswerable replication thereto would be by way of a plea, supported by clear evidence, of, an estoppel. At no time in the course of the proceedings was the defendant misled or lulled into a sense of security by any act of plaintiff. Even before the action to recover a judgment for damages was brought against plaintiff by the victim of the collision that occurred between the automobile that was driven by plaintiff and that which was driven by the injured person, the defendant had been fully apprised by plaintiff that he entirely repudiated the statement contained in the writing to the effect that plaintiff was either the owner of the automobile that he was driving, or that he either had or claimed to have any "interest" therein. That much very clearly stands out and is established not only by testimony that was given by plaintiff, but as well by the several admissions made on the witness stand by the authorized investigator of claims of the defendant corporation. In part, the investigator thus testified:

"A. * * * I think Mr. Williams (plaintiff) called me up on the phone at the office.

"Q. And told you, did he not, *that he had not purchased this car and owned no interest in it?* A. I don't recall what the conversation was on the phone.

"Q. Well, was not that the substance of the conversation? A. It probably was. * * *

"Q. Well, you do recollect, don't you, that a dispute developed between Mr. Williams and your company as to whether this accident was or was not covered by his policy, don't you? A. That was some time *after I had made the investigation* and the file was out of my hands.

"Q. You recall a dispute of that kind arising, don't you? A. Yes.

"Q. *And you recall that that dispute centered around the question as to whether Mr. Williams did or did not own an interest in this car, don't you?* A. Yes.

"Q. And that the company, by virtue of his first statement, claimed that he did own an interest in it, you recall that? A. Yes.

"Q. And you recall that that dispute arose *prior to the time that the personal injury action was commenced,* don't you? A. Yes."

Mr. Williams (plaintiff) confirmed the facts respecting that situation. In substance, he said that at a time after he had made his written statement to the company, he had a conversation with the investigator, and then said that he had "rented that car, but that (he) considered that (he) had an option on every car on Mr. Elias' lot."

Not only before the date when the personal injury action was commenced was the defendant fully aware of plaintiff's position with reference to his repudiation of the statements contained in the writing which theretofore he had delivered to the defendant, wherein, in effect, he admitted a pos-

sible equity in the automobile, but certainly, and without the least equivocation, on the trial of the action, at its very inception, was the defendant again particularly notified by testimony given by plaintiff, that he neither owned the automobile, nor had any interest in it. In that regard, *as the first witness called on the trial,* in part, plaintiff testified as follows:

"Q. *Did you own that automobile?* A. *I did not.*

"Q. *Or any interest in it?* A. *I did not.*"

Furthermore, the evidence shows that in the course of its independent investigation of the question of whether plaintiff owned, or had any interest in, the automobile, even prior to the date when the instant action was commenced, the defendant reliably had been informed through other sources of information just what the situation was with respect to the ownership of, or option to purchase, the automobile; from all of which the defendant was again placed on notice as to the fact, that, in effect, plaintiff not only repudiated his statement of ownership of the automobile, but also that on the trial of the action, in all probability, he would continue to repudiate such statement and the effect thereof. But even in such circumstances, and with such knowledge and notice of facts on the part of the defendant, with such full "opportunity" on its part so to do, at no time during the course of the trial, either in the submission of evidence or in the argument of counsel in the case on its merits, or at any time thereafter, did the defendant either plead, or attempt to plead, or even suggest, an estoppel. It therefore should follow that never having availed itself of any one of its several manifest opportunities to plead estoppel, the defendant should not now be permitted to successfully raise the question for the first time on its appeal from the judgment.

The prevailing opinion also contains the statement that "the issue of estoppel was adequately raised by the evidence." Necessarily, if at all, it must have been raised in that way. The original issues made by the pleadings assuredly did not do so. At the outset of the trial that much was negatively stipulated by the parties. At that time, after respective counsel apparently had orally agreed as to what issues were involved, the judge of the trial court said: "As I understand, I have only two issues, one is the question arising out of the ownership of the automobile; and the other is the question whether the defendant has waived its right under the policy to have the papers turned over to it. So that, with that understanding, it would seem to be unnecessary to spend any further time going through these particular allegations of the pleadings." To which statement the attorneys who represented the parties responded respectively as follows:

"Mr. Belcher: That is my understanding of the matter. Is that yours?

"Mr. Pinkham: That is perfectly clear."

So that beyond peradventure, the question of whether the plaintiff was estopped to deny his ownership of the automobile was not made an issue by the pleadings; consequently it could be injected into the case by no means other than by evidence introduced and accepted as binding on the trial of the action. But that suggestion, although admitting the possibility of raising the issue in such a way, may not be considered as conclusive as to whether an issue actually was thus raised. Generally speaking, and without reference to the instant situation, the assumed fact that an issue of estoppel is contended to have been raised solely through evidence introduced on the trial of an action does not relieve the party who asserts the existence of an estoppel from establishing the fact that the issue was *properly* raised. In other words, in order that it may be properly presented and proved, an estoppel independently raised by the evidence must depend upon the same basic rules that govern in an estoppel that is presented by written pleadings. Hence the question regarding the correctness of the statement contained in the prevailing opinion herein, that "the issue of estoppel was *adequately* raised by the evidence."

In connection with the required foundation for the establishment of an estoppel, the opinion in the case of Bank of America v. Pacific Ready-Cut Homes, 122 Cal.App. 554, 561, 10 P.(2d) 478, 481, contains the statement that: "Generally speaking, there are four elements essential to the application of the doctrine of estoppel: First, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or his conduct must be such that the party asserting the estoppel had a right to believe that it was so intended; third, the party asserting the estoppel must be without knowledge, and without ready means of obtaining knowledge, of the true state of facts; and, fourth,

he must rely upon such conduct to his injury." (Citing authorities.)

Applying such tests to the facts herein, it would seem plain that at least as to the third and the fourth essentials, the legal requirements have not been met. From that which hereinbefore has appeared, it is indisputable that the defendant not only had "means of obtaining knowledge of the true state of facts," but also that in pursuit of its independent investigation of the facts, it actually acquired "knowledge" from the dealer with whom plaintiff had made his optional arrangement respecting the possible purchase by plaintiff of *some* automobile, of exactly what the situation was with reference to the asserted "ownership" by plaintiff of the automobile in question; and that "the true state of facts" was wholly at variance with the statement upon which the defendant depended to establish plaintiff's estoppel. In addition thereto, in remembering that the burden of proving an estoppel was on the defendant, it should be noted that neither of the witnesses introduced by the defendant in its behalf offered even the slightest affirmative evidence to the effect that it was without "knowledge," or that it was unaware of the true facts. More than that, and in considering the necessary element of reliance by the defendant upon the truth of the written statement made by plaintiff, every scrap of evidence pertinent thereto clearly indicates that the defendant did not so rely. In fact, a declaration to the effect that the defendant was misled in that regard could find not the slightest support in the evidence. Its own showing in that particular was to the contrary; and that situation, added to the testimony given by witnesses introduced by plaintiff, could leave not the least doubt that after being in receipt of plaintiff's repudiation of his former statement of his ownership of the automobile, it proceeded to a searching and complete independent investigation of the facts respecting such ownership, with the result that in truth it was in no position either formally to allege, or, either specifically or by implication, orally to assert, that it had relied upon plaintiff's original written statement concerning either his ownership of the automobile or his equitable title therein or thereto. Hence, my inability to agree with my associates in their declaration, as hereinbefore set forth, that "the issue of estoppel was adequately (or at all) raised by the evidence."

As a final and conclusive reason for the reversal of the judgment herein, in substance it is confidently asserted that since estoppel of plaintiff was an issue on the trial of the action, the trial court committed prejudicial error in failing to make a finding of fact to that effect. Again, I find myself not entirely in harmony with the conclusions reached by my respected associates. It ought to be clear that if from the evidence no proper finding of fact would be possible other than one *against* the contention made by the appellant, an error made in failing to find upon the issue in question would not be prejudicial to the defendant; and consequently not available as a reason for reversal of the judgment. And just that situation would appear to prevail: The defendant failed to establish estoppel; the evidence was all against any such conclusion; and if the court had made a finding of fact in that connection, necessarily it would have been that no estoppel was created. But even assuming the possibility that ordinarily a finding on the issue should have been made, it may be that the defendant is not entitled to complain of the failure of the trial court in that regard: No formal issue of estoppel was presented by the pleadings; the stipulation made by the parties did not include it; the issues as stated by the trial judge, to which the parties expressly assented, made no reference to any such issue; nor at any time during the course of the trial, or during the argument, did the defendant suggest, or even hint, that such an issue was before the court. Furthermore, the record is silent as to any request having been made by the defendant to the trial court that any finding be made with respect to any such possible issue; no motion for a new trial was made; the trial court was given no opportunity to correct any alleged error respecting its failure to find on such an issue. In other words, in no manner was the trial court ever informed that the defendant relied upon an estoppel, or that a finding with reference thereto was either expected or required. In such a situation, is it the law of the land that a defendant may say nothing; take a chance on obtaining a favorable judgment in its behalf; and failing in that regard, successfully raise the concealed point for the first time on the appeal from the judgment? Rather, is it not more nearly in accord with the administration of justice to declare that, considering the circumstances, the defendant effectively waived whatever right to a finding of fact it ordinarily might have had?

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BRADLEY CO. v. RIDGEWAY et al.

Civ. 1396.
District Court of Appeal, Fourth District, California.
May 27, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Appeal and error ⇐916(1)

On appeal from judgment for defendant after defendant's objection to introduction of any evidence on ground that allegations of complaint failed to allege cause of action, appellate court would assume that objection amounted, in effect, to motion for judgment on the pleadings.

2. Pleading ⇐350(3)

In considering defendant's motion for judgment on the pleadings, trial court is limited to examination of material allegations of complaint without regard to allegations contained in defendant's answer.

3. Trial ⇐388(2)

Findings of fact made on sustaining defendant's motion for judgment on the pleadings are not necessary and must be disregarded by reviewing court.

4. Municipal corporations ⇐953

Where bonds representing full amount of original contract price of municipal street paving under 1911 Street Improvement Act were issued and delivered to contractor, property owner *held* not entitled to offset of 25 per cent. in advance of contractor's action to enforce lien of bonds against such owner's property, notwithstanding compromise agreement by which contractor agreed to accept 25 per cent. less than original contract price in full satisfaction of amount owing (St.1911, p. 730, as amended).

5. Municipal corporations ⇐953

Bond issued under provisions of 1911 Street Improvement Act is contract forced on parties by compulsion of law enacted in pursuance of taxing power of state, precluding property owner from claiming offset against bonds regularly issued on ground that contractor performing work has made private contract with property owner to accept a less amount than amount of bonds (St.1911, p. 730, as amended).

6. Municipal corporations ⇐931

Property owner could not avoid payment of municipal street improvement bonds issued against its property on ground that bonds were invalid under statutes because city attorney claimed interest in bonds delivered to him as trustee for property owners, where city attorney's interest arose out of his employment in his private capacity as attorney at law to represent property owners in controversy involving bonds (St.1911, p. 730, as amended; Pol.Code, §§ 920, 922).

7. Limitation of actions ⇐58(2)

Property owner which made no payments to fund created by 1911 Street Improvement Act, from which alone principal and interest payments of bonds issued under act could be made, could not interpose bar of statute of limitations to claim for payments of overdue principal and interest on bonds (St.1911, p. 758, § 60; Code Civ.Proc. §§ 337, 338, 343).

8. Limitation of actions ⇐183(3)

When payment of obligation is provided to be made out of particular fund, debtor cannot plead statute of limitations without showing that fund has been provided.

9. Quieting title ⇐1

Cause of action for quieting title against claims for payment of principal and interest due on bonds validly issued under 1911 Street Improvement Act on ground that such payments were barred by statute of limitations is equitable in character and is to be measured by equitable principles (St.1911, p. 730, as amended; Code Civ.Proc. §§ 337, 338, 343).

10. Equity ⇐66

He who seeks equity must first do equity.

11. Equity ⇐66

Unwillingness to pay just indebtedness does not commend him who seeks aid of equity to avoid payment of such indebtedness on ground that debt, though morally due, is barred by provisions of statute limiting time within which action to enforce payment of obligation may be instituted.

12. Quieting title ⇐34(1)

Cause of action for quieting title against claims for payment of principal and interest due on bonds validly issued under 1911 Street Improvement Act on ground that such payments were barred by statute of limitations, without pleading willingness to pay indebtedness represented by bonds, which indebtedness was admittedly due, did not state cause of action for equitable relief (St.1911, p. 730, as amended; Code Civ.Proc. §§ 337, 338, 343).

13. Pleading ⇐343

In action to quiet title against lien of bonds issued under 1911 Street Improvement Act, judgment on pleadings in favor of defendant who filed answer disclaiming any right, title, or interest in bonds and who was not present or represented by counsel at trial and who did not join in objection of his codefendants to introduction of evidence was incorrect, and judgment should have quieted title against him (St.1911, p. 730, as amended).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Bradley Company against E. E. Ridgeway, treasurer of the city of Porterville, and others. From the judgment, the plaintiff appeals.

Judgment partly affirmed and partly reversed, with directions.

J. A. Chase, of Visalia, and Herbert Chamberlin, of San Francisco, for appellant.

Mathew Weber, of San Francisco, and Kirkbride & Wilson, of San Mateo, for respondents Federal Const. Co., Hanrahan Co., and E. E. Ridgeway, Treasurer of City of Porterville.

Gaylord N. Hubler, of Porterville, for respondent Guy Knupp.

JENNINGS, Justice.

The plaintiff, an owner of real property in the city of Porterville, instituted this action against defendants for declaratory relief with respect to certain street improvement bonds representing assessments levied against its property to cover the proportionate cost of paving certain streets in the above-mentioned city and to quiet its title to the property against the claims of defendants thereto. The defendant Guy Knupp interposed a demurrer to the amended complaint which was sustained as to the first and second causes of action alleged in the complaint and overruled as to the third cause of action. This defendant thereupon filed his answer to the third cause of action. The defendant E. E. Ridgeway likewise interposed a demurrer to plaintiff's complaint which was sustained without leave to amend and the action was dismissed as to him. The defendants Federal Construction Company and Hanrahan Company filed answers to plaintiff's original complaint which counsel stipulated should be considered as answers to the amended complaint. At the time appointed for trial of the action the plaintiff produced a witness who was duly sworn and to whom certain preliminary interrogatories were propounded. When the trial had proceeded to this point, the witness was asked whether or not he had protested against the issuance of the bonds. The defendants Federal Construction Company and Hanrahan Company thereupon objected to the introduction of any evidence relating to the first and third causes of action set out in the amended complaint on the ground that the allegations of each of them failed to constitute a cause of action against said defendants. This objection was sustained and the trial court made findings of fact from which it drew the legal conclusion that plaintiff was not entitled to recover from any of the answering defendants or from the defendant Ridgeway. Judgment was thereupon rendered in favor of the defendants in the action from which judgment plaintiff has perfected this appeal.

Appellant's first contention herein is that the objection which was successfully urged to the introduction of any evidence on the ground that the allegations of the first and third counts of the amended complaint failed to allege any cause of action against defendants amounted, in effect, to a motion for a judgment on the pleadings and that it is settled that on such a motion the trial court is restricted to an examination of the material allegations of the complaint which are deemed to be true without reference to the allegations of the answer filed by the moving party which allegations, for the purpose of the motion are deemed to be untrue. It is next urged that findings of fact are neither necessary nor proper on the sustaining of such a motion. It is pointed out that the findings which the trial court here made show that the court did not restrict its examination to the well pleaded material facts alleged in the complaint deeming the allegations of the answers of the moving defendants to be untrue, but that, on the contrary, the court assumed that various material allegations contained in the answers are true.

[1-3] It is undoubtedly true that the trial court considered the objection raised by the defendants to the introduction of

evidence as a motion for a judgment on the pleadings. The judgment rendered in the action so recites and for the purposes of this appeal it will be assumed that respondents' objection amounted, in effect, to such a motion. Appellant's contention that the trial court, in giving consideration to a defendant's motion for judgment on the pleadings, is limited to an examination of the material allegations of the complaint without regard to the allegations contained in the answer of a moving defendant is correct. Shanley v. American Olive Co., 185 Cal. 552, 554, 197 P. 793; Souza v. Market St. R. Co., 106 Cal.App. 347, 351, 289 P. 665; Bates v. Escondido U. H. School Dist., 133 Cal.App. 725, 727, 24 P.(2d) 884. It is also correct that findings of fact are not necessary on sustaining such a motion and must be disregarded. Taylor v. Palmer, 31 Cal. 240, 257. The single problem presented on this appeal consists, therefore, of a consideration as to whether or not the amended complaint states a cause of action.

As heretofore indicated, the pleading which was successfully attacked by respondents contains three causes of action. The material facts alleged in the first of these are as follows: Plaintiff is the owner of certain described real property in the city of Porterville. During the years 1914 and 1915 the defendant Federal Construction Company entered into contracts with the board of trustees of the municipality for the paving of certain streets in said city under the Improvement Act of 1911 (St.1911, p. 730, as amended), and in accordance with the terms of these contracts the said defendant performed the work of paving said streets. On July 14, 1921, bonds were issued which represented the assessments levied against the real property owned by plaintiff. Each of the bonds constituted a lien against the specific property described therein and the liens thus created have never been released, satisfied, or discharged. On May 9, 1921, prior to the issuance of the bonds, the defendant Federal Construction Company entered into a compromise agreement with certain owners of property in the city of Porterville whereby said defendant agreed to accept in full satisfaction and discharge of all its claims for the work done in paving the streets a sum which was 25 per cent. less than the amount specified in the original contract under which the improvement work was done. Notwithstanding the making of the compromise agreement, bonds for the full amount of the original contract price were issued and delivered to said defendant. Under the provisions of the compromise agreement, plaintiff is entitled to a discount of 25 per cent. of the amount of each bond and has tendered payment and is ready, able, and willing to pay such amount as may be determined to be proper upon allowance of the 25 per cent. discount specified in the compromise agreement. The first cause of action concludes with an allegation that an actual and genuine controversy exists with reference to the legal rights and obligations of plaintiff and said defendant under the aforesaid bonds.

The material facts alleged in the second cause of action are as follows: At the time the bonds mentioned in the first cause of action were issued, the defendant Guy Knupp was a public officer of the city of Porterville, to wit, the city attorney of said municipality and as such city attorney had direct charge of all proceedings preliminary to issuance and delivery of the bonds and became financially interested in said bonds in violation of the provisions of section 920 of the Political Code in that prior to execution and delivery of the bonds, the said defendant was employed by certain property owners to represent them in a controversy which had arisen between said property owners and the Federal Construction Company and the property owners became indebted to said defendant for professional services rendered by him in representing them in the controversy. In the compromise agreement referred to in the first cause of action the said defendant agreed that 25 per cent. of the bonds should be delivered to him to be held by him as trustee for the benefit of the property owners. Said defendant, however, claims an interest in and to the said 25 per cent. of the bonds delivered to him. The claim thus made is adverse to the property owners and the amount of the claim is unknown. By reason of the claim thus asserted by said defendant the bonds may be avoided by plaintiff under the provisions of section 922 of the Political Code. The second cause of action concludes with an allegation similar to the concluding allegation of the first cause of action respecting the existence

of an actual controversy between plaintiff and defendants with reference to the bonds.

The third cause of action alleges that no payment, either of principal or interest on the bonds, has been made except on two designated bonds and no action has been taken by the bondholders prior to the commencement of this action to collect either the principal or interest which has become due on the bonds. The collection of all payments of principal and interest which had become due prior to January 1, 1930, is barred by sections 337, 338, and 343 of the Code of Civil Procedure. Plaintiff hereby tenders and offers to pay all installments of principal and interest and penalties, if any, which have become due on the bonds subsequent to January 1, 1930, and in addition thereto all proper costs incurred, if any. "Defendants claim and assert an interest thereon adverse to plaintiff," which claim is without right and none of said defendants has any estate, right, title or interest in said land or any part thereof.

The prayer of the amended complaint is, first, for a declaration of the rights and duties of plaintiff and defendants under the bonds and a determination of the validity of said bonds and the obligations of the parties hereto with reference to the bonds; second, that it be declared that plaintiff is entitled to avoid payment of the bonds and that the same constitute no lien against plaintiff's property; third, that the defendants be required to set forth the nature of their claims and that all adverse claims asserted by defendants or by any of them be determined by decree wherein it shall be adjudged that plaintiff is the owner of the land and that none of the defendants has any estate or interest therein and said defendants be debarred from asserting any claim to the land adverse to plaintiff.

Analysis of the allegations of the first cause of action as above described indicates that appellant is attempting to maintain that it is entitled to a discount of 25 per cent. of the principal amount of the specified street improvement bonds which were issued to cover assessments levied upon its property to pay the cost of paving certain streets. This offset against the bonds, which admittedly constitute valid liens upon the property, is claimed by virtue of the provisions of a compromise agreement entered into between the contractor and certain property owners whereby the contractor agreed that the original contract price should be reduced by 25 per cent. It may be observed that the compromise agreement is not set out at any place in the amended complaint, but is generally described in the first and second causes of action. The descriptions of the agreement contained in the two causes of action do not agree. In the first cause of action it is simply declared that the contractor agreed to accept, in full satisfaction and discharge of all its claims for performance of the street improvement work, a sum equal to 75 per cent. of the original contract price. In the second cause of action it is alleged that the respondent Guy Knupp agreed that 25 per cent. of the bonds should be delivered to him to be held by him as trustee for the benefit of property owners. The uncertainty as to just what was contained in the compromise agreement is emphasized by other allegations contained in the two causes of action. In the first cause of action it is alleged that notwithstanding the agreement of the contractor to accept 75 per cent. of the original contract price bonds were issued for the full amount of the original contract price and upon issuance were delivered to the contractor. In the second cause of action it is alleged that 25 per cent. of the bonds were delivered to the respondent Knupp to be held by him as trustee for the property owners. If the latter allegation is true, it is manifest that appellant has no valid claim against the contractor since it has received no more than it was entitled to receive under the terms of the compromise agreement, viz., bonds whose total face value amounts to 75 per cent. of the original contract price, bonds representing the remaining 25 per cent. having been delivered to the respondent Knupp. Appellant's claim would therefore be against Knupp alone for its proportionate share of the amount of the bonds which it is specifically alleged have been delivered to him.

[4, 5] However, taking the allegations of the first cause of action as true, without reference to the statements contained in the second cause of action, it is our opinion that they do not state a cause of action against respondent Federal Construction Company. Obviously, no attempt is there made to state a cause of action against any respondent other than the construction company. No other respondent is mentioned therein and the con-

troversy which is alleged to exist is solely between appellant and the contractor. It is declared that the contractor agreed to accept 75 per cent. of the original contract price, but that nevertheless bonds representing the full amount of the original contract price were issued and delivered to the contractor. Appellant maintains that it is entitled to rely on the provisions of the agreement and to have the court declare that the contractor may not recover more than 75 per cent. of the principal amount of the bonds. In other words, appellant desires a declaration that it is entitled to an offset of 25 per cent. in advance of any action brought by a bondholder to enforce the lien of the bonds which is admitted to be a valid subsisting lien against appellant's property. This we think appellant may not do. A bond issued under the provisions of the 1911 Street Improvement Act, as the pleading here being considered alleges, is a contract. Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962, 963; Jeffreys v. Point Richmond Canal Co., 202 Cal. 290, 293, 260 P. 548; Meriwether Investment Co., Ltd., v. Lampton (Cal.Sup.) 53 P.(2d) 147; Sammon v. Wing, 105 Cal.App. 689, 692, 288 P. 711. It is not, however, a contract voluntarily entered into between the contracting parties. "It is a contract forced upon the parties by the compulsion of law enacted in pursuance of the taxing power of the state." Chapman v. Jocelyn, supra. In the final analysis, the governmental power of taxation is the foundation for the plan established by the statute for the improvement of public streets. Hornung v. McCarthy, 126 Cal. 17, 21, 58 P. 303. The property owner who has thus been compelled by law to become a party to a contract for the improvement of streets may not claim an offset against assessments regularly levied or bonds regularly issued on the ground that the contractor who has performed the work has made a private contract with him to accept a less amount than the amount of the bonds. Perine v. Forbush, 97 Cal. 305, 311, 32 P. 226; San Francisco Paving Co. v. Dubois, 2 Cal.App. 42, 46, 83 P. 72.

[6] Appellant's second cause of action, as pleaded in the amended complaint, is that it is entitled to avoid payment of all bonds issued against its property because the city attorney of the municipality to whom 25 per cent. of the bonds were delivered as trustee for the property owners claims that he has an interest in the bonds thus delivered to him which interest is adverse to the rights of the property owners in the bonds which are being held by said city attorney. This novel claim is alleged to be sustained by the provisions of sections 920 and 922 of the Political Code. Section 920 of said Code provides that "members of the legislature, state, county, city, and township officers, must not be interested in any contract made by them in their official capacity," and section 922 provides that every contract made in violation of the provisions of section 920 may be avoided at the instance of any party except the officer interested therein. However, it is here specifically alleged that the individual who was city attorney of the city of Porterville at the time a controversy arose between the contractor and certain property owners was employed by the property owners to act as counsel for them for the purpose of presenting their claims in court and otherwise and that thus the property owners became indebted to the attorney for his professional services which indebtedness constitutes the basis for the attorney trustee's claim of some interest in the particular bonds delivered to him. It must be observed that the inhibition against interest in contracts by public officers which is contained in section 920 of the Political Code is expressly limited to contracts made by such officers "in their official capacity." The pleading effectually negatives any claim that the interest which the attorney is allegedly asserting in any of the bonds is based upon or has any connection with any contract made by him in his official capacity as city attorney. According to the allegations of the complaint the attorney acted, not in his official capacity as city attorney, but in his private capacity as an attorney at law. It is obvious that the aforesaid sections of the Political Code are not applicable to the situation presented by the pleading and that no cause of action is therein alleged.

The third cause of action seeks to interpose the bar of the statute of limitations to any claim for payments of either principal or interest which became due on the bonds specified in the complaint prior to January 1, 1930, and, upon tender of payment of whatever amounts became due subsequent to said date, to have an adjudication that respondents have no right, title, interest, or estate in the land.

In effect, it is a cause of action to quiet title against the lien of the bonds.

[7, 8] It is apparent that no cause of action is stated by the pleading. It is by reference alleged that the bonds were issued under the 1911 Street Improvement Act. Section 60 of this statute (St.1911, p. 758) provides that payments of principal and interest on the bonds shall be paid by the city treasurer exclusively from a designated fund which is made up from sums paid to said officer "for the principal of said bonds and the interest thereon." Since the bonds represent assessments levied upon real property to meet the cost of street improvements, it is obvious that the various sums of money which are to compose the special fund, from which alone the city treasurer is authorized to make payments of principal and interest to bondholders, are to be supplied by the property owners. Appellant in his third cause of action expressly admits that it has made no payment, either of principal or interest, from the date of issuance of the bonds up to the time of instituting its action, and then pleads that payments of all installments of principal and interest which became due prior to January 1, 1930, are barred by the statute of limitations. So naive a plea may not be sustained. It is settled that when payment of an obligation is provided to be made out of a particular fund the debtor may not plead the statute of limitations without showing that the fund has been provided. Sawyer v. Colgan, 102 Cal. 283, 292, 36 P. 580, 834. Here the debtor has not merely failed to show that the particular fund has been provided, but has affirmatively alleged that it has not made the contributions to the fund which the statute declares it must make and from which alone the payments due on the bonds could have been made. Under these circumstances, the plea of the statute of limitations by the debtor is entirely unavailing and the pleading fails to state a cause of action. Hewel v. Hogin, 3 Cal. App. 248, 253, 84 P. 1002.

[9-12] With reference to the third cause of action, it should further be observed that the attempt is here made to state a cause of action for quieting title against claims for payment of principal and interest due on bonds validly issued on the ground that such payments are barred by the statute of limitations, without pleading willingness to pay the indebtedness represented by the bonds, which indebtedness is admittedly due. The cause of action thus attempted to be stated is strictly equitable in character and is to be measured by equitable principles. No principle of equity is more firmly established than the familiar rule that he who seeks equity must first do equity. Unwillingness to pay a just indebtedness concededly due does not commend him who seeks the aid of equity to avoid payment of such indebtedness on the ground that the debt, though morally due, is barred by the provisions of a statute limiting the time within which an action to enforce payment of the obligation may be instituted. Hayne v. San Francisco, 174 Cal. 185, 197, 162 P. 625; Dool v. First National Bank, 207 Cal. 347, 352, 278 P. 233; Warden v. Barnes, 111 Cal.App. 287, 292, 295 P. 569. For this additional reason, we conclude that the third cause of action is vulnerable to the claim that it fails to state a cause of action for equitable relief.

[13] One final matter deserves consideration. The record shows that respondent Guy Knupp filed a demurrer to the amended complaint which was sustained without leave to amend as to the first and second causes of action and overruled as to the third cause of action and that thereafter said respondent filed an answer in which he disclaimed any right, title, or interest of any character in any of the bonds or the property described in the third cause of action. The record also shows that at the time of trial this respondent was neither present himself nor was he represented by counsel. The objection which was raised by his codefendants to the introduction of evidence by appellant was not made by this respondent. He did not join in it. It was not made in his behalf. Under these circumstances, the trial court's action in rendering judgment on the pleadings in favor of this particular respondent was obviously incorrect. As to Knupp, the judgment should have quieted title against him since he was a defendant in the action who had disclaimed any interest in the bonds or in the real property described in the amended complaint.

The judgment in so far as it refuses to grant any relief against the disclaiming respondent Guy Knupp is reversed with

directions to the trial court to correct its judgment in accordance with the views herein expressed. In all other respects, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



14 Cal.App.2d 570

GROAT v. WALKUP DRAYAGE & WAREHOUSE CO. et al.

Civ. 9658.

District Court of Appeal, First District, Division 1. California.

May 28, 1936.

Rehearing Denied June 27, 1936.

Hearing Denied by Supreme Court July 27, 1936.

1. Automobiles ⇐225, 246(58)

Where plaintiff driving automobile across intersection passed in front of stopping street car at motorman's signal and saw defendant's truck traveling behind street car, and collision resulted when truck did not stop as anticipated, plaintiff was confronted with sudden emergency and was entitled in personal injury action to instruction on sudden emergency.

2. Negligence ⇐72

Negligence which denies benefit of doctrine of sudden peril is such as causes or contributes to creation of perilous situation.

3. Automobiles ⇐246(21, 37)

Instruction, that doctrine of sudden peril could not be applied to conduct of either driver of automobile or truck which collided at intersection unless driver was not guilty of negligence proximately causing collision, *held* correct, as against contention that qualification should have required merely freedom from negligence.

4. Trial ⇐296(3)

In automobile driver's action for injuries which allegedly resulted from collision with truck at intersection, omitting from instruction on right of way of vehicles approaching intersections that driver must be traveling at lawful speed to obtain right of way *held* not error in view of other instructions (St.1931, p. 2120, § 113; p. 2126, § 131(a).

5. Automobiles ⇐171(4)

Driver of automobile cannot acquire right of way at intersection by negligently approaching or entering intersection (St.1931, p. 2120, § 113; p. 2126, § 131(a).

6. Automobiles ⇐246(57)

Instruction on doctrine of unavoidable accident *held* properly refused in personal injury action tried upon theory of each party that automobile collision was caused entirely by other's negligence.

7. Appeal and error ⇐1050(1)

Where policeman, who suffered heart failure 10 days after collision with defendant's truck and was permanently disabled, brought personal injury action and introduced police department record showing absences due to sickness during 22½ years prior to accident, error, if any, in admitting written statements, made by departmental physician four and five years before accident, as to policeman's health was rendered harmless by physician's full testimony on matter (Code Civ.Proc. § 1854).

8. Damages ⇐208(1)

Whether shock of collision between automobile and truck was proximate cause of automobile driver's heart failure 10 days after collision by aggravation of high blood pressure, hardening of arteries, and diseased kidneys and heart, which driver had for a number of years before accident, *held* for jury.

9. Evidence ⇐128

Declarations, made by injured party to physician examining party solely for purpose of testifying, that party had been athlete and always well, so far as he knew, except for high blood pressure found four years before examination, *held* properly admitted under instruction that statements were made to physician to enable making diagnosis and were not to be considered as evidence of facts stated.

10. Damages ⇐38

Loss of future earning capacity is proper element of damages for personal injuries.

11. Damages ⇐36

Where injuries resulting from automobile collision terminated policeman's employment four years before right to pension accrued, loss of future pension *held* proper element of damages, since such right formed part of compensation of employment.

12. Damages ⇐208(4)

In determining damages in policeman's action for injuries which allegedly resulted from automobile accident and which necessitated terminating employment four years before right to pension accrued, where there

was evidence of pre-existing ailments, whether, but for accident, pension would have accrued, and length of time it would have been received, *held* for jury.

13. Evidence ⇐364

In policeman's action for personal injuries which necessitated terminating employment four years before right to pension accrued, mortality tables showing life expectancy of man of policeman's age in average or ordinary health *held* admissible to assist jury in fixing present value of future pension, notwithstanding evidence showed that policeman was suffering from ailments which probably would shorten his life.

14. Damages ⇐132(1)

$12,500 to policeman who suffered heart failure after automobile collision, necessitating terminating employment four years before right to pension accrued, and who was confined to bed for two months under care of physicians and nurses and totally unable to exert physically, *held* not excessive.

Appeal from Superior Court, San Francisco; Walter Perry Johnson, Judge.

Action by Charles F. Groat against the Walkup Drayage & Warehouse Company, a corporation, and another. From a judgment for plaintiff, defendants appeal. Charles F. Groat having died pending the appeal, Laura Groat, special administratrix of the estate of Charles F. Groat, deceased, was substituted as respondent.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Conrad Louis Gardner and Philander B. Beadle, both of San Francisco, for respondent.

GRAY, Justice pro tem.

A White autotruck owned by Walkup Drayage & Warehouse Company and then being operated by its employee, Harold Rumsey, easterly on Broadway street, in the city and county of San Francisco, struck the right side of a Chevrolet sedan automobile, then being driven southerly on Sansome street by its owner Charles F. Groat. In an action, brought by the latter against the former, to recover damages for injuries suffered as a result of the collision, the jury awarded the latter the sum of $12,500. The owner and operator of the truck appealed from the judgment, entered on the verdict, assigning as error: (1) The giving and refusal of instructions; (2) the admission and exclusion of evidence; and (3) excessive damages. Charles F. Groat having died pending the appeal, the special administratrix of his estate was substituted as respondent. For convenience Groat will be referred to as respondent.

[1] Appellants argue that an instruction on the doctrine of sudden peril should not have been given because, as they claim, there is no evidence that respondent was induced to do anything in the operation of his automobile by actual or seemingly sudden peril or imminent danger. According to their summary of the evidence, each driver merely testified that he entered the intersection first and that the other attempted unlawfully to usurp the right of way. Such testimony discloses no more than the ordinary and usual hazards which arise when two vehicles, traveling at an angle to each other, attempt to use the same part of the intersection at the same time, but utterly fails to picture a sudden emergency facing either driver. In absence of any evidence disclosing a situation of sudden peril, the doctrine is not applicable, and the giving of an instruction stating the doctrine would be erroneous. Vedder v. Bireley, 92 Cal.App. 52, 267 P. 724; Musante v. Guerrini, 125 Cal.App. 556, 13 P.(2d) 965. But the following additional testimony of respondent shows that he was confronted with a sudden emergency and was therefore entitled to have the jury advised as to the amount of care he was required to exercise while acting under its stress. Taylor v. Lowenstein, 113 Cal.App. 665, 298 P. 847. He testified that, before entering the intersection, he decreased his speed to ten or twelve miles per hour upon seeing an eastbound street car on Broadway, stopped, with its front end even with the westerly curb of Sansome, and discharging passengers; that, at the motorman's signal, he proceeded in front of the street car, saw appellants' truck traveling behind the street car, and anticipated it would also stop; that momentarily he took his eyes off the truck; that when he next looked, the truck had passed to the south of the standing street car and was coming towards him at a speed of thirty to

thirty-five miles per hour; that he then unsuccessfully attempted to avoid the collision by increasing his speed; and that, when struck, the rear end of his automobile was about two feet southerly of the street car and its front end beyond the southern curb of Broadway.

[2, 3] In effect, the instruction told the jury that the doctrine of sudden peril could not be applied to the conduct of either driver, unless such driver was not guilty of negligence proximately causing or proximately contributing to the collision. Appellants claim that the qualification should have required merely that such driver was not negligent, and that it was erroneous to include the further requirement that such negligence should not be a proximate cause of the collision. The negligence of a party which will deny him the benefit of the doctrine is such as causes or contributes to the creation of the perilous situation. Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540; Dodds v. Gifford, 127 Cal.App. 629, 16 P.(2d) 279; Wagy v. Brave, 133 Cal.App. 413, 24 P.(2d) 209; Nitta v. Haslam, 138 Cal.App. 736, 33 P.(2d) 678. Under the present facts, the perilous situation which confronted each driver was the collision. So understood, the instruction was correct.

[4, 5] In its charge to the jury, the court read section 131 (a) of the California Vehicle Act (St.1923, p. 560), as amended in 1931, page 2126. It also instructed the jury that the driver of the car which first entered the intersection, in absence of reason to believe otherwise, had the right to assume that the right of way would be accorded him, and that, while proceeding lawfully and using ordinary care in the exercise of the right of way, he was justified in assuming the other driver would yield the right of way and, if necessary, slow down or stop. Appellants claim the instruction erroneously omitted the qualification that a driver, in order to obtain the right of way, must be traveling at a lawful speed. Such qualification formerly found in the section was eliminated in its revision in 1931. In other instructions the jury was fully advised as to the care required of each driver, and particularly as to section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1931, p. 2120). Of course a driver cannot acquire the right of way by means of negligence in approaching or entering the intersection. Note, 89 A.L.R. 838.

[6] After reading several sections of the California Vehicle Act of 1931, including subdivisions "a", "b(3)," and "d" of section 113, the court told the jury that any violation of such provisions, except those of section 113 relating to speed, was negligence as a matter of law, but that a violation of such speed provisions presented a question of fact, as to whether it was negligence. Appellants correctly state that subdivision "d," by its express terms, does not qualify subdivision "a" and that therefore a violation of the latter is negligence as a matter of law. But they fallaciously argue that the instruction told the jury to the contrary. While it is true that subdivision "a" in requiring operation "at a careful and prudent speed" does relate to speed, yet, if reasonably construed, the instruction refers only to the rates of speed specified in subdivision "b." Any chance that the jury could have misconstrued the court's meaning was entirely removed by the clarity of other instructions upon the same matter. The court properly refused to give appellants' proposed instruction on the doctrine of unavoidable accident, since such issue was not presented by either the pleadings or the evidence. Metcalfe v. Pacific Electric Ry. Co., 63 Cal.App. 331, 218 P. 486; Riley v. Berkeley Motors, Inc., 1 Cal.App.(2d) 217, 36 P.(2d) 398. The case was tried upon the theory of each party, supported by his evidence, that the collision was caused entirely by the other's negligence.

[7] At the time of the accident respondent was 58 years of age and had been a member of the San Francisco police department for 32 years and a police sergeant for 11 years. He received no visible physical injuries in the collision but, immediately thereafter, appeared pale, nervous, excited, angry, and vociferous. He worked at his regular police duties on the next eight days, although during this time his wife and associates noticed that he was pale, nervous, and apparently sick. On the ninth day he drove his sedan over the Santa Cruz Mountains to Capitola, for a rest. During that and the succeeding night he was unable to sleep and suffered from gastro-intestinal disturbances. His condition becoming worse, his son drove him home the next day. Unable to reach his regular physician, he called in a neighborhood doctor, who found him in a critical condition, suffering from congestive heart failure or cardiac decompensation.

This condition, not improving under medical treatment, permanently disabled him for physical activities and prevented him from thereafter performing his police work.

Respondent introduced in evidence a record of the police department, showing his sick leaves of 319 days in a period of 22½ years prior to the accident, the nature of each sickness, and the name of the attending physician. The only entries of present significance are those showing an absence of 97 days in the seventh year before the accident, on account of nephritis, and an absence of 123 days in the fourth year due to arteriosclerosis. Upon the theory that they formed part of such record, and were therefore admissible under section 1854 of the Code of Civil Procedure, appellants offered written statements of attending physicians as to the nature of respondent's various sicknesses. The court sustained respondent's objection thereto that they were hearsay. Ten of such statements supplied the information appearing in such record and add nothing to what there appears. In two other statements, not referred to in such record, the departmental physician reported, respectively four and five years before the accident, that respondent had had high blood pressure and a diseased heart for several years. But since this physician testified on behalf of appellants fully as to the same matters, the error, if any, was harmless. Longuy v. La Societe Francaise De Bienfaisance Mutuelle, 52 Cal.App. 370, 198 P. 1011.

[8, 9] It is undisputed that, for a number of years before the accident, respondent had high blood pressure, hardening of the arteries, and diseased kidneys and heart; that, nevertheless, he was on active duty as a police officer; and that, ten days after the accident, he was stricken with an acute congestive heart failure. Medical testimony produced by respondent is sufficient to support his theory that the shock of the collision was a proximate cause of his heart failure by its aggravation of his previous condition. Likewise, the medical evidence, of appellants, sufficiently supports their claim that such failure was but the natural and ordinary development of his pre-existing ailments. The jury's decision on this conflict cannot be here disturbed. Shaw v. Owl Drug Co., 4 Cal.App.(2d) 191, 40 P.(2d) 588. However, appellants claim that the court erred in permitting a physician, who had examined respondent solely for the purpose of testifying, to narrate respondent's declarations to him that he had been an athlete in his younger years, had always been a well man, so far as he knew, and that, four or five years before, a police surgeon, in a routine examination, had found his blood pressure pretty high. Before admitting such testimony, the court, on its own motion, told the jurors that such statements were made to the doctor to enable him to make his diagnosis and admonished them not to consider such statements as evidence of the facts stated. Appellants argue in favor of the rule in other jurisdictions, which, distinguishing between history told an attending physician for purpose of treatment and that given an expert solely for purpose of testifying, hold the former admissible and the latter inadmissible. See 8 R.C.L. 639. No such distinction has been made in this state. "Declarations and statements, made to an examining expert by an injured party, of previous condition and past suffering, when declared by the expert to be necessary to enable him to form an opinion as to the nature and extent of disease or injury, and when such statements constitute in part the basis upon which the opinion of the expert is based, are admissible, not for the purpose of establishing the truth of the statements, but to serve as a basis for the medical opinion the expert is about to give. People v. Shattuck, 109 Cal. 673, 42 P. 315; Davis v. Renton, 113 Cal.App. 561, 298 P. 834; Rohner v. Gross, 121 Cal.App. 667, 9 P.(2d) 509." Willoughby v. Zylstra, 5 Cal.App.(2d) 297, 300, 42 P.(2d) 685, 686. The rule in this state is in accord with the majority rule. 67 A.L.R. 10, 18; 80 A.L.R. 1527, 1528.

[10, 11] Under section 166 of the city charter, respondent, at the age of 62 years would have been entitled to retire upon a monthly pension, payable for life, equal to one-half of the monthly salary of a sergeant. In lieu of such pension, he could have elected to receive its actuarial equivalent, partly in pension for life and partly in other benefits, payable to others after his death, subject, however, to conditions prescribed by the board of supervisors. This right to a future pension formed part of his compensation of employment. O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464; Douglas v. Pension Board, 75 Cal.App. 335, 242

P. 756; Klench v. Board of Pension Fund Com'rs, 79 Cal.App. 171, 249 P. 46. Although at the time of the accident the accrual of respondent's right to a pension was contingent upon his further service for four years, and the amount that he would receive depended upon his subsequent length of life, yet he then had a present existing right to fulfill such contingencies, and any interference with his ability so to do constituted an invasion of such right. This right to mature a pension is somewhat analogous to the right of a person to work and earn in the future. Loss of future earning capacity has always been considered a proper element of damages. Bonneau v. North Shore R. Co., 152 Cal. 406, 93 P. 106, 125 Am.St.Rep. 68; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Respondent's loss of a future pension because his injuries terminated his employment four years before his right to a pension accrued was therefore a proper element of damages.

[12, 13] Appellants contend that respondent's physical condition was so bad that it was problematical whether he would have lived to enjoy such pension and therefore his right thereto is too remote and speculative to warrant consideration. The opinions of the opposing medical experts as to the probable effect of respondent's pre-existing ailments upon the length of his remaining life are conflicting. The jury evidently accepted the opinions of respondent's physicians that he could, with care and treatment of such ailments, have lived to enjoy a pension for a considerable number of years. Under the evidence, whether, but for the accident, the pension would have accrued and the length of time it would have been received, presented questions of facts for the jury's decision. To assist the jury in fixing the present value of such future pension, the court admitted in evidence mortality tables showing the life expectancy of a man aged 58 years in average or ordinary health to be 15.39 years, and allowed an actuary, employed by the San Francisco City and County Employees' Retirement System, to testify that the present value of a sergeant's pension based upon such expectancy was $12,500. Appellants objected to this evidence, because respondent was not in average or ordinary health. The tables were admissible, although the evidence showed that respondent was suffering from ailments which probably would shorten his life to less than that of a person in average or ordinary health. 19 R.C.L. 217; 17 C.J. 875. The objection which goes to use of the tables, not their admissibility, was correctly handled in the instructions. The court told the jury that the tables did not establish the length of time any particular person of a given age would live but tended merely to show the ordinary experience as to a person of the age named in ordinary or average health. It further instructed the jury that "in estimating the probable length of a particular man's life, as compared with the average duration of life of a person of the same age, the individual's state of health, occupation, habits and surroundings as disclosed by the evidence, must be taken into account; and the reasonable and proper weight is to be given to all such elements in fixing that person's expectancy, and either increasing or decreasing, according to the facts and circumstances of the particular case, the figures set out in the tables for the average person of the same age."

[14] The verdict is in the same amount as the actuary fixed for the present value of a sergeant's pension, based upon the life expectancy of a person in ordinary or average health. From this coincidence, appellants argue that the verdict is excessive, because respondent's physical condition decreased his expectancy to less than that of a person in ordinary or average health. But other elements entered into the amount of the verdict. It is undisputed that respondent incurred liability for physicians' services in the sum of $500, for nurse hire in the sum of $728, and for repairs to his automobile in the sum of $20. He suffered a loss in earning capacity because his injuries prevented him from continuing to work as a police sergeant at a salary of $220 per month. He was also entitled to an allowance for past and future pain and suffering. The evidence discloses that he was confined to bed at home for two months, attended by two nurses for four weeks and by one nurse for three weeks; that he was kept alive by taking digitalis and coramin; and that he was unable to exert physically to any extent. Considering all these factors, it does not appear that the verdict is excessive.

The judgment is affirmed.

We concur: TYLER, P.J.; CASHIN, J.

14 Cal.App.2d 365

CLYDE v. MITCHELL et al.

Civ. 10803.

District Court of Appeal, Second District, Division 2, California.

May 29, 1936.

Rehearing Denied June 27, 1936.

Hearing Denied by Supreme Court July 27, 1936.

1. Appeal and error ⇨927(3)

In determining propriety of granting of motions for nonsuit, evidence must be interpreted most strongly in favor of plaintiff and against defendants.

2. Landlord and tenant ⇨167(2)

While owner or occupant of premises is bound to use ordinary care for protection of invitee, owner or occupant is entitled to assume that invitee will perceive dangers obvious to him upon ordinary use of his senses, and hence need not give invitee notice or warning.

3. Landlord and tenant ⇨167(2)

Roofing contractor who with coworker leaned against defective guard rail while inspecting old residence in an effort to locate a leak, and thus caused guard rail to collapse, precipitating both men to cement pavement 15 feet below, *held* precluded from recovery against owner, owner's agent, or tenants.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Suit by Fred P. Clyde against Carrie M. Mitchell and others. From a judgment granting motions for nonsuit as to all defendants, plaintiff appeals.

Affirmed.

M. B. Butler, of Pasadena, for appellant.

A. G. Allen and Paul W. Davis, both of Pasadena, and LeRoy Anderson, of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiff and another roofing contractor were called to examine the roof of an old two-story residence in an effort to locate a leak. While leaning against a guard rail inclosing a second-story porch the rail gave way and the two men were precipitated to the cement pavement 15 feet below. Plaintiff brought this action to recover damages for the injuries he suffered. His suit was directed against defendant Mitchell as owner of the property, defendants Hampton as tenants, defendant MacLaughlin Company as agent of the owner, and defendant Chaffin as the employee of the owner's agent, who summoned him to do the work. At the conclusion of trial the court granted motions for nonsuit as to all defendants, and from the resultant judgment plaintiff appeals.

[1, 2] The court properly ruled that appellant had not made out a case entitling him to recover. Interpreting the evidence most strongly in favor of appellant and against respondents, as we must (Hoff v. Los Angeles Pacific Company, 158 Cal. 596, 112 P. 53), it is apparent that he can maintain no cause of action against respondents or any of them upon the showing which he made. At the time of the accident appellant was 52 years of age, had been engaged for 17 years in work upon roofs and about buildings, and his coworker was a man equally experienced. It is significant that although the two men tested another section of the guard rail before they trusted it for the purpose of climbing upon it to a higher elevation, they approached the section where the accident happened without any precaution, both leaned against it "off balance," and thus caused it to collapse. The building was old, its condition was apparent, and the event occurred in broad daylight. To reach the same point of inspection they might have used ladders which they had at the very time in their automobiles on the premises. While the owner or occupant of premises is bound to use ordinary care for the protection of an invitee, it is stated in Shanley v. American Olive Company, 185 Cal. 552, 197 P. 793, 794, that such owner is entitled to assume that the invitee "will perceive that which would be obvious to him upon the ordinary use of his own senses. * * * [The owner] is not required to give to the invitee notice or warning of an obvious danger."

Moreover, it is manifest that appellant and his coworker were subjecting the guard rail to an unintended use when they used it to protect their combined weight while leaning out in search for the leak. In a similar case, De Motte v. Arkell, 77 Cal.App. 610, 247 P. 254, 260, the court, holding that nonsuit should have been granted, used this language: "Irrespective of the actual pressure exerted * * * against the railing, it is clear that the guard rail was not intended to be used for leaning against, nor was the platform or balcony erected as a place to be used for lounging or social purposes. Where it is shown that a back porch

or balcony is being used for the purpose for which the same was erected, then the weight or pressure brought against a guard rail as to whether it was reasonable or unreasonable, or any greater than should have been anticipated, becomes purely a question for the jury. * * * The facts appearing in the transcript, in view of the law which we have cited, show that the defendant's motion for a nonsuit in this case should have been granted."

[3] Holding, as indicated above, that appellant subjected the guard rail to an unintended use and that for that reason, if for no other, he cannot recover, it becomes unnecessary to pass upon the degree of responsibility to an invitee upon leased premises of an owner, agent, tenant, and agent's employee, respectively, to which points a major portion of the briefs herein is directed.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 306

WESTERN TRAVELERS ACCIDENT ASS'N OF CALIFORNIA v. JOHNSON, State Treasurer.

Civ. 1904.

District Court of Appeal, Fourth District, California.

May 26, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Taxation ⇐140

Phrase "gross premiums," in statute authorizing levy of tax on amount of gross premiums received by insurance company on business done in California, includes premiums and assessments (Pol.Code, § 3664b).

[Ed. Note.—For other definitions of "Gross Premiums," see Words & Phrases.]

2. Taxation ⇐140

Where California accident insurance association took over business of Nebraska accident insurance association, mere continuance of obligation of policies issued by Nebraska association was "business done in California," and not in Nebraska, and hence California company was subject to statutory privilege tax on amount of gross premiums received from such continued obligations (Pol. Code, § 3664b).

[Ed. Note.—For other definitions of "Business Done," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by the Western Travelers Accident Association of California against Charles G. Johnson, State Treasurer of the State of California. From the judgment, the plaintiff appeals.

Affirmed.

Leo E. Anderson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for respondent.

MUNDO, Justice pro tem.

This is an action to recover taxes paid under protest to the defendant state treasurer. Plaintiff was organized under the laws of this state July 6, 1927. Prior to this date an association by the name of Western Travelers Accident Association of Nebraska, carried on a mutual benefit insurance business in Nebraska. This Nebraska association was licensed in 1924 to do business in California. On September 15, 1927, plaintiff offered to assume all the liabilities of the Nebraska association in exchange for all of the assets thereof. Each member of the Nebraska association who desired to continue his or her insurance made written application to plaintiff. The application contained a provision authorizing appellant to issue a new policy or adopt the old policy of the Nebraska association as its (plaintiff's) policy. No new policies were issued; the only change being that instead of paying their assessments to the old company in Nebraska, they mailed their assessments to plaintiff in Los Angeles. The offer of plaintiff was approved by the stockholders of the Nebraska association on January 28, 1928, and on February 9, 1928, it was accepted by the executive board of said association subject to the California association (plaintiff) qualifying in Nebraska. The California association qualified in Nebraska and received a permit to do business there. Thereupon the assets of the

Nebraska association were transferred to plaintiff, and thereafter plaintiff carried on the business. The Nebraska association was dissolved and its license to do business in California was surrendered. The effect of the transaction was simply a reorganization, transferring the association from a Nebraska corporation to a California corporation. After this was accomplished the business was conducted by plaintiff under its California license.

All contracts of insurance written in the Nebraska association were made and entered into at Omaha, Neb. Plaintiff association is maintained by the voluntary acts of its members paying the assessments as levied and all payments thereof are made by mail addressed to plaintiff at Los Angeles. The amount collected in 1930 from members residing in California amounted to $7,010, as against a total collection from members residing outside the state, amounting to $56,348. The figures also show that the total amount collected from holders of Nebraska contracts amounted to $54,949, and that the total collected for the year was $63,358.

All assessments levied by plaintiff are used to maintain reserves, pay losses and expenses of operation; plaintiff makes or pays no rebates, refunds, or dividends.

In 1931, the board of equalization of the state of California levied and assessed against plaintiff as tax payable to the state of California a sum equal to 2.607 upon "the amount of gross premiums received from all business done by plaintiff under the provisions of section 3664b of the Political Code." Plaintiff paid the amount of the tax under protest. It then filed this action to recover the amount so paid. The trial court rendered judgment in favor of the state treasurer, and ordered that plaintiff take nothing.

The questions presented by this appeal taken by the plaintiff involve the construction of two phrases contained in section 3664b of the Political Code under which the tax was levied on the plaintiff association. The two phrases to be construed are: "Gross premiums" and "business done in this state." This section provides: "Every insurance company or association doing business in this state shall annually pay to the state a tax of two and sixty hundredths per cent upon the amount of the gross premiums received upon its business done in this state."

[1] Appellant points out that this section does not provide for the levy of any tax upon assessments, and it cites authorities from other jurisdictions to the effect that assessments are not included within the term "premiums" as applied to an association such as appellant, which pays no rebates or benefits and does not operate for profit. Whatever may be the rule elsewhere, it is established in this state that the phrase "gross premiums" includes both premiums and assessments. Bankers' Life Co. v. Richardson, 192 Cal. 113, 218 P. 586. Accordingly, appellant would be required to pay a tax on the assessments if the business is done in this state.

A study of the law upon this subject reveals two lines of decisions, one holding that a foreign insurance corporation which had transacted business within the jurisdiction of a state continued, notwithstanding its withdrawal from the state, to be subject to service of process within the state, in actions arising out of the business so transacted (Connecticut Mut. L. Ins. Co. v. Spratley, 172 U.S. 602, 19 S.Ct. 308, 43 L. Ed. 569); and the other holding that the mere continuance of the obligation of existing policies in a foreign life insurance company, held by resident policyholders, together with the receipt of the renewal premiums upon these policies at the company's home office, may not be treated by the state as constituting in itself the transaction of a local business, justifying the imposition of an annual privilege tax upon the amount of the premiums so received. Provident Savings Life Assurance Society v. Kentucky, 239 U.S. 103, 36 S.Ct. 34, 38, 60 L.Ed. 167, L.R.A.1916C, 572. The Spratley Case, supra, related to the validity of the service of process upon foreign corporations, while the Provident Case deals with the power of the state to treat the mere continuance of the obligation of the existing policies held by resident policyholders as the transaction of a local business justifying the imposition of an annual privilege tax in the absence of the actual conduct of business within the limits of the state. In pointing out the distinction between these two lines of authority, the court in the Provident Case refers to the case of Mutual Res. F. Life Ass'n v. Phelps, 190 U.S. 147, 23 S.Ct. 707, 47 L.Ed. 987, and says: "Thus, in the Phelps Case * * * the court of appeals of Kentucky had decided that the withdrawal of the company from the state di

not terminate the statutory agency for the acceptance of service which had been created as a condition of the company's admission; the granted authority continued with respect to the business transacted. * * * But a distinction obtains when the question is whether the mere continuance of the obligation to resident policy holders under the existing policies can be regarded as constituting in itself the transaction of a local business." See, also, Hunter v. Mutual Res. L. Ins. Co., 218 U.S. 573, 31 S.Ct. 127, 54 L.Ed. 1155, 30 L.R.A. (N.S.) 686.

Appellant relies principally upon the Spratley Case, supra, and cases following the rule therein set forth. These cases, as we have seen, are concerned with the validity of the service of process upon a company after it has assumed to withdraw from the state. Other cases relied on by appellant, such as Commonwealth v. Equitable L. Assur. Society, 239 Pa. 288, 86 A. 787, are cases where the company actually does business in the state and maintains agencies there, although some of the premiums are paid directly to the home office, out of the state. In the Equitable Case, the company did more than merely receive the premiums at its home office; it was licensed to do business in Pennsylvania and it transacted a large amount of business there.

Another case cited by appellant is Commonwealth v. Provident Savings L. Assur. Society, 155 Ky. 197, 159 S.W. 698. This case referred to the Equitable Case, and erroneously construed them to be similar. Upon appeal to the United States Supreme Court, the decision was reversed and the court pointed out the distinction between the two. The question in the Equitable Case was as to the permissible measure of a tax exacted for a privilege admittedly exercised. Provident Sav. L. Assur. Society v. Kentucky, supra.

It will be seen from the foregoing that the mere continuance of the obligation of the policies issued by the Nebraska association, which were assumed by the appellant, would not constitute the doing of business in Nebraska for which a privilege tax could be exacted. It is immaterial whether appellant issued new policies or simply adopted the policies previously issued; the end result would be a continuation of the obligation of the company to its members.

At the time appellant was organized under the laws of California, pursuant to the provisions of sections 453d and 453q of the Civil Code, the law required such a corporation to have at least 1,000 members who must have made written application for membership or insurance in the corporation and must have paid to the treasurer of the corporation the sum of $25,000. The by-laws of appellant corporation conformed with this requirement. The by-laws read: "Membership in this association shall be acquired by the acceptance by the association as hereinafter provided of the written application for membership and the issuance to such applicant of a policy. * * *"

Every contract of insurance issued by a corporation such as appellant must be founded upon a written application therefor. Civ.Code, § 453j.

The applications which were sent by the members of the old Nebraska company to appellant at Los Angeles authorized appellant to either issue a new policy or adopt the policy which had previously been issued. Whichever alternative appellant adopted, the result would be the same; the contract of insurance would be complete upon appellant's acceptance of the application and the issuance of a new policy or the adoption of the policy which had theretofore been issued by the old Nebraska association. The contracts of insurance were complete upon their acceptance by appellant at Los Angeles.

Assuming, however, that the contracts were made in their entirety in Nebraska, it cannot be said that the continuance of the obligations of the policies constitutes the transaction of business in Nebraska for which that state could exact a privilege tax. Appellant had sought to withdraw itself from that state and the effect of the transaction between it and the Nebraska association was nothing more than a reorganization whereby the old association was transferred from a Nebraska corporation to a California corporation. The continuance of the contracts of insurance, whether written in Nebraska or California, was not dependent on the consent of the state of Nebraska. It is the actual transaction of business that furnishes the ground of license exaction, and not the mere existence of the obligation under the policies previously written. These policies are contracts already made; the state of Nebraska "cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation

in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control." Provident Sav. L. Assur. Society v. Kentucky, supra.

[2] The business conducted by appellant after it took over the business of the Nebraska association and withdrew from the state of Nebraska was business done in the state of California and subject to the tax provided for in section 3664b of the Political Code.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



14 Cal.App.2d 388

In re MAGUIRE'S ESTATE.

MAGUIRE et al. v. ROGERS.

Civ. 11000.

District Court of Appeal, Second District, Division 2, California.

June 1, 1936.

Hearing Denied by Supreme Court July 30, 1936.

1. Wills ⇐130

Date which is incomplete because lacking statement of either day, month, or year of execution does not satisfy statutory definition of holographic will (Probate Code, § 53).

2. Wills ⇐130

Instrument consisting of double sheet of foolscap paper containing dispositive clauses signed by deceased but not dated, and a codicil thereto signed by the deceased and dated "March nineteen hundred and thirty" *held* not sufficiently dated to qualify instrument as holographic will under statute (Probate Code, § 53).

3. Courts ⇐91(1)

District Court of Appeals must follow law as interpreted by Supreme Court.

4. Wills ⇐324(4)

Whether envelope bearing on its face in deceased's handwriting the words "Will of H. F. Maguire Mch 8th, 1930," was part of will so as to supply complete date or whether inscription on envelope was merely description of contents of envelope was question of fact to be determined by fact finder (Probate Code, § 53).

5. Appeal and error ⇐1010(1)

Determination of trial court on question of fact is not to be overthrown on appeal unless that determination is without support in the evidence.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

In the matter of the estate of Henry Francis Maguire, also known as H. F. Maguire deceased. Will contest by Francis C. Maguire and others against Sylvia S. Rogers, proponent. From a judgment denying admission to probate of a holographic will, the proponent appeals.

Affirmed.

Griffith & Thornburgh, Robertson, Crawford & Nichols, S. E. Crow, and J. V. Wood, all of Santa Barbara, for appellant.

Edward F. Wehrle, of Los Angeles, and Smith & Delwiche, Heaney, Price, Postel & Parma, and Norman W. Ambrose, all of Santa Barbara, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment of the Superior Court denying admission to probate of a holographic will. The instrument consisted of a double sheet of foolscap paper containing the dispositive clauses signed by the testator but not dated and a codicil thereto signed by the testator and dated "March nineteen hundred and thirty"; both were inclosed and sealed in an envelope which bore on its face the words, "Will of H. F. Maguire Mch 8th, 1930," all in the handwriting of the testator. The questions for our consideration are two: (1) Was the foolscap paper itself sufficiently dated in order to qualify it in this respect as a holographic will? (2) Was the envelope a part of the will to thus supply a complete date?

[1, 2] The first question must be answered in the negative. "A date which is incomplete, because lacking a statement of either the day, the month, or the year of execution, does not satisfy the statutory definition of an olographic will." In re Estate of Vance, 174 Cal. 122, 162 P. 103, 104, L.R.A.1917C, 479. In that case the instrument was dated as follows: "This 22nd day of March in the year of our

Lord one thousand." The date was written entirely by the hand of the testator, but the court said: "We think it cannot fairly be said that the paper was 'entirely dated by the hand of the testator.'" See, also, In re Estate of Price, 14 Cal. App. 462, 112 P. 482; In re Estate of Martin, 58 Cal. 530; In re Estate of Thorn, 183 Cal. 512, 192 P. 19; In re Estate of Anthony, 21 Cal.App. 157, 131 P. 96. In Re Estate of Billings, 64 Cal. 427, 1 P. 701, the court said: "It [a holographic will] must be entirely written, it must be entirely dated, and it must be entirely signed by him." This language was quoted with approval in Re Estate of Thorn, supra, and In re Estate of Vance, supra.

[3] If the matter had not already been decided in California and become a rule of property, we would be inclined to hold otherwise. The statute reads as follows: "A holographic will is one that is entirely written, dated and signed by the hand of the testator himself." Section 53 of the Probate Code. Our first impression of the meaning of this sentence is that a holographic will must be written, dated, and signed entirely by the hand of the testator, and not that the will must be entirely written, entirely dated, and entirely signed by the hand of the testator. During years of experience in the probate court the writer of this opinion never heard the contention made that a holographic will must be entirely written in the sense that the will would be invalid if a syllable of one of the words were omitted or if an entire word were omitted, and we never heard the contention made that such a will must be signed by the full signature of the testator. Yet to be consistent this obviously would be the meaning of the statute. But this court is not the Supreme Court of the state of California and it is the duty of this court to follow the law as it is interpreted by that court.

As early as 1923 in a case involving the same section Louis Myers, Justice, afterwards Chief Justice, in a concurring opinion said: "I concur solely because I must agree that this case is ruled by the decision in Re Estate of Thorn, and if a change is to be made in the rule as there announced it should be by legislative enactment." In re Estate of Francis, 191 Cal. 600, 217 P. 746. Thereafter an additional sentence was added to the section by the Legislature as follows: "No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will." But, even so, the Legislature has not yet taken care of the situation which confronts us herein. Grief and disappointment are often caused to those depending upon holographic wills by the law as it now exists. A tragic illustration was the will of June Mathis, Los Angeles superior court, No. 90235. It may be that some time in the future the Legislature will make an additional amendment to the section to the effect that no date is necessary provided the approximate time of the execution of the will is proved and that the testator was competent to make a will during all the time within the limits of said approximation.

[4, 5] Was the envelope a part of the will to thus supply a complete date? Whether the envelope was a part of the will, or whether the inscription on the envelope was merely descriptive of the contents of the envelope, was a question of fact to be determined, like all questions of fact, by the fact finder upon the evidence and circumstances in evidence bearing upon the question and the inferences fairly to be drawn therefrom. In re Estate of Streeton, 183 Cal. 284, 191 P. 16. This, indeed, is admitted by the proponent of the will. The question might have been determined either way by the fact finder. It was determined adversely to the proponent. The determination of the trial court on a question of fact is not to be overthrown on appeal unless that determination is without support in the evidence, and it cannot be said in this case that there was not any substantial evidence to sustain the finding.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

14 Cal.App.2d 373

PEOPLE v. JOHNSON.

Cr. 296.

District Court of Appeal, Fourth District, California.

May 29, 1936.

1. Criminal law ⇐1023(10)

Purported appeal from conviction for willfully omitting to transfer public moneys as required by law was dismissed, where no judgment was entered because probation was granted (Pen.Code, § 424, subd. 6).

2. Criminal law ⇐1023(13)

Appeal from order denying motion for new trial *held* properly before reviewing court, although purported appeal from judgment was dismissed because no judgment had been entered.

3. Taxation ⇐325

Evidence *held* to support conviction of county assessor for willfully omitting to transfer public moneys in his hands as required by law in amount refunded to taxpayer without submission of matter to board of supervisors as provided by statute (Pen.Code, § 424, subd. 6; Pol.Code, § 3804).

4. Criminal law ⇐20

"Willfully" within statute defining term when applied to intent with which act is done or omitted implies purpose or willingness to commit the act, including idea that person doing act was conscious of or knew what he was doing and all circumstances connected therewith, and does not imply an intent to violate law or injure another, but, where word is used in connection with specific statement showing purpose to injure another, it implies criminal intent if law makes doing of act with such purpose a criminal act (Pen. Code, § 7).

"Willfully" within criminal statutes is stronger word than "intentionally," in so far as it may expose the intention or purpose in the mind of the defendant, and means governed by will, obstinate, perverse; to do a thing "willfully" being to do it by design and with a set purpose.

[Ed. Note.—For other definitions of "Willfully," see Words & Phrases.]

5. Taxation ⇐325

Under statute providing for punishment of county officer for "willfully" omitting to transfer public money in his hands as required by law, proof that county assessor knowingly omitted to transfer funds in question in violation of law *held* sufficient; proof that he omitted to transfer with evil intent to defraud county or to gain something for himself being unnecessary (Pen.Code, §§ 7, 424, subd. 6).

6. Taxation ⇐325

In prosecution of county assessor for willfully omitting to transfer public moneys in his hands as required by law in amount of tax refunds made without submission to board of county supervisors, letter by district attorney advising assessor that he had right to make changes he deemed advisable on assessment rolls until time rolls were turned over to board of supervisors as board of equalization *held* inadmissible (Pen.Code, § 424, subd. 6; Pol.Code, § 3804).

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

James Hervey Johnson was convicted of willfully omitting to transfer public moneys in his hands as required by law, and he appeals from the judgment of conviction and from an order denying his motion for a new trial.

Appeal from judgment dismissed, and order denying new trial affirmed.

Edgar A. Luce, Robert R. Hamilton, and Don L. Yale, all of San Diego, for appellant.

U. S. Webb, Atty. Gen., John O. Palstine, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., of San Diego, for the People.

BARNARD, Presiding Justice.

[1, 2] The defendant, who was the assessor of San Diego county, was charged with a violation of subdivision 6 of section 424 of the Penal Code, it being charged that he willfully omitted to transfer to the county treasurer the sum of $356.40 which he had collected from various persons as taxes on personal property and when it was his duty, under the law, to transfer said money to the treasurer. He was tried by the court without a jury, and, after being found guilty, his application for probation was granted. He gave notice of appeal from the judgment and also from an order denying his motion for a new trial. Because probation was granted, no judgment was entered, and the purported appeal from such judg-

ment should be dismissed, although the case is before us on the appeal from the order denying a new trial. People v. Von Eckartsberg, 133 Cal.App. 1, 23 P.(2d) 819.

With one exception, which will hereafter be referred to, there is no dispute as to the facts in the transaction which led to the conviction of the appellant. On March 6, 1934, an agent for the receiver of a theater paid to the appellant, as county assessor, $1,021.68 in payment of the tax on certain personal property in the theater, in accordance with an assessment made by the appellant. This tax was paid under protest on the ground that an excessive valuation had been placed on the property. In making this assessment, the regular form used in assessing unsecured personal property had been filled in. On March 7, 1934, this $1,021.68 was deposited in the office of the county treasurer on account of personal property tax collections, and that particular money was never withdrawn for the purpose of making a refund to this taxpayer. The appellant had agreed with the agent of the receiver to have the property re-examined and reappraised and sent a deputy for that purpose. This deputy made a report that the assessment was too high, and recommended that it be reduced by $6,000. A correction was made on the assessment roll, which was still in the hands of the assessor, by inclosing the original assessment figures in a circle in red ink and by writing in the reduced assessment figures, which thus showed a tax of $665.28 in lieu of the original tax of $1,021.68. On April 3, 1934, the agent of the receiver appeared at the cashier's window in the appellant's office and requested a return of the amount due him. The cashier appeared to know nothing about the matter, and left his window for some five or six minutes. When he returned, he handed the agent $356.40 in cash. The old receipt for $1,021.68 was taken up and pasted in the receipt book over the carbon copy of the same, and a new receipt was issued to the taxpayer for $665.28. The money thus returned to the taxpayer was taken out of the till, and was money which had been paid in by other taxpayers on April 3, and the day before. Complete entries were made on the assessor's books which fully disclosed the entire transaction and on the assessment roll, which was finally turned over, the appellant was charged with $665.28 with respect to this assessment and not with $1,021.68.

[3] It is appellant's contention that the evidence is not sufficient to show that he authorized the making of this refund in the manner in which it was made, and in this connection appears the only conflict in the evidence. He testified that he did not authorize the cashier to make this refund by paying cash out of the till, that he had never instructed anyone in his office to make a refund by paying money out of the drawer except by way of making change, and that, although he approved the reduction of this assessment, his instruction was that the refund should be handled in accordance with "Refund Form No. 232," which contemplated a submission of the matter to the board of supervisors under the provisions of section 3804 of the Political Code. On the other hand, it appears that the agent of the receiver had talked personally to the appellant, protesting the amount of this assessment both before the assessment was originally made and after the tax was paid, and appellant had agreed to have the matter investigated. It does not appear how the receiver's agent was informed that a refund was to be made, but it does appear that he knew this when he came in on April 3, although he did not know the amount of the reduction. The cashier knew nothing of the matter and left his cage for several minutes. When he returned, he paid the money from the till. It is significant that the written authorization which was signed by the appellant, which will hereafter be referred to, was signed by him on the same day. One of the appellant's deputies who had charge of such complaints as this testified that they had instructions from the appellant that, before money could be paid back to taxpayers, an investigation must be made and the data furnished the appellant and his personal "O. K." received, and that this procedure was followed invariably during the year 1934. The cashier testified that he had general instructions from the appellant that money might be given back to taxpayers, but only upon the appellant's approval. He further testified that on many occasions the appellant had approved forms so that he might take cash out of the till and give the money to taxpayers, and that he did not make this refund without getting permission, and that he had never made a refund to any taxpayer without getting permission. Evidence was introduced of a number of occasions in which refunds had been made to taxpayers on the approval of the appellant without the formality of going through the board of supervisors. The appellant admitted on the stand that in a number of cases he had authorized the making of refunds

to taxpayers by taking money from the till. Other evidence and other possible inferences to which our attention is called merely present a matter of conflict in the evidence.

The investigation report in this particular matter was introduced in evidence, which was a form regularly used for that purpose. This set forth the basis of the complaint, and was handed to an investigator, one of the appellant's deputies. On March 7, 1934, this deputy entered his report on the form recommending a reduction of $6,000 in the amount of the assessed valuation of the property. Another deputy, in charge of such matters, indorsed on the form a request for permission to make a refund of $356.40 on account of this overassessment. Another deputy made a record of this, giving the refund a number, and indorsing the number on the form, and attached what is known as "Refund Form No. 232" to the investigation report by pinning the two together. These two were handed to the appellant, who, on April 3, 1934, wrote on the investigation report, in a space reserved for him, the following: "O. K. Not necessary to go thru B of S. JHJ." and stamped the same "April 3, 1934." The appellant testified that he meant by the words "Not necessary to go thru B of S" that it was not necessary to have this assessment equalized, that he had the right and the duty to change the assessment without the necessity of going before the board of supervisors for equalization, and that he intended to have the refund made in accordance with refund form No. 232. It does not appear what became of the refund form No. 232 which had been attached to the investigation report, but it does appear that the same was not used. This refund form No. 232 was a mimeographed form of a letter to a taxpayer, telling him that the records of the assessor's office show that he had apparently overpaid his taxes or that they had been paid more than once, and telling him to take his receipted bills and this letter to the county auditor, "so that he may assist you in obtaining a refund from the board of supervisors, if you are entitled to it, and so that you may sign a claim therefor."

This investigation report, with the recommendation for a refund appearing thereon and with the approval by the appellant with the notation "Not necessary to go thru B of S," was, in itself, sufficient to justify the trial court's finding that the appellant had authorized the making of this refund to the taxpayer without the usual application to the board of supervisors. While the appellant says he meant that it was not necessary to have the matter referred to the board of supervisors as a board of equalization, a procedure provided for by the other sections of the Political Code, and that he merely intended to authorize the procedure indicated by refund form No. 232, the last-mentioned form, which was attached to the investigation report, plainly showed on its face that it was to be used only in connection with making an application to the board of supervisors. With that before him the appellant's written statement that this particular transaction need not go through the board of supervisors would indicate that he did not intend form No. 232 to be used or the procedure indicated by it to be followed.

While the appellant calls attention to other inferences that might be drawn, his written statement on the investigation report, taken in connection with the other evidence, is entirely sufficient to support the implied finding that the appellant authorized the making of this refund in the manner in which it was made.

[4, 5] It is further contended that the evidence is not sufficient to establish, on the part of the appellant an intent to do wrong and that the statute placed this burden on the prosecution. It is argued that nothing here appears but a mistake in the manner of bookkeeping, with no loss to the county and no gain to the appellant; that no fraud on the part of the appellant appears; and that it was the intention of the Legislature, in adopting the statute upon which this prosecution is based, to cover cases of actual misappropriation of public funds, but that the same was never intended to apply to such a harmless transaction as the one here in question. It is argued that, since the Legislature used the word "willfully" in subdivision 6 of section 424 of the Penal Code, it was necessary to prove that the appellant not only omitted to transfer the funds in question but that he did this with an evil intent to defraud the county or to gain something for himself. He relies on People v. Swiggy, 69 Cal.App. 574, 232 P. 174, 176, People v. Okomoto, 26 Cal.App. 568, 147 P. 598, 599, and People v. Von Tiedeman, 120 Cal. 128, 52 P. 155, 158. He also cites certain cases from federal courts, including Roberts v. United States (C.C.A.) 126 F. 897, where it is said that the word "willfully," "as ordinarily used in the penal statutes, implied wicked purpose or perverse disposition, or, indeed, any evil or im-

proper motive, intent, or feeling, or, to characterize an act done wantonly." Even in that case the part just quoted is followed by "or one which a man of reasonable knowledge must know to be contrary to his duty." In People v. Von Tiedeman supra, the court said: "The word 'willfully' implies 'a purpose or willingness to commit the act.' Pen. Code, § 7. 'To do a thing willfully is to do it by design, with set purpose.' People v. Sheldon, 68 Cal. 434, 9 P. 457." In People v. Okomoto, supra, it is said: "The statement in the Penal Code (section 7, subd. 1) that the word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, includes, rather than excludes, the idea that the person doing the act was fully conscious of, or, in other words, that he knew, what he was doing and all of the circumstances connected therewith which made the doing willful. The word 'willfully' alone, as thus used, does not imply an intent to violate law or to injure another; but, when the word is used, as in this information, in connection with a specific statement showing a purpose to injure another, it implies a criminal intent, if the law makes the doing of that act with that purpose a criminal act."

In People v. Swiggy, supra, the court said: "The word 'willfully,' as used in section 270, means a deliberate intention or a set purpose to omit to perform the natural duty which the section declares that an omission to perform shall be penalized. The word, when used in criminal statutes, has been said to be a stronger word than word 'intentionally' in so far as the word may expose the intention or purpose in the mind of the defendant, and that 'it means governed by the will; obstinate; perverse.'"

We are unable to read these cases as sustaining the interpretation which the appellant gives the statute in question; namely, that it is necessary in a case of this kind to prove that the omission occurred with a wrongful intent on the part of the appellant to defraud the county. It is argued that the word "willfully" in this statute has no meaning unless given this interpretation. But section 7 of the Penal Code provides that this word, when applied to the intent with which an act is done or omitted, shall imply simply a purpose or willingness to commit the act or make the omission, and that it does not require any intent to violate law, injure another, or acquire any advantage. Even though it implies a criminal intent when used in connection with other words showing a purpose to injure another, no such words appear here. In this particular statute there is an obvious reason why the legislature intended that the willful failure to turn over public funds should constitute an offense, regardless of what motives actuated the officer in so doing. To fail to turn over such funds when required by law is made a wrong by the statute. To intentionally disobey the statute is to willfully do this wrong. To so interpret it is not to render the statute meaningless. For example, if a check representing public funds fell behind a cash drawer when it was opened and was temporarily overlooked, the failure of the office to deposit the funds might not be a willful one. Many other circumstances might be imagined where the mere failure to deposit the funds would not be a crime within the meaning of the statute because the word "willfully" is included therein. Doubtless the Legislature had such things in mind and inserted this word to cover any such a case.

But it does not follow that it was intended thereby to make it necessary to prove that a failure to transmit funds, when required by law, was done with the intent of defrauding the people or of embezzling the money. The matter of embezzling such funds is covered by other subdivisions of this section. From the very nature of the case it is necessary to surround the handling of such public funds with the greatest restrictions and safeguards. This is done by this statute, and it is made a crime to willfully omit to transfer such funds in accordance with the requirements of law. The charter of San Diego county required such funds to be transmitted to the county treasurer daily. In our opinion, this statute covers a case where an assessor intentionally and knowingly disobeys the law, and it is not necessary to prove that in thus disregarding the law he also intended to defraud the public or to acquire financial gain for himself. To say the least, it is sufficient under that statute if the act is knowingly done in violation of the law, and this sufficiently appears here. Knowledge and purpose to do wrong may appear from an intentional disregard of this statute as well as from an actual embezzlement or stealing of funds. It fully appears that the appellant was aware of the law; that he complied with it in many cases; that he failed to comply with it in other cases; and that he intended here to keep these funds which should have been transferred to the treasurer for the purpose of paying some one who

he thought had a just claim against the county. He had no more authority to use tax money which he had collected for this purpose than he would have had to use the same to pay any other bill or demand which he might personally think was justly owed by the county. It was entirely unnecessary to prove that his purpose was evil. The act itself was wrongful, in view of the statute, and it was sufficient to show that it was done willfully and not merely inadvertently and unintentionally. In People v. O'Brien, 96 Cal. 171, 31 P. 45, 47, the court said: "It is a familiar rule that, to constitute crime, there must be a union of act and intent; but our Code provides that the word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

It is argued that he acted in good faith and "under color of the authority of law." Assuming that color of authority of law might in some cases excuse the omission to transfer such funds, nothing here appears which might bring the appellant within any such rule. There can be no question, under the evidence, that the appellant's act in failing to deposit this money and in using it for another purpose was willfully done, within the meaning of this statute.

Some contention is made by the appellant that the funds here in question were not public funds which the law required him to transmit to the county treasurer. In effect the argument is that the receiver for the theater was entitled to the money returned, and therefore the money was his and did not belong to the county. However, the appellant is not charged with the failure to transmit the money which was paid in by this taxpayer. That money had already been deposited with the county treasurer. The money used in making this refund was money which was subsequently paid in by other taxpayers in payment of taxes assessed upon their personal property. These funds belonged to the county, and beyond question were public funds which the appellant was required by law to transfer to the treasurer.

[6] It is further argued that the court erred in excluding from evidence a letter written to the appellant by the district attorney in June, 1931. This letter advised the appellant that he had a right to make any changes he deemed advisable on his assessment roll up to the time the rolls were turned over by him to the board of supervisors as a board of equalization. If it be assumed that the appellant, as assessor, was authorized to make such corrections as this in the assessment rolls while they were still in his office, it would by no means follow that he would have the right to use the money paid in by other taxpayers in making a refund to one whose assessment had been thus corrected without letting the money and the matter of the refund go through the proper channels provided by law. We find no error in the ruling complained of.

The appellant complains of the harshness of this statute if so interpreted as to permit a conviction for its violation where no overt dishonesty or intent to defraud has been shown. In People v. Dillon, 199 Cal. 1, 248 P. 230, 235, the court said: "The wisdom of the Legislature in requiring custodians of public moneys to hold them inviolate is both a protection to the public and to the officer, as it tends to remove from him the temptations that beset those who have large sums of money in their possession free from immediate demands." And further: "The safe-keeping of public moneys has, from the first, been safeguarded and hedged in by legislation most strict and severe in its exactitudes. It has continuously been the policy of the law that the custodians of public moneys or funds should hold and keep them inviolate and use or disburse them only in strict compliance with the law."

Apparently, ample provision has been made in the law for the making of refunds to which a taxpayer is legally entitled. The decision in such matters has been placed with the board of supervisors and not with the assessor. To permit the various officers of the county to make such disposition of county funds in their hands as they desire would open the door to such possibilities of fraud as to fully justify laws which may seem harsh in an individual case.

The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

We concur: MARKS, J.; JENNINGS, J.

14 Cal.App.2d 316

CALDWELL et al. v. SCHROCK et al.

Civ. 10754.

District Court of Appeal, Second District, Division 2, California.

May 27, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Pledges ⇐57

Judgment in pledgee's suit foreclosing mortgage on realty *held* not res judicata in suit by mortgagors against executors of pledgee based on fraudulent manipulations of pledgee in connection with sale, since such issues were not litigated in foreclosure suit which was conclusive only as to issues involved therein.

2. Pledges ⇐57

Mortgagors could recover from executors of pledgee of mortgage and water stock who fraudulently procured property at less than its value at foreclosure sale by representing that sale did not include pledged water stock which mortgagors and mortgagee had agreed should be included, but which pledgee had sold secretly for nominal sum, since foreclosure of both mortgage and pledge was possible in one action.

3. Pledges ⇐57

Measure of damages to mortgagors who did not receive full value for mortgaged property at pledgee's foreclosure sale because of fraudulent manipulations of pledgee *held* to be difference between value of property and price realized at sale.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by B. F. Caldwell and another against D. F. Schrock. The defendant died during the progress of the litigation, and the judgment was entered against Earl L. Schrock and others, as executors of the last will and testament of D. F. Schrock, deceased, and they appeal.

Affirmed.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for appellants.

William B. Beirne, of Los Angeles, for respondents.

GOULD, Justice pro tem.

From the testimony in this case it appears that plaintiffs acquired a ten-acre orange grove with ten shares of water stock, giving to Mrs. Nora A. Hinman as part of the purchase price their promissory note for $14,500 secured by mortgage upon the real property, including buildings, "water rights" and other appurtenances. They also pledged her the water stock; and at the time it was understood and agreed between plaintiffs and their vendor that such water stock should at all times be regarded as part of the real property covered by the mortgage, and, in case of foreclosure of the mortgage, to be sold with the land. Mrs. Hinman pledged the $14,500 mortgage and water stock to D. F. Schrock as security for her note to him in the sum of $6,500, and he took the same with full knowledge of the agreement between Mrs. Hinman and plaintiffs. At a later date, however, when proceedings for foreclosure of the $14,500 mortgage were pending, Schrock intervened in the action to protect his $6,500 interest, induced plaintiffs to assign the water stock to him, so fraudulently manipulated the deal that he secretly sold at pledgee's sale the stock for the nominal value of $50, dissuaded prospective purchasers at the mortgage foreclosure sale by telling them that the land was without water stock, and so was enabled to bid in the property for himself at $7,867.42, when as a matter of fact it was worth $16,434.77.

Upon substantial evidence the trial court found all these facts to be true and gave judgment for plaintiffs in the sum of $8,567.35, being the difference between the real value of the mortgaged property and the price realized at foreclosure sale. D. F. Schrock having died in the progress of the litigation, the judgment ran against the executors of his estate, who prosecute this appeal.

[1] Appellants assert that the very matters forming the basis of this action were litigated and determined in the mortgage foreclosure suit, and that such matters became res judicata by the judgment of foreclosure. Because respondents did not interpose as a defense in the foreclosure suit the matters pleaded as the basis of the cause of action herein, it is argued that they are now estopped and barred from asserting them. In the foreclosure action respondents (defendants therein) defaulted. But in that suit the only issues tendered were those customarily incident to a mortgage foreclosure. It involved the land only and not the water stock. That action was determinative and conclusive only as to the issues or matters "essential

to or shown to have been involved" therein. Blumenthal v. Maryland Casualty Co., 119 Cal.App. 563, 6 P.(2d) 965. The issues before the court in the instant case were not in any sense litigated in the prior foreclosure suit, and some of the matters alleged in this action which were an essential part thereof had not even transpired at the time of the former litigation. Under the circumstances, the former judgment was not res judicata of the cause of action set forth in this complaint.

[2] Nor do we perceive any force in appellants' point that the water stock was not a part of the land or appurtenant to it, and that therefore it could not be foreclosed with and as a part of the real property. This action is not predicated upon the contention that the water stock is appurtenant to the land, and the court made no finding to that effect. It is based upon an agreement that the mortgage and the pledged stock would be held together and sold together in event of foreclosure, and as pointed out by respondents, foreclosure of both mortgage and pledge is possible in one action. First National Bank of Fresno v. Dusy, 110 Cal. 69, 42 P. 476.

[3] That the court used the correct measure for estimating respondents' damages there can be no question. The full market value of the property was what the mortgagors were entitled to under the foreclosure sale; and that they did not receive such full value was due, the court found, to the fraudulent manipulations of appellants' testator. In a similar situation, an improper sale under a deed of trust, the Supreme Court in Humboldt Savings Bank v. McCleverty, 161 Cal. 285, 119 P. 82, 85, approved the doctrine that the parties at fault "must submit to such decree as will most fairly redress the injury which they have inflicted. If relief cannot be given without compelling the creditor to accept the property wrongfully purchased by him at its true value, he may be held to a purchase at such value."

Other points raised by appellants have to do with the sufficiency of the evidence to support certain findings. Without a detailed discussion of the various items it is sufficient to say that substantial evidence supports all the findings of the court.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

DIETZEL et al. v. ANGER et al. *

Civ. 9986.

District Court of Appeal, Second District, Division 1, California.

May 27, 1936.

Hearing Granted by Supreme Court July 24, 1936.

1. Action ⇐13

Law does not recognize mere naked right of action, but right to sue goes with some enforceable legal or equitable demand, and cannot exist by itself or be reposed by contract in person who has no legal or equitable interest in right to be enforced (Code Civ.Proc. § 367).

2. Corporations ⇐265(1)

Assignee of bonds issued by corporation payable to bearer or registered owner *held* "real party in interest" entitled to maintain action to enforce stockholder's liability after default in payment on bond, notwithstanding provision of trust deed securing bonds that all rights of action on or because of bonds were exclusively vested in trustee which held legal title to security (Code Civ.Proc. § 367).

[Ed. Note.—For other definitions of "Real Party in Interest," see Words & Phrases.]

3. Corporations ⇐240(1)

Trustee designated in trust deed securing bonds issued by corporation, and providing that all rights of action on or because of bonds were exclusively vested in trustee, *held* not entitled to sue on stockholder's liability after default on bond unless trustee was creditor or assignee of creditor (Code Civ.Proc. § 367).

4. Corporations ⇐240(1)

Authority conferred on trustee designated in corporation's trust deed securing bonds which were payable to bearer or registered owners to bring action to enforce liability of stockholders of corporation *held* revoked when bondholders' committee holding legal title to bonds elected to sue in their own behalf, since agency of trustee was not coupled with an interest (Code Civ.Proc. § 367; Civ.Code § 2356).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Ferd H. Dietzel and others against Lou Anger, Roscoe Arbuckle, Joseph Toplitzky, and others. Judgment

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 65 P.2d 803.

for plaintiff, and defendants Lou Anger and others, and C. H. Evans, as administrator with the will annexed of the estate of Joe Toplitzky, deceased, appeal.

Affirmed.

Guy Richards Crump, Mark S. Feiler, and Roy W. Colegate, all of Los Angeles, for appellants Lou Anger, Joseph T. Keaton, Irving Thalberg, Harry Rapf, Louis B. Mayer, Sid Grauman, J. M. Schenck, and C. H. Evans as administrator of Joe Toplitzky.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for appellant I. C. Freud.

Harry G. Sadicoff and Guy Richards Crump, both of Los Angeles (Roy W. Colegate, of Los Angeles, of counsel), for appellant William Hasberg.

Loeb, Walker & Loeb, of Los Angeles, for appellant Edwin J. Loeb.

G. C. O'Connell, of Los Angeles, for respondents.

SHINN, Justice pro tem.

Plaintiffs constitute a bondholders' committee, holding as such all of the outstanding bonds of a certain issue of Southern California Realty Corporation, issued under and secured by a trust indenture to a corporate trustee. The bonds made reference to the trust indenture and provided that each bondholder, by accepting the bond, assented to the terms and conditions of the trust indenture. Among those provisions was the following: "All rights of action on or because of the bonds issued hereunder or the interest coupons thereto appertaining and all rights of action under this indenture, are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; and such rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder or the interest coupons thereto appertaining. Any suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the pro rata benefit of the holders of the bonds issued hereunder and the interest coupons thereto appertaining." It was further provided that no bond or coupon holder should have the right to institute any suit "upon or in respect of this indenture or for the execution of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this indenture" unless notice of default had been given to the trustee and it had refused to sue after the holders of at least 25 per cent. in amount of the bonds had requested suit and had indemnified the trustee. The indenture read in part: "Provided, however, that nothing contained herein shall defeat the right of an individual bondholder to pursue his legal or equitable remedy where his right of action arises out of collusion, fraud, gross negligence or wilful misconduct." Another provision of the indenture read as follows: "The Trustee is hereby constituted and appointed the agent and attorney of the holders of the bonds and coupons issued and to be issued hereunder for the purpose of making any affidavits or of taking any other steps necessary or proper, under any present or future law, in order to preserve the full lien and priority of this indenture, or to effect a sale of the trust property or to preserve or enforce the liability of the Company and/or any or all of its stockholders in respect of this indenture and/or of the bonds issued hereunder," etc.

The issuer of the bonds defaulted in certain payments, because of which, and under an acceleration provision of the indenture, the entire unpaid amount of the bonds was declared immediately due. Plaintiffs brought this action against the stockholders of Southern California Realty Corporation, without making any demand upon the trustee to bring the same, contending that the right of action was vested in them and not in the trustee. The trial court decided this issue against the defendants, holding that plaintiffs had the right to sue. This is the only question on the appeal.

[1] It is contended by appellants that the action on stockholders' liability came into being "because of the bonds issued under the trust indenture"; that the present action is one "under or upon" or in respect of said indenture; and that therefore the right of action was in the trustee and not in the bondholders. The language used is susceptible of this construction, for considered alone, and without reference to the relationships created by the trust indenture read as a whole, it would seem to include actions to enforce stockholders' liability. Such liability is not "on the bonds," but it exists "because of the bonds" under a literal reading of the

phrase, for had the bonds not been issued there would have been no stockholders' liability. Whittier v. Visscher, 189 Cal. 450, 209 P. 23. But for reasons which we shall state, we are of the opinion that the right to pursue the present remedy against the stockholders is one that was vested in the bondholders and not in the trustee even though the language used to that purpose indicates an intention that the trustee should have the sole right to sue for the recovery of the debt. For the trustee to be vested with that right, something more was required than a mere recital in the trust indenture that the trustee was so invested. The law does not recognize such a thing as a mere naked right of action. The right to sue goes with some enforceable legal or equitable demand and cannot exist by itself. Nor can the right to sue be reposed by contract in one who has no legal or equitable interest in the right to be enforced. Here the entire title to the debt evidenced by the bonds is in the bondholders. While the title to the security was in the trustee, the bonds were payable to bearer or to the registered owner, and neither before nor after default were the sums evidenced by the bonds payable to the trustee.

[2] Section 367 of the Code of Civil Procedure provides that every action must be prosecuted in the name of the real party in interest. As to the debt, the bondholders were the real parties in interest before they transferred the bonds to plaintiffs and plaintiffs are the real parties in interest as holders of the legal title. Therefore, the right of action is in plaintiffs unless by virtue of the provisions of the trust indenture that right has been vested in the trustee. That it has not been so vested we think is made clear by a reading of the indenture and a consideration of the authorities.

In Mackay v. Randolph Macon Coal Co. (C.C.A.) 178 F. 881, 884, the court was considering the right of a trustee under a bond indenture to file a claim with a referee in bankruptcy on behalf of bondholders. In denying the trustee this right, the court said: "In the present case the trustee under the mortgage is neither the holder nor the payee of the bonds. It clearly could not have maintained an action at law for their collection. We are aware that the fifteenth article of the mortgage authorizes the trustee to collect and recover the principal and interest of the bonds for the owners and holders thereof. This may have reference to their collection by the enforcement of the security. If that is not its meaning, we are of the opinion that it could not confer upon the trustee the right to maintain an independent action upon the bonds. Who may maintain a suit is a matter of law, not subject to be controlled by the private conventions of parties. Hybart v. Parker, 4 C.B.(N.S.) 209; Evans v. Hooper, 1 Q.B.Div. 45; Gray v. Pearson, L.R. 5 C.P. 568; Knorr v. Bates, 14 Misc. 501, 35 N.Y.S. 1060. Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest. The only exceptions to that rule here important are these: (1) The trustee of an express trust may maintain an action in his own name on behalf of the beneficiary. To come within this exception, however, the trustee must be the holder of the property or obligation out of which the action arises. Here, as already pointed out, the trustee under the mortgage is not the holder of the bonds. (2) A person with whom or in whose name a contract is made for the benefit of another may maintain an action upon the contract. The trustee under the mortgage comes within this exception as to the security, but not as to the bonds, for they are not payable to the trustee."

Upon the principal point decided, namely, that parties cannot, by contract, confer upon one of their number or a third person the naked right to sue alone, the holding in the Mackay Case was approved in Fitkin v. Century Oil Co. (C.C.A.) 16 F.(2d) 22, and in In re A. J. Ellis, Inc. (D.C.) 242 F. 156. It is true that in these cases it was also held that the authority of the trustee was confined to the mortgage security by the provisions of the trust indentures, although this was not true in the Mackay Case. That fact, however, does not detract from the soundness of the views expressed as to the fallacy of the trustees' claim that they could sue without possessing any semblance of title to the debt. It was also held in the cases of In re United States Leatheroid & Rubber Co. (D.C.) 285 F. 884, and United States Trust Co. v. Gordon (C.C.A.) 216 F. 929, that bondholders whose bonds were secured by a trust mortgage were cred-

itors, notwithstanding the right of trust mortgagees under the mortgage, and that the mere fact that the trustee held legal title to the security did not necessarily make it in equity a creditor with respect to the debt itself. A trustee was allowed to file a claim in bankruptcy on behalf of bondholders in the case of In re International Match Corporation (D.C.) 3 F.Supp. 445, 447, where the covenant of the indenture was that the trustor would, in the event of default, pay to the trustee for the benefit of the bondholders the whole amount of the unpaid secured debt. The opinion in that case does not, as appellants contend, overrule the previous cases, but it does distinguish them. As to the right of a trustee holding the legal or equitable title, it was said: "It is entirely clear that parties, by their agreement, may not decide who shall be the proper party to bring proceedings at law, in equity, or in bankruptcy, to enforce a contractual obligation; the common or statutory law, itself, determines this procedural question." The trustee was allowed to file a claim as express trustee for the debenture holders and it was assumed in the opinion that the bondholders might also file claims, but the trustee's right was said to follow its status as a payee of the debt in case of default, which the court held gave it a clear legal claim as a creditor. The facts of the instant case do not bring it within the holding in the International Match Corporation Case, because the trustee here was not the payee either before or after default in the bonds and therefore could not stand in the position of a creditor.

In Allan v. Moline Plow Co. (C.C.A.) 14 F.(2d) 912, it was held that bondholders could not maintain an action to set aside allegedly fraudulent transfers of property by the debtor, because the right to sue had been vested by the terms of the indenture in the trustee; in Carson v. Long-Bell Lumber Corporation (C.C.A.) 73 F.(2d) 397, the right of bondholders to sue for a receiver, to prevent waste and for other equitable relief, was denied upon the same ground. The indenture in each case made the sums due under the bonds payable to the trustee. We would not question the applicability of these cases upon which appellants rely if the indenture we are considering had named the trustee as payee of the notes, but as it did not, section 367 of the Code of Civil Procedure is controlling.

[3] Unless is was a creditor or the assignee of a creditor, the trustee could not sue on stockholders' liability. Herman v. Hecht, 116 Cal. 553, 48 P. 611. It is said by respondents that the trustee is the assignee of the creditors and that it could sue for that reason. The most that can be claimed for this position is that it was attempted to vest in the trustee a right of action to sue on the debt in the absence of any agreement that it held even a legal title to the debt. If it can claim only as assignee of this naked right, it has, under the authorities we have cited, no power to sue.

[4] By the provisions of the indenture which we have quoted, the trustee was appointed agent and attorney of the bondholders with the power, among others, "to preserve or enforce the liability of the company and/or any or all of its stockholders in respect of this indenture and/or the bonds issued hereunder," etc. This provision did not invest the trustee with any interest in the bonds or the debt represented thereby, nor did it deprive the bondholders of the right to act as principals, notwithstanding the agency of the trustee. If it be conceded that authority was originally conferred upon the trustee to bring an action to enforce the liability of the stockholders of the company, its agency in that behalf was not coupled with an interest and must be deemed to have been revoked when the plaintiffs, holding legal title to the bonds, elected to sue in their own behalf. Civ. Code, § 2356; Boehm v. Spreckels, 183 Cal. 239, 191 P. 5.

There is nothing in the views we have expressed which is in conflict with the many cases cited by appellants in which it has been held under similar bond indentures that the trustee had the sole right to sue in all matters relating to the security, and we refrain from discussing those cases, since they are distinguishable in principle.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

MARBLE et al. v. HASBERG.
SAME v. ANGER et al. *

Civ. 10000.

District Court of Appeal, Second District, Division 1, California.

May 27, 1936.

Hearing Denied by Supreme Court July 24, 1936.

Corporations ⊜240(1)

Bondholders' committee holding legal title to bonds issued by corporation *held* entitled to sue to enforce stockholders' liability after default on bond as against contention that all rights of action were vested in trustee designated in trust deed securing bond issue.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Two actions by John M. Marble and others against William Hasberg, and against Lou Anger and others. Judgment for defendants and plaintiffs appeal.

Reversed.

Overton, Lyman & Plumb, Irving H. Prince, Chalmers L. McGaughey, and Roscoe R. Hess, all of Los Angeles, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondents William Hasberg, Lou Anger, Sidney Grauman, Harry Rapf, Irving G. Thalberg, Louis B. Mayer, Joseph P. Loeb, Edwin J. Loeb, Roy C. Lichty, C. H. Evans, as administrator of Joe Toplitzky, Joseph F. Keaton, also known as Buster Keaton.

Guy Richards Crump, Mark S. Feiler, and Roy W. Colegate, all of Los Angeles, for respondent Joseph M. Schenck.

SHINN, Justice pro tem.

The questions involved on the appeal are the same as those we have this day decided in Dietzel et al. v. Anger et al., 58 P. (2d) 217. In the present case the trial court held that plaintiffs, constituting a committee holding all of the outstanding bonds of an issue of Southern California Realty Corporation, had no right to sue the defendants upon their liability as stockholders of the issuing corporation. As the court construed the trust indenture, all rights of action, including the one involved here, were vested in the trustee. Under identical provisions of the trust indenture before us in Dietzel v. Anger, we held that the plaintiffs in that action, holding legal title to the bonds, had the right to sue on stockholders' liability. We hold the same as to the causes of action stated in the complaints in the consolidated actions from which the present appeal was taken.

The consolidated judgment in those actions is reversed.

We concur: HOUSER, P. J.; DORAN, J.

KEY NUMBER SYSTEM

14 Cal.App.2d 338

PEOPLE v. BACOS et al.

Cr. 295.

District Court of Appeal, Fourth District, California.

May 27, 1936.
Rehearing Denied June 8, 1936.

Hearing Denied by Supreme Court June 25, 1936.

1. Criminal law ⊜511(1)

Evidence to corroborate an accomplice need not be sufficient to establish guilt of accused, but must more than raise mere suspicion as to accused's guilt, and must tend to connect accused with commission of the offense, though if it stood alone it would be entitled to little weight (Pen.Code, § 1111).

2. Criminal law ⊜511(1)

Evidence corroborating that of confessed accomplice *held* insufficient to sustain conviction of murder in view of fact that accomplice testified that his evidence implicating accused in commission of crime was false and accomplice was otherwise thoroughly impeached (Pen.Code, § 1111).

3. Criminal law ⊜511(2)

Where accomplice testifies that evidence implicating accused in commission of crime was false and accomplice is thoroughly impeached, corroborating evidence necessary for conviction must connect accused with commission of crime in positive manner, and not merely tend to corroborate accomplice as to details of incriminating story (Pen. Code, § 1111).

⊜For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 65 P.2d 806.

4. Criminal law ⇐935(1)

An accused is entitled to two decisions on evidence, one by jury and one on motion for new trial by trial judge, who is not bound by conflicts in evidence.

5. Criminal law ⇐935(1)

Although trial court should not lightly set aside verdict of jury against accused, trial court should review cause for second time, and if, after reviewing cause, trial court deems evidence insufficient to support verdict, new trial should be granted.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Miguel Romero Bacos and Mintee Savage were convicted of murder, and they appeal.

Reversed, and new trials ordered.

Claude L. Chambers and Herman Allen, both of San Diego, for appellants.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendants were charged with the crime of murder in the first degree, found guilty with the recommendation of life imprisonment, and sentenced to the penitentiary. Their motions for new trials were denied and they have appealed from the judgments and orders.

At about 10 o'clock on the evening of September 8, 1935, Paul Arriola was shot to death by Jose Gonzales in an anteroom to Arriola's taxi dance hall in San Diego. Gonzales fled and was arrested in San Francisco about September 28. He there made a statement to police officers that he killed Arriola in self-defense. He was returned to San Diego, made a like statement to police officers, and a third of similar import to the district attorney.

About November 1st he was interviewed in the county jail by Johnnie Cabillo, a fellow countryman. Shortly thereafter he changed his story and made a statement to the district attorney wherein he said he had been hired by Miguel Romero Bacos and Mintee Savage to kill Arriola; that he had been promised about $500 but had only been paid $70.

Bacos and Mrs. Savage were arrested and charged with the murder of Arriola. Their preliminary examination was held on November 14th and Gonzales was called as a witness for the people. While under oath he repudiated his last statement to the district attorney and testified that he killed Arriola in self-defense and that Bacos and Mrs. Savage were in no manner connected with the killing. They were discharged for lack of probable cause.

During December, 1935, Gonzales had been tried for murder. He testified in his own behalf that he killed Arriola in self-defense and did not implicate either Bacos or Mrs. Savage. He was found guilty and sentenced to be hanged. His case is now pending on appeal in the Supreme Court.

While in the penitentiary he made statements to the warden that caused the case against Bacos and Mrs. Savage to be reopened. They were rearrested and charged with the murder.

The preliminary examination was held in January, 1936, and Gonzales was again called as a witness for the People. At first he refused to be sworn, claiming he thought he had been brought to San Diego for his own second trial. After a short recess he was sworn and testified that defendants hired him to kill Arriola. He testified that for about a month prior to the murder both defendants had urged him to kill Arriola and promised to pay him if he did so. He detailed the events immediately preceding the killing as follows: That at aboout 9 o'clock on the fatal evening he entered a café owned by Mrs. Savage and consumed some wine; that Bacos, a bartender for Mrs. Savage, took him upstairs into a sitting room of a hotel operated by her, and later into a toilet; that Bacos gave him whisky to drink, $10 in currency, and a nickel-plated revolver, and asked him, "Why don't you shoot Paul Arriola?" and told him it was time to see if he had any "guts"; that Bacos said to him, "Come on, you go all right"; that Gonzales then went downstairs where Mrs. Savage said to him, "Why don't you go now and see if you got the guts?" that he went to the taxi dance hall and killed Arriola.

Gonzales' accounts of his actions following the killing were as conflicting as those of his reasons for the murder. He disposed of the revolver by either leaving it in a trash burner in San Diego or throwing it in the ocean south of Long Beach. Early in the morning of September 9th he ap-

peared at the house of a friend, one Medina, in San Diego, and sent word of his whereabouts to Mrs. Savage by one of her employees. She sent $60 by this employee so that Gonzales might buy wine and beer. He walked to Long Beach and was later arrested in San Francisco.

Bacos and Mrs. Savage were held to answer and were placed on trial in the superior court on January 29, 1936. Their convictions rested entirely upon the testimony of Gonzales, who was the only witness who directly connected them with the murder.

When Gonzales was first called as a witness for the people, he detailed the events preceding the killing in accordance with the evidence he had given at the second preliminary examination of Bacos and Mrs. Savage, which we have just outlined. During the rest of the considerable time he spent on the witness stand his evidence was composed of a bewildering maze of contradictions and flagrant perjury. He was thoroughly examined and cross-examined, and his testimony in his own trial, where he claimed he killed in self-defense and did not implicate Bacos and Mrs. Savage, was read into the record, as was his evidence to the same effect given in the first preliminary examination of Bacos and Mrs. Savage. His evidence given at the second preliminary examination where he implicated these two defendants was also placed in evidence, as was his second statement, to the same effect, given to the district attorney. It was also made clear that in his statement to the police in San Francisco, to the police in San Diego, and in his first statement to the district attorney in San Diego, he claimed the killing was in self-defense and did not implicate the defendants. To make the confusion complete he testified at least twice in this trial, and before the jury that convicted Bacos and Mrs. Savage, that his statements and evidence to the effect that they had hired him to kill Arriola were false.

While being examined by the district attorney Gonzales testified as follows:

"Q. And you say that when Mr. Blake Mason and Mr. Wagner took you up to state's prison at San Quentin, did they talk to you? A. Yes, sir.

"Q. You told them you would like to get a new trial, did you? A. I didn't talk to them. They are the ones that talked to me, sir.

"Q. I know, but they told you to just tell the truth, didn't they?

"Mr. Allen: Well, let him tell what they told him. A. I told him if I could get a new trial, I would tell the whole truth, all about what happened.

"By Mr. Whelan: Q. Well, now what is the truth, what is the real truth about this, Joe—where did you get the gun with which you shot Paul Arriola?

"Mr. Allen: Objected as repetition.

"The Court: Well, you might tell us over again. A. Well, the truth is this, sir, as you know in this case, a lot of people implicated, a lot of people that want to be in this case. I believe the third statement I signed, it is the truth.

"By Mr. Whelan: Q. This is this statement here (indicating) is the truth?

"The Court: People's Exhibit No. 8? A. Some of that, that is the truth. Some of that, there is the men that told me to tell it like that.

"Q. Well, is this the truth, did Bacos give you the gun, that is what I want to know? A. I tell you the truth, sir, that is not the truth that Bacos gave me the gun.

"Q. That is not the truth? A. No, sir.

"Q. Has there been any attorney down in the jail to see you recently, Joe? A. No, sir.

"Q. None at all?

"The Court: Just answer out, answer yes or no. A. No, sir.

"By Mr. Whelan: Q. Well, you said when you were on the witness stand, you stated that Bacos gave you the gun? A. Well, I don't remember in this case, a lot of people are mixed up in this case, I don't know.

"Q. No, this is a direct question and doesn't have to—does not require any explanation from any body but you yourself will either know whether Bacos gave you the gun or whether he didn't. A. Well, the trouble is this, I was in this already just the same.

"Q. The trouble is you want somebody to promise you a new trial so you won't have to hang, is that it? And nobody has promised that? A. No, sir, I am not asking for promises or anything and they sent me there and I went just the same and my

case is not on appeal yet and I thought that is why they sent me here that I get a new trial.

"Q. How long had you been in San Diego, Joe, before you killed Paul Arriola? A. About three months, I guess, sir.

"Q. About three months? A. Well, a little over three months.

"Q. And what was your business or occupation? A. Why sometimes I used to work at the Coronado Hotel.

"Q. You only worked there a couple of days, didn't you Joe? A. I worked about a week, still I worked there.

"Q. Mr. Gonzales, were you drunk the night that you killed Paul Arriola? A. No, sir.

"Q. What is that—had you had anything to drink? A. I had a little to drink.

"Q. And where did you get it, what did you have to drink, Joe? A. I drink wine, sir.

"Q. Anything else? A. No, sir.

"Q. What is that? A. No, sir.

"Q. Well, how about the story you told us here yesterday that Mr. Bacos and Mrs. Savage had taken you out on automobile rides and showed you where Paul Arriola lived, is that true? A. Why, I just told you that only because on account of that man by the name of Johnnie Cabillio, he had me talk some different questions. That is why I got mixed in this.

"Mr. Whelan: May we have an adjournment of about ten minutes, your Honor?

"The Court: The court will stand adjourned for ten minutes. We will take our afternoon recess and you are admonished under the same admonition heretofore given you, Ladies and Gentlemen of the Jury." Thereupon a short recess was taken.

"The Court: It may be stipulated that the jurors are all present in the jury box and the defendants are present in Court?

"Mr. Whelan: So stipulated by the People.

"Mr. Chambers: So stipulated by the defendants.

"By Mr. Whelan: Q. Joe, what is the truth about this? A. The truth?

"The Court: You understand—we might go further—you understand this Court or the District Attorney or Sheriff of this county can under no circumstances grant you a new trial—do you understand that? Your case is on appeal to the Supreme Court. All that we want is the truth in this case. If these defendants are involved, we want the truth. If they are not, you tell us the truth and nothing but the truth—do you understand that? A. Yes, sir.

"The Court: All right.

"By Mr. Whelan: Q. All right, Joe, tell us the truth. A. Well, the truth is that they made me drunk and Bacos gave me the gun, sir."

The record also shows the following, the portions in subquotation marks having been read to Gonzales from the transcript of his testimony at the first preliminary examination of defendants on November 14th where Gonzales exonerated the defendants:

"'Mr. Mahedy: Your Honor. I prefer to interrogate the witness in the morning.

"'The Court: Mr. Gonzales, the same crowd will be here tomorrow morning. You are not afraid to talk tomorrow morning?

"'Joe Gonzales: I better talk now.

"'The Court: It's pretty late now.

"'Joe Gonzales: It takes about fifteen minutes to talk.

"'The Court: But they will cross-examine you, too; come back tomorrow morning.

"'Joe Gonzales: I am going to talk now. Maybe that man won't be here tomorrow.

"'The Court: What man?

"'Joe Gonzales: That man who—

"'The Court: Someone in the court room?

"'Joe Gonzales: There's a man by the name of Johnnie Cabillio—

"'The Court: Who is Johnnie?

"'Joe Gonzales: Right there.

"'The Court: That man there?

"'Joe Gonzales: Yes, sir. And this is the person that I was surprised that he come up and visit me in the jail house. I don't know why he is so interested about this case.

"'The Court: Has he threatened you?

"'Joe Gonzales: Yes, sir, because he tell me, "You just lied, don't tell the truth—that you"—I shoot Arriola—and he come and threat me and he try to put me to

trouble. That's why I change my story to the District Attorney at that time, because he tell me he going to help me out of jail if I tell a lie.

"'The Court: When did you first realize this? When did you first know of this?

"'Joe Gonzales: That's the time when he come up and visit me.

"'The Court: Has someone talked to you since then?

"'Joe Gonzales: No, sir, nobody come up and see me but this man.

"'The Court: Just a minute. Well, I cannot force the prosecution to call this man as a witness. Ten o'clock tomorrow morning.'

"Mr. Whelan: That is objected to as being incompetent, irrelevant and immaterial and nothing to do with the issues in this case.

"By Mr. Allen: Q. (continuing) Is that the way you testified in the court?

"Mr. Whelan: Just a minute—

"The Court: The objection is overruled. Answer whether or not you testified to that. A. Yes, I testified—that is the truth."

We have read and reread the testimony of Gonzales. With all its confusion and conflicts one thing is clear, that he hoped to benefit in some way by aiding in the conviction of the defendants and that this belief found its origin in his conversation with Johnnie Cabillio in the county jail just before he made his second statement to the district attorney, in which, for the first time, he accused Bacos and Mrs. Savage of hiring him to kill Arriola. From many similar statements by Gonzales in the record we quote the following:

"'Q. Did you say it Joe? A. Because there's a man tell me to tell that.

"'Q. Did you tell us that? A. I tell lie.

"' Q. You did, didn't you; and didn't you tell us that Bacos gave you a gun and ten dollars and a pint of whiskey and told you that when you killed Paul Arriola he and Mama would give you five hundred dollars more? Didn't you tell us that? A. Because there's a man there—

"'The Court: Just a minute. Do you understand the question? Did you make that statement? A. I make that statement because they promised me something.

"'The Court: Who promised you something? A. There's a man by the name of Johnnie Cabillio.

"'The Court: But you made the statement, did you? A. He promised me to tell a lie, that's why I want this thing—

"'The Court: What did he promise you? A. He come up in the county jail at three o'clock when they were serving supper to us, and I be surprised, it was three o'clock when they serve suppers to prisoner, and they say some one wants to see me, and I was surprised, he is only person he can come up and see me in the county jail.

"'The Court: What did he promise you? A. He give me lots of talk, he say, "How about all your story?" I say, "Listen, Johnnie, I don't want anything from you, when they got me in Frisco I tell my story, when I got in the city jail I just stick to my story self-defense." And this Johnnie Cabillio promise me, he said, "If you lie maybe I still could help you." So he tell me. "Maybe if you tell that somebody sent you to kill, like that, you may get out of this trouble, this case, or maybe I have three big shots that I know here in San Diego too, Joe Robinson his name, colored people, Joe Robinson, and that Still, and that Sonny, he had money maybe I could get money from him and try to get the District Attorney, and at the present time you are doing your time in San Quentin like that, come up before the parole, and then you come outside." And I said, "I don't like that, to make those other people in this case, I don't want you to make me implicated with those two people in this case, those people don't know anything about this." And so he tell me, "Well, what did they know, they don't know anything about that, no people going to get mad on you, if you get outside and they want to do something to you then you can start again, have another shooting." And I tell him, "Gee, I thought you was going to help me, you was my friend." "Well, it is going to take easy to you," and besides that he tell me that the chief of police don't like him, and what they got to do me, because the chief of police want to put him in the back all the time. * * *'"

In fairness, it should be stated that there is no implication in the record that any officer of the law offered Gonzales any inducement or was in any way connected

with any of the changes in his evidence. It is apparent that the police officers gathered what evidence they could and that the district attorney submitted the available evidence to the jury.

Gonzales had been an inmate in a naval prison and had received a dishonorable discharge from the Navy. The evidence shows him to be a perjuror and a confessed murderer. Other witnesses are not above reproach. Mrs. Savage was a "madam," and no praise can be given to the private life of Bacos. The search for the truth in the testimony of witnesses of that character is an impossible undertaking. Still a defendant cannot be convicted on the defects of his character alone. Evidence must be produced to prove guilt beyond a reasonable doubt.

The sole question raised on this appeal is the sufficiency of the evidence to sustain the verdicts and judgments. In one portion of his evidence Gonzales testified that he killed Arriola and was hired to do so by defendants. If this is to be believed, the three persons were accomplices and the convictions cannot be sustained without corroborating evidence supporting the testimony of the accomplice.

The evidence relied upon to corroborate the testimony of Gonzales is as follows:

Defendants were shown to be in possession of a nickel-plated revolver before the murder which was committed with a nickel-plated revolver.

Bacos and Gonzales were seen together on the second floor of the hotel at about 9 o'clock on the night of the murder and Bacos was heard to say to Gonzales, "Come on, let's go."

Defendant Bacos went with two others to the office of an attorney who was engaged to represent Gonzales, one of the three paying the attorney $30 on account of his fee. The money was not delivered to the attorney by Bacos, and he is not shown to have entered into the conversation with the attorney. The money was provided by Mrs. Savage.

Mrs. Savage furnished the $60 that was given Gonzales the day after the killing.

Both defendants made statements to witnesses advising them to keep their mouths shut or they might get into trouble.

No satisfactory motive why either defendant desired the death of Arriola was proven. While proof of motive is not essential to support a conviction, it would have lent support to the people's case had one been established.

[1, 2] Section 1111 of the Penal Code provides that a defendant cannot be convicted on "the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." The provisions of this section have been construed in many cases which it is not necessary to review here. The holding of those cases favorable to the contentions of the Attorney General are summarized in 8 California Jurisprudence, 178, as follows: "Evidence to corroborate an accomplice need not be sufficient to establish the guilt of the defendant, and it need not establish the actual commission of the offense. Nor need it extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, or prove that the accomplice has told the truth. However, the corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than to raise a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight." It must be admitted that there are many cases in which convictions of defendants have been affirmed where the evidence corroborating the testimony of the accomplice was no more full or complete than that in the instant case. However, in none of them was the accomplice so thoroughly impeached, his testimony so contradictory and so little worthy of belief as in the instant case. We have found no case where a conviction has been sustained where the accomplice admittedly committed perjury as to the most material parts of his testimony and twice in his evidence against the defendants in the very trial in which they were convicted repudiated the portions of his evidence upon which the conviction was had and under oath testified that such evidence was false. Surely in such a case the time-honored admonition to the jury that "A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has sworn falsely as to a material point; and

the jury, being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but wilfully and with design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced that he or she has in other particulars stated the truth," should be applied with all strictness.

Attention should be directed to two decisions of the Supreme Court in each of which it was held that evidence corroborating the accomplice was insufficient to support the conviction. People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Davis, 210 Cal. 540, 293 P. 32, 38.

In the Kempley Case the accomplice, Agnes Kellar, was a woman of low character and the rule requiring the corroboration of her testimony with other evidence tending to connect the defendants with the *commission of the offense charged* was applied with considerable strictness.

What was said in the Davis Case should be applicable here: "Taking the testimony of the several witnesses offered in corroboration of the story told by Ben Getzoff [the accomplice], it is exceedingly doubtful whether any of it, or all of it together, in and of itself amounts to corroborative evidence tending to connect the defendant with the commission of the crime charged. In order to give it effect even as tending in that direction, it seems at every point necessary to interpret and explain this 'corroboration' in the light of the testimony of Ben Getzoff. It requires the testimony of Ben Getzoff to give it direction to the alleged crime, before it can be said to connect the defendant with the commission of the crime. But the law requires that such testimony offered in corroboration of the testimony of an accomplice shall *of itself* tend to connect the defendant with the offense charged."

[3] Where an appellate court cannot say as a matter of law that one of the conflicting stories told by the accomplice on the witness stand is inherently improbable, but when the accomplice, before the jury which convicted defendants, testified at least twice that his evidence implicating them in the commission of the crime was false, and where he was otherwise so thoroughly impeached that little credence can be given his evidence, the corroborating evidence should "connect the defendant with the commission of the offense" (section 1111, Pen.Code) in a positive manner and not merely tend to corroborate some of the details of the incriminating story told by the accomplice.

Although the trial judge denied defendants' motions for new trials, that he entertained doubts of their guilt is shown by the following colloquy occurring at the time sentences were pronounced:

"The Court: No legal cause—as to the defendant, Miguel Romero Bacos, and as to the defendant, Mintee Savage, each of you have been heretofore convicted by a jury in this court of the crime of murder and they fixed the degree thereof as murder of the first degree and recommended life imprisonment for each of you. Of course it is out of my hands to do anything different than what the jury have recommended. It is beyond my control. The case, I assume, will be appealed to the upper courts and if they reverse the judgment, then you will be released. If it is affirmed and upheld, of course then you will be committed accordingly and it is out of my hands and it is no duty of mine to determine whether or not you are innocent or guilty. That is a matter that is left entirely to the jury and the jury have found that you are guilty.

"Defendant Savage: The next thing for me to do is to have that appealed, is it?

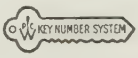
"The Court: Your attorney will take care of that and will do it, I take it. It then goes to a higher court on appeal. If it is reversed, then you will be released or a new trial had. There is considerable doubt about the value of the testimony of Gonzales, in my opinion. He changed his story so many times, it is doubtful."

[4, 5] In any trial a defendant is entitled to two decisions on the evidence, —one by the jury and one by the trial judge when he rules on the motion for new trial. Smith v. Royer, 181 Cal. 165, 183 P. 660. In so passing upon the sufficiency of the evidence he is not bound by conflicts in it (Moyer v. Dresch, 2 Cal.App.(2d) 655, 38 P.(2d) 849), and it becomes his duty to then consider the credibility of the witnesses, their manner of testifying on the stand and the weight and sufficiency of the evidence. While he should not lightly set aside the verdict of a jury he should review the cause for a second time and only after such review decide the motion for

new trial. Olinger v. Pacific Greyhound Lines, 7 Cal.App.(2d) 484, 46 P.(2d) 774. If, after reviewing the entire cause, he deems the evidence insufficient to support the verdict, he should not hesitate to grant the motion. Under the unusual circumstances of this case we believe the trial judge should have granted defendants' motions for new trial.

The judgments pronounced on both defendants, and the orders denying their motions for new trial, are reversed, and new trials are ordered.

We concur: BARNARD, P. J.; JENNINGS, J.



14 Cal.App.2d 324

In re WHITCOMB'S ESTATE.

CHAPMAN et al. v. WHITCOMB et al.

Civ. 11003.

District Court of Appeal, Second District, Division 2, California.

May 27, 1936.

Wills ⇐587(5)

Will stating that testatrix was possessed of bonds, mortgages, stock, and cash on hand, making bequests, and providing that, "The remainder of the estate, derived from the sale of my home place * * *, and whatever other securities remain," should be divided into eight shares and distributed among designated persons, *held* to include inheritance to which testatrix was entitled in phrase "remainder of the estate," although inheritance was not discovered until after testatrix' death (Probate Code, § 102; Civ.Code, § 1326).

[Ed. Note.—For other definitions of "Remainder," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Proceeding in the matter of the estate of Elizabeth Whitcomb, deceased, wherein Ward Chapman, executor of the estate of Elizabeth Whitcomb, deceased, and others, were opposed by William Card Whitcomb and others. From an order construing the will of Elizabeth Whitcomb, deceased, the first designated parties appeal.

Reversed.

Chapman & Chapman (by L. M. Chapman), all of Los Angeles, for appellants.

W. C. Shelton, and George W. Burch, Jr., both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from an order construing the will of Elizabeth Whitcomb, deceased. Boiled down, the pertinent parts of the will read as follows: "I am possessed of certain liquid bonds, mortgages, stock and cash on hand, from which funds can be readily realized for payment," etc. [The will then proceeds to provide bequests to various of her friends and to her sister. Then in the sixth paragraph it continues as follows:] "The remainder of the estate, derived from the sale of my home place at 337 So. Harvard Blvd., when an advantageous opportunity offers, and whatever other securities remain, shall be divided as follows into eight shares and distributed among the following as designated." At the time of testatrix' death her mother had been dead for more than a year. At the time of the mother's death there was a savings account in the bank standing in the mother's name, and to a share of which the testatrix was entitled, but the account was not administered upon until four years later for the reason that the existence of said account was unknown to the heirs of the mother. From this account there was distributed to testatrix' executor the sum of $2,502.63. The trial court by its decree dated December 10, 1935, held that the testatrix died intestate as to said money and that the distribution of said sum was not governed by the terms of the will. It is from this order the appeal is taken.

In Re Estate of Farelly, 214 Cal. 199, 4 P.(2d) 948, 951, reference is made to section 1326 of the Civil Code, which provides that "of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy," and this reference is followed by the statement that "the same rule has been applied to partial intestacy," citing O'Connor v. Murphy, 147 Cal. 148, 81 P. 406. In Re Estate of Spreckels, 162 Cal. 559, 123 P. 371, 374, it is said: "'Where a will may reasonably be interpreted in two ways, one of which results in intestacy, while the other leads to

an effective testamentary disposition, the interpretation which will prevent intestacy is to be preferred." Also, see, In re Estate of O'Gorman, 161 Cal. 654, 120 P. 33, and In re Estate of Olson (Cal.App.) 50 P.(2d) 70.

It is apparent from the will itself that except for the bequests of personal effects the testatrix contemplated a distribution of her entire estate in the form of cash. The intent of the testatrix to distribute fractional parts to numerous beneficiaries could not from a practical standpoint be carried out except by distributions in cash, and this intent is further manifested by the provision in the will for the sale of her home.

The fact that the words "remainder of the estate" are followed by the words "derived from the sale of my home * * * and whatever other securities remain" does not restrict the residuary clause so as to exclude the fund above referred to. The testatrix inserted a comma after the phrase "remainder of the estate," and it is manifest that the words which follow are not used as words of limitation but rather as a confirmation of the plan of testatrix that her estate should be converted into cash for the purpose of distribution. The word "securities" in the phrase "whatever other securities remain" manifestly refers back to and is a short way of repeating what she has already said in the first sentence, "certain liquid bonds, mortgages, stock and cash on hand." In re Estate of Olson (Cal.App.) 50 P.(2d) 70, 71, involved an holographic will which, after leaving various sums of money to various people, then provided "to Hellen Landgren Katie McDonald [and] Her Sister Mrs. Hertel all my personal property." No mention was made of real property though the estate had two lots which represented about one-half of the estate. It was there held that the provision of the will above quoted should be construed as a residuary clause disposing of all the estate including the real property. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." Probate Code, § 102. It is the duty of the court in this case to give some effect to the words "the remainder of the estate." It will not suffice to construe them as if they read "a portion of the estate." It is our conclusion that the terms of the will included said funds.

Judgment reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



14 Cal.App.2d 402

PEOPLE v. FLEMING.

Cr. 2864.

District Court of Appeal, Second District, Division 2, California.

June 2, 1936.

1. Criminal law ⇐1159(2)

Only evidence question reviewable on appeal from judgment on verdict of conviction is whether there was any substantial evidence sustaining verdict.

2. Criminal law ⇐713

District attorney's remarks in closing argument to jury *held* not ground for reversal of judgment on verdict of conviction, in absence of claim that court made erroneous rulings regarding them, where not such as to constitute reversible error in themselves.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Harry Fleming was convicted of rape and robbery, and he appeals.

Affirmed.

Lloyd Cornelius Griffith, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant was convicted of rape and also of robbery and appeals from the judgment. The points upon which he relies are not separately stated in his brief, but we can see that he complains (1) about the sufficiency of the evidence and (2) about certain remarks made by the district attorney in his closing argument to the jury.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[1, 2] With regard to the evidence he argues that "a number of witnesses were produced to testify for the plaintiff and respondent whose testimony was volunteered for the purpose of misleading the jury." But he does not argue at all the legal proposition that there is not any substantial evidence to sustain the verdict, which is the only question in this regard that we may review on appeal. With regard to the remarks of the district attorney, there is no claim that the court made erroneous rulings with regard thereto. The remarks themselves were not such as in themselves to constitute reversible error.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



14 Cal.App.2d 368

WHEELER v. BUERKLE et al.

Civ. 1775.

District Court of Appeal, Fourth District, California.

May 29, 1936.

Rehearing Denied June 25, 1936.

Hearing Denied by Supreme Court July 27, 1936.

1. Automobiles ⇐242(4)

In absence of evidence that street intersection is obstructed, located within business or residential district or signposted, it is conclusively presumed to be outside business or residential district in determining permissive speed limit thereat (St.1931, pp. 2120, 2122, §§ 113, 115, 116; St.1929, p. 510, § 28½, and subd. (c).

2. Automobiles ⇐171(12)

Automobile driver, starting to make "U" turn in front of approaching automobile when near right curb of street between 10 and 30 feet from intersection, without first seeing that turn could be made safely, and passing over, instead of around, center of intersection, *held* guilty of negligence per se in violating statutory rules of road (St.1929, p. 541, § 129; St.1925, p. 413, § 130).

3. Automobiles ⇐181(1), 224(7)

One riding on automobile fender and automobile driver permitting former to do so, in violation of city ordinance, *held* guilty of negligence per se.

4. Automobiles ⇐201(8)

Concurrent negligence of automobile driver, making U turn over center of street intersection in front of approaching automobile without first seeing that turn could be made safely, and of driver of latter automobile in permitting another to ride on fender thereof, *held* proximate cause of collision resulting in injury to such rider (St.1929, p. 541, § 129; St.1925, p. 413, § 130).

5. Automobiles ⇐226(2)

Negligence in riding on automobile fender *held* to have contributed to such rider's injuries when thrown to pavement by collision with another automobile as to drivers of both automobiles; collision being caused by their concurrent negligence.

6. Automobiles ⇐226(1)

Driver of automobile, from fender of which passenger was thrown to pavement, causing injury for which he sued driver, when automobile collided with another automobile, *held* not to have waived plaintiff's contributory negligence in riding on fender by knowingly permitting him to do so.

7. Negligence ⇐136(32), 142

If facts do not bring last clear chance doctrine into play, court must so decide and need not instruct jury or find on such doctrine, but, if facts be such that doctrine may be applied, trial judge must submit it to jury by proper instructions or find thereon in absence of jury.

8. Appeal and error ⇐173(13)

In absence of appropriate findings by trial court on last clear chance doctrine, apparently presented on appeal for first time, appellate court need not consider it.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Jack Wheeler against William Buerkle and others. From a judgment for plaintiff against named defendant, the latter appeals.

Reversed.

Francis J. Gabel, of Los Angeles, and Edward West, of Bakersfield, for appellant.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment rendered in favor of Jack Wheeler against William Buerkle. We will refer to William Buerkle as the defendant. Plaintiff was awarded damages for injuries suffered in a collision between an automobile owned and driven by defendant and another owned by Augusta T. Rambaud, and driven by Lillian Nikkel with the knowledge and consent of the owner.

The collision occurred in the intersection of Tulare and Nineteenth streets in the city of Bakersfield. Nineteenth street runs east and west and Tulare street north and south. The accident happened on May 12, 1934. The day was clear, the streets were dry, and there were no other vehicles near the intersection.

At the time of the accident defendant was bringing four men to his ranch in the expectation of giving them employment. He was driving a small coupé. Two of the men were riding in the seat beside him, Fred McCall was riding on the left front fender, and plaintiff was riding on the right front fender with his right arm around a spare tire and his left arm around the right front headlight.

The record is free from serious conflicts in the evidence which would affect the material rights of the parties.

[1] Defendant was driving east and Miss Nikkel west on Nineteenth street, both approaching the intersection of that street with Tulare. Both were on their own right-hand sides of the road. Defendant's speed was variously estimated at between 15 and 45 miles an hour, and Miss Nikkel's at between 20 and 35 miles an hour. There is no evidence that the intersection was obstructed, as such an intersection is defined in section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1931, p. 2120) in effect at the time of the accident, or that it was within either a business or a residential district, as defined by section 28½ of the same act, as added by St. 1929, p. 510, or that it was signposted as required by sections 115 and 116 of that act (St.1923, pp. 554, 555, as amended by St. 1931, p. 2122). It is therefore conclusively presumed to be outside a business or residential district (subdivision c, § 28½, Cal. Vehicle Act), where the permissive speed limit was 45 miles an hour. Section 113, Cal. Vehicle Act.

[2] When Miss Nikkel was between 10 and 30 feet east of the east line of the intersection, and defendant was between 10 and 30 feet from its west line, Miss Nikkel attempted to make a U turn which brought her car across the path of defendant's car. She started to turn when her car was near the north curb line of Nineteenth street, did not pass around but over the center of the intersection, and before starting the turn did not see that it could be made safely. She violated three rules of the road established by sections 129 and 130 of the California Vehicle Act (St.1923, pp. 558, 559, as amended by St.1929, p. 541, and St.1925, p. 413, respectively). The evidence is conflicting on whether she gave a proper arm signal on turning. If she failed to do so, this would add a fourth violation of the rules of the road to her manner of driving. In any event she was guilty of negligence per se.

[3] At the time of the accident, an ordinance of the city of Bakersfield provided in part as follows: "It shall be unlawful for any person to ride upon the fender, running board, hood, top, tank, or luggage carrier of any vehicle or street car, or for the operator thereof to knowingly permit any person to so ride on any vehicle or street car." Both plaintiff and defendant were guilty of negligence per se in violating the provisions of this ordinance. Lorry v. Englander Drayage & Warehouse Co., 108 Cal.App. 116, 291 P. 467, 468.

[4] Defendant testified that, when he saw Miss Nikkel turning her car across his path, he gently applied the brakes of his automobile because he realized that, if he applied them with full force, the sudden lessening of the speed of the car would probably have thrown both fender riders onto the pavement. At the time of the impact he had succeeded in so reducing the speed of his automobile that the two cars came together with a slight jar sufficient to dislodge plaintiff from the fender and throw him onto the pavement, breaking his leg. Defendant's car showed no injury from the collision, and the other car was only slightly damaged.

It is clear from finding No. 4 of the findings of fact that the collision of the two cars was caused by the active and concurrent negligence of defendant and of Miss Nikkel in the respective manners in which they operated their automobiles. While the word "proximate" is not used in this

finding, no conclusion can be drawn from it other than that the concurrent negligence of the two drivers was the proximate cause of the collision. It was the jar of the collision that precipitated plaintiff to the pavement and caused his broken leg. It follows from this finding that it was the opinion of the trial judge that the concurrent negligence of both drivers was the proximate cause of the injury.

[5] When we analyze finding No. 5, we find that the trial court very properly held that both plaintiff and defendant were negligent, the plaintiff in riding, and the defendant in knowingly permitting him to ride, upon the automobile fender contrary to the express terms of the Bakersfield ordinance. This is followed by the very proper finding that, in so far as the defendants Nikkel and Rambaud are concerned, this negligence of plaintiff contributed to his injuries. The court next found that the negligence of defendant was the proximate cause of the collision and of plaintiff's injuries, which is but a repetition of portions of finding 4 and necessary inferences to be drawn from them. Lastly, the trial court, found that, in so far as the defendant is concerned, plaintiff's negligence did not contribute to his injuries.

There was proved but one act of negligence on the part of plaintiff; namely, riding on the fender of defendant's car. If, in so far as Miss Nikkel and Mrs. Rambaud are concerned, this negligence contributed to plaintiff's injuries, it is difficult to conceive how it would not have contributed to his injuries in so far as the defendant is concerned. The collision was caused by the concurrent negligence of both drivers. There was but one collision, one injury, and one act of contributory negligence. If the negligence of plaintiff contributed to his injury at all, it contributed to the entire injury and throughout the accident. It was an indivisible act and must have related to both drivers.

What was said in Lorry v. Englander Drayage, etc., Co., supra, is particularly applicable here: "Under these facts we can see no escape from the conclusion that the conduct of appellants in riding on the running board in violation of the ordinance was a proximate contributing cause of their injuries. We can conceive of cases where the impact might be of such a character that a jury would be justified in holding that the negligence of a person riding on the running board in violation of an ordinance did not proximately contribute to his injuries. Dallas Ry. Co. v. Eaton (Tex. Civ.App.) 222 S.W. 318, cited and relied on by appellants, was such a case. There the jitney bus, on the running board of which the injured person was riding, was struck by a street car with terrific force and dragged for a long distance. In that case the jury might reasonably have found that the injury would as well have occurred had the injured person been riding inside the bus. But in this case the evidence does not warrant any reasonable conclusion except the one that appellants would not have been injured but for their own negligent act in placing themselves upon the running board in violation of the ordinance. We would not be justified in closing our eyes to the plain facts of the case and saying blindly that the question of proximate cause was one for the jury. McMahon v. Hamilton, 204 Cal. 228, 230, 267 P. 546."

[6] Plaintiff urges that defendant waived the contributory negligence of plaintiff by knowingly permitting him to ride on the fender. If this argument be sound, it would be equally logical to argue that plaintiff also waived the negligence of defendant in knowingly permitting plaintiff to ride on the fender.

Plaintiff relies on the case of Fresno Traction Co. v. Atchison, etc., Ry. Co., 175 Cal. 358, 165 P. 1013, to support this theory. That case not only does not support such a theory, but is compelling authority against it. In that case it appears that an ordinance of the city of Fresno required the railroad company to maintain gates at one of its crossings. The gates were installed and placed in operation for a period of time. Their use was later discontinued. This fact was known to plaintiff and the operator of one of its cars which was damaged by a collision with a train at this crossing. That case is only authority for the rule there applied, that where, before the accident, the plaintiff knew that the gates were not being used, the failure to use them could not be proximate cause of the collision.

[7, 8] Counsel in their briefs argue the doctrine of the last clear chance, but we cannot consider it on this appeal. That doctrine is one of law and also of fact. If the facts of a case do not bring the doctrine into play, the court must so decide, and is not required to instruct a jury or to find upon it. If the facts of a case be such that the doctrine may be applied, it is

the duty of a trial judge to submit it to a jury by proper instructions or to find upon it in the absence of a jury. In the instant case there are no findings upon it. The question is apparently presented here for the first time. In the absence of appropriate findings, we are not required to consider the question here.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



14 Cal.App.2d 320

ARCHIBALD v. SCHULTZ et al.

Civ. 10316.

District Court of Appeal, Second District, Division 2, California.

May 27, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Appeal and error ⇐1039(2)

Use of term "and/or" in allegation of complaint in action on note, payable to nominee of plaintiff's assignor, that payee was bribed by "defendants and/or their agents" to certify that note and trust deed securing it were paid and satisfied, with result that realty was reconveyed and security lost to note holder, *held* not prejudicial to defendants, though creating uncertainty, as matter could have been reached by timely demurrer and ultimate fact sought to be proved was that security was rendered valueless, which complaint properly alleged and court definitely found.

2. Trial ⇐163

Motion for nonsuit simply on ground of failure of proof as provided for by statute was properly denied, as motion should have specifically stated precise grounds therefor and shown wherein plaintiff failed to make out case (Code Civ.Proc. § 471).

3. Assignments ⇐134

Written assignment is presumptive evidence of consideration therefor (Civ.Code, § 1614).

4. Bills and notes ⇐459

Assignee, who acquired no real or substantial interest in note assigned to her and disposed of whatever apparent interest she had, was not necessary party defendant in action thereon.

5. Bills and notes ⇐459

Assignee, who acquired no real or substantial interest in note assigned to her and disposed of whatever apparent interest she had, was not necessary party defendant in action thereon.

6. Appeal and error ⇐1033(8)

Defendants, not being injured, but benefited, by judgment against them for less than face amount of unpaid note sued on, cannot be heard to complain of such judgment on appeal.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by R. E. Archibald against Herman Schultz and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Buel R. Wood, of Los Angeles, for appellants.

Ames Peterson, of Los Angeles (P. V. Davis, of Los Angeles, of counsel), for respondent.

GOULD, Justice pro tem.

Defendants executed and delivered their promissory note for $7,500, secured by deed of trust, to the nominee of C. Morton Booth as security to the latter for his attorney's fee. The parties had agreed upon a fee of $5,000, but when this could not be paid in cash the secured note was given in the expectation that it could be sold for the amount of the agreed fee. The services for which he was employed were performed by the attorney. Nothing was paid upon the note, and this action was then instituted by the assignee of Booth, the latter since deceased. Evidence introduced at the trial in support of appropriate allegations in the complaint disclosed that while the note and trust deed were in the name of Booth's original nominee (not the plaintiff-assignee in this case), she was "wrongfully, unlawfully and by bribes" induced to certify that the note and trust deed had been paid and satisfied, so that a reconveyance of the real property was effected and the security for the note thus became valueless and lost to its holder. Upon trial without

a jury the court rendered judgment for plaintiff in the sum of $5,000, finding that that amount was "due, owing and unpaid" upon the note. Defendants appeal.

[1] In the midst of testimony with relation to the offer of "bribes" for reconveyance of the trust deed, counsel for defendants made a motion to strike such testimony and also stated that he renewed his demurrer to the complaint "on the ground that it doesn't state facts constituting a cause of action." The court denied the motion and overruled the demurrer. Appellants now complain that the court erred, basing their argument wholly upon the proposition that because paragraph VI of the complaint, relating to the so-called bribes, alleged that the acts complained of were done by "defendants and/or their agents," it "presented a quandary instead of an allegation of fact." At no time in the progress of the trial or argument relating to the "demurrer" was objection made to the "and/or" expression, the point being raised for the first time upon appeal. Appellants also complain of the use of the same expression in the findings of the court upon the same subject.

The use and misuse of the term "and/or" has been the subject of much controversy in recent judicial pronouncements in this state [Underhill v. Alameda Elementary School District, 133 Cal.App. 733, 24 P. (2d) 849] and elsewhere. It is often condemned as creating confusion and uncertainty, and that criticism applies in this case leaving the record in doubt as to whether the acts complained of were committed by defendants or by their agents, or by defendants and their agents jointly. Appellants, however, suffered no prejudice either by the pleading or the court's ruling. As to the complaint, the matter could have been readily reached by filing a timely demurrer for uncertainty, which the pleader did not do. It is, moreover, immaterial whether defendants or their agents or both of them committed the acts. The ultimate fact sought to be proved was that the security for the note was rendered valueless, which allegation was properly pleaded in the complaint and found as a fact by the court in certain and definite language. Appellants were not prejudiced by the uncertainty of which they complain.

[2] There is no merit in the contention that defendants' motion for nonsuit should have been granted. Motion was made simply "on the ground of failure of proof as provided for by section 471 of the Code of Civil Procedure." The motion should have specifically stated the precise grounds upon which it was made, and should have shown wherein plaintiff had failed to make out a case for recovery. 9 Cal.Jur. 548.

[3] Neither is there merit in appellants' claim that the motion for nonsuit should have been granted because there was no proof of assignment and no consideration for such assignment. There was direct proof of assignment by an instrument in writing, and such written instrument is itself presumptive evidence of consideration. Civ.Code, § 1614.

[4, 5] Testimony was presented as to various pledges of the promissory note involved herein, and for that reason appellants now contend that other persons, assignees or pledgees, were necessary parties defendant. The court, however, found upon substantial evidence that plaintiff's assignor was at all times the real owner of the note. No real or substantial interest passed to the assignee Lewis, in whose behalf appellants now urge that she should have been made a party defendant, and we perceive no compelling reason why she should be joined in the action, inasmuch as she had disposed of whatever apparent interest she may have had.

[6] Although the face of the note was for $7,500 and it was found that no part of it had been paid, the court's judgment was only for $5,000. Appellants now assert that the court thereby committed error. If it was error, appellants were not thereby injured but were greatly benefited, and consequently may not be heard to complain if the judgment is more favorable to them than the facts warranted.

Objections that the findings of the court are unsupported by the evidence are answered by the statement that there is in each case complained of substantial evidence in support of the court's conclusions.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

6 Cal.2d 439

GOLDEN GATE MOTOR TRANSPORT CO v. GREAT AMERICAN INDEMNITY CO.

S. F. 15547.

Supreme Court of California.

May 26, 1936.

Rehearing Denied June 25, 1936.

1. Insurance ⇐629(1)

Under automobile policy excluding liability for automobile registered in assured's name, assured's failure to allege that automobile was registered in employee's name or that it was not registered in assured's name *held* not to render complaint defective, since any claim of breach of contract was matter of defense.

2. Insurance ⇐639

Setting forth certain allegations in nature of anticipating defense in action on automobile policy *held* not to render assured's complaint demurrable, where otherwise sufficient.

3. Insurance ⇐615

Where assured requested insurer to issue full coverage automobile policy to replace policy about to expire, and insurer delivered policy which it represented covered request, assured's failure to read new policy *held* not to preclude recovery thereon, where assured did not make written application for such policy.

4. Insurance ⇐615

Where assured requested insurer to issue full coverage automobile policy to replace policy about to expire, and insurer delivered new policy which it represented covered request, but which excluded liability for automobile registered in assured's name, failure of assured, who was registered owner of automobile, to deliver registration certificate to buyer until after issuance of policy, *held* not to preclude recovery for damage to automobile (St.1929, p. 514, § 45(e).

5. Insurance ⇐615

Assured *held* entitled to recover for damage to automobile which had been sold to employee, though assured was still registered owner thereof, notwithstanding policy excluded liability for automobile registered in assured's name, since assured was entitled to coverage of liability which might be imposed upon it because of employee's accident while in assured's employment (St.1929, p. 514, § 45(e).

6. Insurance ⇐665(4)

Where assured requested insurer to issue full coverage automobile policy to replace policy about to expire, and insurer delivered policy which it represented covered request, evidence *held* to support finding that insurer made such representations so as to entitle assured to recovery on policy.

7. Insurance ⇐665(4)

Evidence that assured informed representatives of insurer that he desired policy to replace full coverage policy about to expire, and representatives told assured that such policy could be issued, and insurer issued policy which it represented covered request, *held* to show that representatives had authority to speak for insurer so as to entitle assured to recover on policy.

8. Insurance ⇐615

That assured, who was registered owner of automobile, seeking recovery on automobile policy excluding liability in such case, had failed to plead or prove waiver of condition, *held* no defense to action, since no duty rested on assured to plead waiver of affirmative warranty.

9. Insurance ⇐665(8)

Evidence that assured who was registered owner of automobile which had been sold to employee made no false representations concerning ownership of automobile, and that insurer did not call assured's attention to provision of policy excluding liability where automobile was registered in assured's name, *held* to show waiver of condition so as to entitle assured to recover on policy (St. 1929, p. 514, § 45(e).

10. Insurance ⇐615

Where assured secured policy on automobile which had been sold to employee without transferring registration certificate to employee's name and policy excluded liability where automobile was registered in assured's name, failure to show that insurer had actual knowledge as to registration *held* not to preclude recovery on policy, where facts directly brought to insurer's attention cast on it duty to inquire into all facts pertinent to transaction (St.1929, p. 514, § 45 (e).

11. Insurance ⇐384

Provision of automobile policy requiring waiver of any condition thereof to be in writing *held* not to preclude recovery on policy, in absence of such writing, where policy

was written by general agent of insurer who had authority to make contract.

12. Insurance ⇐384, 385

Waivers of policy constituting new contract upon sufficient consideration need not be evidenced by writing and need not be indorsed on policy, no matter what limitations or conditions are expressed therein, provided waivers are made by agent having authority to make contract.

13. Insurance ⇐615

Where assured requested specific coverage for particular automobile which assured had sold to employee, insurer *held* bound to give protection for such automobile, notwithstanding that policy issued pursuant to such request excluded automobile registered in assured's name and that registration certificate had not been transferred to employee's name at time of issuance of policy (St.1929, p. 514, § 45(e).

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by the Golden Gate Motor Transport Company against the Great American Indemnity Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 48 P.(2d) 713.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, amici curiæ.

Johnson & Harmon, of San Francisco, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2. Upon further consideration we are satisfied that the opinion of Mr. Justice Sturtevant correctly determines the issues, and we hereby adopt it as part of the opinion of this court. The opinion reads as follows:

"This is an appeal by the defendant from a judgment rendered in favor of plaintiff in an action to recover on an insurance policy.

"The plaintiff is a corporation engaged in the transportation business. In California and Nevada it owns or operates from fifteen to twenty trucks, trailers, and automobiles. Prior to the 1st of July, 1930, it had insured each piece of its equipment. The insurance was written in three different policies. Each was pleaded in hæc verba by the plaintiff, and they are designated in the record as Plaintiff's Exhibits 1, 2, and 3. In the early part of the year 1930 the plaintiff sold to Paul Colburn a car spoken of by the witnesses as a Hudson sedan. The sale was in the form of a conditional sales contract enumerating certain deferred payments. Before the 1st of May, 1930, all payments had been made. The registration certificate was delivered to Colburn on July 1, 1930. Mr. G. T. McNeely was the secretary-treasurer of the plaintiff corporation. Mrs. Adams, his daughter, was an employee of the Great American Insurance Company, hereinafter called the insurance company. In May or June of 1930 Mr. McNeely delivered to Mrs. Adams the policies above mentioned and asked her to inquire of her employer if it would be willing to take over the business and give to the plaintiff policies providing the same complete coverage as Plaintiff's 1, 2, and 3, which were about to expire. Mrs. Adams took the policies and exhibited them to Mr. Benner, assistant manager of the insurance company, and repeated to him the inquiry made by Mr. McNeely. After examining the documents, Mr. Benner expressed a hesitation on compensation; that is, as we understand it, he hesitated on liability for employer's compensation liability. Thereupon, seated at Mr. Benner's desk, Mrs. Adams called up Mr. McNeely, and, after certain conversations were had, Mr. Benner stated that he would send a representative to the plaintiff to discuss the business. At that time, and for some time previous thereto, the insurance company had in its employment Miss Nielund, who was, as we understand the record, an expert in framing and writing insurance policies. A little later, Mr. Benner directed Miss Nielund and Mrs. Adams to call on Mr. McNeely and discuss the business tendered by Mr. McNeely. When they arrived at his office, with the old policies before them, Mr. McNeely explained the change in ownership of the Hudson sedan, and they discussed what changes were to be made in the policies. Miss Nielund told him her company could and would handle the business. She also stated that the Hudson sedan could be put in a nonownership policy and that such policy would be so written.

After leaving the plaintiff's premises, Miss Nielund telephoned to Mr. Kemper, superintendent of the casualty department of the Great American Indemnity Company, hereinafter called the indemnity company. Thereafter three new policies were written which the plaintiff pleaded in hæc verba and which are numbered Plaintiff's Exhibits 5, 6, and 7. A comparison of the documents shows that the Hudson sedan was covered by Plaintiff's 1 and 3. It was not covered by Plaintiff's 5 and 6, and as will presently appear, the sole question presented by this litigation is whether it was covered by Plaintiff's 7. After the new policies were written, all were delivered, the premiums were paid and are still retained. The new policies were so delivered some time in June. As we understand the record, Mrs. Adams delivered them in person. Be that as it may, the record is clear from the time Mr. McNeely had his conversation with Miss Nielund the plaintiff was not advised by any one representing either the insurance company or the indemnity company that the policies contained anything to the effect that the policies did not give to the plaintiff the full coverage for which it had contracted. No written application was requested or was executed. No inquiries except as we have stated were made by the defendant; neither is there any claim that at any time or at all the plaintiff made any misrepresentation. A short time after Plaintiff's 5, 6, and 7 had taken effect, Colburn drove the Hudson sedan into San Francisco. While here that car was stolen and while in the hands of the thief it met with a collision. When asked by the plaintiff to take over the litigation the defendant refused and thereafter this action was commenced.

[1, 2] "The defendant contends that the complaint does not state a cause of action. Except as will hereinafter be noted, it is not claimed that it did not contain every allegation necessary to recover on an insurance policy. Plaintiff's Exhibit 7 does not specifically designate any automobile, but specifies the owners by name, the risks assumed, and the premium charged for each risk. One of its provisions is: 'Exclusions * * * (c) This policy does not cover * * * (6) For any automobile and/or motorcycle registered in the name of the named assured. * * *' The plaintiff did not allege that the Hudson sedan was registered in the name of Colburn (the employee using it), nor that it was not registered in the name of the plaintiff. Pointing to the absence of those allegations, the defendant makes its attack. No duty rested on plaintiff to insert any allegation on the subject. Cowan v. Phenix Insurance Co., 78 Cal. 181, 185, 20 P. 408. As stated above, there is no claim that this plaintiff made any misrepresentations; hence Goorberg v. Western Assurance Co., 150 Cal. 510, 89 P. 130, 10 L.R.A.(N.S.) 876, 119 Am.St.Rep. 246, 11 Ann.Cas. 801, is not in point. 14 Cal. Jur. 498, 499. If the defendant claimed a breach of contract by the plaintiff, that subject was a matter of defense. Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213, 235, 107 P. 292. In its complaint the plaintiff did set forth certain allegations which were in the nature of anticipating a defense, but by doing so it did not render its complaint, which was otherwise sufficient, subject to a general demurrer. Kansaburo Ohsaki v. Ahern, 61 Cal.App. 787, 215 P. 714.

[3] "It is next asserted that the plaintiff, having accepted and retained the policy, is charged with knowledge of its terms, is bound by it, and is estopped from asserting that it did not know the terms of the policy. It cites and relies on Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 P. 51, and Burch v. Hartford Fire Ins. Co., 85 Cal. App. 542, 259 P. 1108. Those cases involved statements made by the insured in their written applications. In neither one did it appear that there was no written application and that, after the insured had made a request for full coverage, the insurer delivered a document which it represented covered the demand as made. If defendant contends that the plaintiff may not recover because it did not read the policy, such contention may not be sustained. In Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213, at page 229, 107 P. 292, 298, the court said:

"'There was no written application for the insurance, and, as we have seen, no actual fraud and no intentional misrepresentation by plaintiff. She was ignorant of this provision in the policy, which was secured by her agent, and no inquiry was made by the company as to the existence of any chattel mortgage.

"'It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policyholders are actually cognizant of

the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous—the one before us covering thirteen pages of the transcript—and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, *and it is only just and equitable that the company should be required to call specifically to the attention of the policy holder such provisions as the one before us.*

" 'The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent. *The defendant should either have made inquiries in reference to the chattel mortgage, required a written application covering by question and answer all the material provisions of the policy, or have consulted the records in the recorder's office where it would have been apprized of the incumbrance.*

" 'Considering the nature of the contract and the relation of the parties, there should be no difficulty in reaching the conclusion that this provision was waived, and it therefore constitutes no bar to recovery.' (Italics ours.) In McElroy v. British America Assur. Co. (C.C.A.) 94 F. 990, at page 1000, the court said: 'It may be said that the insured should have ascertained the correctness of the policy upon receiving it. Barrington, who acted for the insured in the matter, testified that he did open the policy, and note the company insuring, and the amount of insurance, but nothing more. It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured.'

[4, 5] "It is then asserted that the plaintiff was the owner and registered owner of the Hudson sedan, because under the law as it was in 1930 any attempted transfer was incomplete unless the certificate was registered. California Vehicle Act of 1929, § 45 (e), St.1929, p. 514. If the purchaser, Colburn, were maintaining this action, the point might have merit (Morris v. Firemen's Ins. Co., 121 Kan. 482, 247 P. 852, 52 A.L.R. 696), because, under the assertion made, he would have had no insurable interest. But this action is being maintained by the seller and not the buyer. That this plaintiff formerly owned the Hudson sedan is beyond dispute. If its contract of sale was incomplete, it was still the owner when it applied for full coverage. Sly v. American Indemnity Co., 127 Cal.App. 202, 15 P.(2d) 522. As to how that coverage should be written, the plaintiff left the matter entirely in the hands of the insurer. Furthermore, whether the plaintiff or Colburn was the legal owner at the time the policy was written we need not decide. Colburn had been, down to that date, operating the Hudson sedan while transacting the business of the plaintiff. There is no evidence that his services were to be terminated. If, during the following year, he continued to serve the plaintiff and operate a motorcar owned by himself, in the event of an accident a peril would arise which might damnify the plaintiff and it was entitled to coverage thereon. Sharman v. Continental Ins. Co., 167 Cal. 117, 121, 138 P. 708, 52 L.R.A.(N.S.) 670.

[6, 7] "It is claimed that there is no evidence to support findings 3, 4, and 5. They contain findings on the representations alleged to have been made by the defendant. The attack is twofold. It is claimed that the persons claimed to have made the representations did not make them. It is also claimed that such persons had no authority to make representations. As to the first claim, the most that can be said in favor of the defendant is that the evidence was conflicting. Be that as it may, it greatly preponderated in favor of the plaintiff. The old policies on which Miss Nielund made pencil notes strongly support the story as told by the witnesses for the plaintiff. As to the second claim—want of authority—the record is wholly in favor of the plaintiff. In its brief, giving page and line of the record, it says: 'The companies are very similar in name (Great American Insurance Company, New York; Great American Indemnity Company, New York); they are affiliated together; they have offices in the same building and the same telephone number; the appellant writes the casualty end of insurance and the other writes straight insurance.' But what is of more impor-

tance all policies are written in those offices. When new business comes into the office of the insurance company, it takes out its line and sends to the indemnity company such as falls in its line. When the business falls within a line written by both companies, then both companies join in writing it. See Plaintiff's Exhibit 5. When the relations between the insurance company and the indemnity company so stood, Mr. Benner, the assistant manager of the former, sent Miss Nielund and Mrs. Adams to take up the subject of the plaintiff's insurance with Mr. McNeely. They did so. Later they reported to Mr. Benner and also to Mr. Kemper, superintendent of the indemnity company. Their reports were accepted and the policies were written. Under these facts we think Miss Nielund and Mrs. Adams had the right to speak for both companies.

[8-10] "The defendant makes the further contention that the plaintiff neither pleaded nor proved facts sufficient in law to establish a waiver. As we have shown above, no duty rested on the plaintiff to plead a waiver of an affirmative warranty. As to the plaintiff's proof, we think it may not be said that it was insufficient. There is no conflict in the evidence to the effect that the plaintiff had an insurable interest; that the defendant made no inquiry as to how the registration of the Hudson sedan stood; that it asked for no written application covering by question and answer the material provisions of the policy; and that it made no examination of the records of the motor vehicle department. Nevertheless it rendered its bill for the premium, collected it, and still retains it. There is not a particle of a claim that the plaintiff made false representations, nor is there any claim that the defendant did in any manner call to the plaintiff's attention the registration clause. Such facts have been held sufficient to establish a waiver. Raulet v. Northwestern, etc., Ins. Co., supra; Sam Wong v. Stuyvesant Ins. Co., 100 Cal.App. 109, 279 P. 1050; 5 Cooley's Briefs on Ins. 4226. The only objection which the defendant specifically makes to the proof is that there was no showing that the defendant had actual knowledge as to the registration of the Hudson sedan. But it was not necessary that the plaintiff should show that the defendant had actual knowledge. It was bound both by its actual knowledge and by such knowledge as in law was imputed to it. This is so because the facts which were directly brought to its attention cast on it the duty to inquire into all facts pertinent to the transaction. 5 Cooley's Briefs on Ins. pp. 4204-4249; 14 Cal.Jur. 522; Sharp v. Scottish Union, etc., Co., 136 Cal. 542, 546, 547, 69 P. 253, 615; Foristiere v. Ætna Ins. Co., 209 Cal. 92, 94, 95, 285 P. 849.

[11, 12] "As to the point made that the waiver could only be in writing as provided in the policy, we think it has no merit. As appears from the facts hereinabove recited, the business was taken and the policy was written by Mr. Kemper. After he had been advised of the facts by Miss Nielund, later he called on Mr. McNeely, and still later he signed the schedules as the agent of the defendant. Under all of the facts he was clearly a general agent. In Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, at page 448, 89 P. 102, 106, 119 Am.St.Rep. 234, the court said: 'And, as a general rule, a subsequent parol waiver by a general agent of conditions in a policy, are valid, although the policy requires them to be in writing. [Citing cases.] Waivers such as that here made, constituting, as they do, a new contract upon a sufficient consideration, need not be evidenced by a writing, and need not be indorsed on the policy, no matter what limitations or conditions are expressed in the policy, provided, always, they are made by an agent who would otherwise have authority to make the contract. 3 Cooley's Briefs, p. 2695.'"

[13] Defendant contends that the above discussion is in conflict with the case of Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 P. 51, in holding the company bound under a contract of insurance different from that actually written. They rely upon the general proposition that where, without fraud or other invalidating cause, a contract of insurance is delivered to and retained by the insured, he will be bound by the terms thereof. There is no dispute about the general rule, and the exceptions to it are equally well established. In the instant case, specific coverage was requested for a particular car; the Colburn transaction involving that car was called to the attention of the agent who negotiated for the insurance as the representative of the company; and in the policy itself the name of Paul Colburn appeared. Under these circumstances, the company must be held bound to give the protection thus contracted for, and it cannot be permitted to perpetrate what would undoubtedly be a fraud on the insured by relying upon the

exclusion clause of the policy. The fact that the premium differs in a nonownership policy is utterly immaterial. Plaintiff paid the premium charged for the coverage requested, and, if by some mistake it was not charged the proper premium, it is no doubt possible to recover the deficiency.

The judgment is affirmed.



14 Cal.App.2d 360

HOPPING et al. v. REDWOOD CITY et al.

Civ. 10040.

District Court of Appeal, First District, Division 2, California.

May 29, 1936.

1. Appeal and error ⇐218(1)

Error, if any, in permitting single verdict without segregation as to two causes of action set up in complaint *held* not prejudicial where verdict was returned on form approved by counsel and was not objected to, especially where verdict was not excessive (Const. art. 6, § 4½).

2. Automobiles ⇐245(19)

In suit for injuries to motorist and his wife in intersectional collision with city's automobile driven by police officer who did not give emergency signals, whether police officer was negligent *held* for jury (St.1929, p. 542, § 132).

3. Automobiles ⇐245(19)

Where motorist collided at street intersection with city's automobile driven by police officer who was responding to radio message to come to office, and no emergency signals were given or displayed, whether officer was responding to "emergency" call within statute *held* for jury (St.1929, pp. 509, 542, 568, §§ 8½, 132; Civ.Code, § 1714½).

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Suit by Orion A. Hopping and another against Redwood City and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Ross & Ross, of Redwood City, for appellants.

F. E. Hoffmann, of San Mateo, and Clifford D. Good, both of San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs sued to recover damages arising out of personal injuries sustained by them in an automobile accident. The cause was tried by the court sitting with a jury, and, from a judgment in favor of plaintiffs, defendants appeal.

The accident occurred at about 1:45 a. m. on the morning of January 27, 1935, at the intersection of Main and Cedar streets in Redwood City. Plaintiff Orion A. Hopping was driving his car in a westerly direction along Cedar street and across the intersection of Main street. He was accompanied by plaintiff Thelma S. Hopping, his wife. Defendant H. G. Fleishman, a police officer, was driving a car belonging to the defendant city in a northerly direction on Main street. The testimony showed that, as plaintiffs' car approached the intersection, it slowed down to approximately 12 miles per hour. Before entering the intersection, plaintiff Orion A. Hopping saw defendants' car over 100 feet away approaching from the south at between 35 and 40 miles per hour. He proceeded into the intersection looking to the north for other traffic and did not look again to the south until he heard the screech of the brakes of defendants' car. The cars collided, causing injuries to both plaintiffs.

The first count of the complaint alleged a cause of action on behalf of plaintiff Orion A. Hopping based upon the personal injuries received by him and damage was alleged as to him in the sum of $50,000. The second count alleged a cause of action on behalf of both plaintiffs based upon the personal injuries received by plaintiff Thelma S. Hopping, and damage was alleged as to both plaintiffs in the sum of $5,000. The jury returned a verdict in favor of "the plaintiffs and against the defendants in the sum of $7,500." Judgment was entered upon said verdict.

[1] Appellants first contend that the verdict was void "in that the amounts were not segregated between the two causes of action set up in the complaint." Assuming that it was error to permit a single verdict without segregation as to the two causes of action, we are of the opinion that

such error does not require a reversal in the present case. It appears from the record that the verdict was returned upon the form approved by counsel for all parties prior to the time that the cause was submitted to the jury, and that, when the verdict was returned, appellants stood by and made no objection thereto. They should not now be permitted to complain. Joerger v. Pacific Gas & Electric Company, 207 Cal. 8, 276 P. 1017. Furthermore, there was no claim made in the trial court nor is any claim made on this appeal that the verdict was excessive in view of the injuries and damage sustained by both the husband and wife. We therefore believe the error was not prejudicial to appellants and that the judgment should not be set aside because of such error. Const. art. 6, § 4½.

[2] Appellants further contend that respondents were guilty of negligence as a matter of law. We find no merit in this contention. Appellants cite no authority in point, and, from the evidence adduced at the trial, it appears that the question of whether the driver of respondents' car was chargeable with negligence was essentially a question for the determination of the jury. Leblanc v. Coverdale, 213 Cal. 654, 3 P.(2d) 312; Briggs v. Koyer, 138 Cal. App. 487, 32 P.(2d) 649. In this connection, it may be stated that, while appellants' car was equipped with red lights and a siren, said lights were not lit and the siren was not sounded. It is therefore not claimed that appellants' car had the right of way by virtue of the provision of section 132 of the California Vehicle Act (St. 1923, p. 560 as amended by St.1929, p. 542).

Two further contentions of appellants may be considered together. The first is that "under the Statutes of 1929, Chapter 263 [page 568], a member of a police department, maintained by a city, is not liable in an action for damages rising out of the operation in line of duty of a motor vehicle of such department while responding to an emergency police call." The second is, "Section 1714½ of the Civil Code imposing a liability upon municipal corporations does not apply to an emergency vehicle belonging to a chartered city while responding to an emergency call." In support of the last-mentioned point, appellants cite and rely upon the recent decisions of this court in Armas v. City of Oakland, 135 Cal.App. 411, 27 P.(2d) 666, 28 P.(2d) 422, and Tuten v. Town of Emeryville, 139 Cal.App. 745, 35 P.(2d) 195. The contentions of appellants are substantially correct as abstract statements of the law, but the question still remains as to whether the law, as stated in these contentions, is determinative on this appeal.

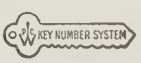
The freedom from liability of a member of a police department under St.1929, c. 263, p. 568, does not extend to all cases where such member is operating a police car, nor does it extend to all cases where such member is responding to a police call. The wording of the statute is "while responding to an alarm of fire or an *emergency* police call." (Italics ours.) The freedom from liability of a municipality under the rule of the above-mentioned authorities is limited to cases involving the operation of authorized *emergency* vehicles as defined in section 8½ of the California Vehicle Act (St.1923, p. 517, added by St. 1929, p. 509). An "authorized emergency vehicle" is there defined as "every vehicle publicly owned and operated by a police or fire department or traffic law enforcement officer *in responding to emergency calls* or in traffic patrol duty and a vehicle owned and operated by the chief or one assistant chief of an organized fire department in answering fire alarms and public owned ambulances used on emergency calls and emergency repair vehicles of public utility corporations, only when responding to emergency, accident or fire calls." (Italics ours.) It will be noted that the word "emergency" is significantly used in both statutes.

[3] Appellants' last-mentioned contentions are not determinative of this appeal, for the reason that it cannot be said *as a matter of law* that appellant Fleishman was responding to an "emergency" call at the time that the accident happened. This issue was submitted to the jury under instructions which are not attacked by appellants, and the jury impliedly found that said appellant Fleishman was not responding to an "emergency" call. The evidence showed that said appellant was on duty as a police officer driving around within the limits of the city in a "cruising car" equipped with a radio. He received a radio message to "come into the office." Nothing more was said. Said appellant was not informed of the existence of any emergency, and there was no evidence whatever to show that any emergency existed. In response to a question as to

whether there was any urgency about this call, said appellant testified upon the taking of his deposition, "It was just another call to me." He gave similar answers upon the trial, but in one place in his testimony he stated, "All calls are urgent." Upon this state of the record, and in the absence of any other testimony on the subject, we are of the opinion that the implied finding of the jury to the effect that said appellant was not responding to an "emergency" call was sustained by the evidence and that the judgment must be affirmed. The Armas Case and the Tuten Case, relied upon by appellants, are not in point as in each of said cases the uncontradicted evidence showed that the vehicle involved was an "authorized emergency vehicle" within the meaning of section 8½ of the California Vehicle Act.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



14 Cal.App.2d 407

TILDEN et al. v. BLOOD, City Clerk.

Civ. 10162.

District Court of Appeal, First District, Division 1, California.

June 3, 1936.

Hearing Denied by Supreme Court July 31, 1936.

1. Mandamus ⇐187(7)

Finding of trial court in proceeding to compel city clerk to certify two petitions for recall election that clerk had rejected certain groups of signatures arbitrarily *held* binding on appeal, where based upon result of checking signatures with those appearing on registration affidavits which were not in record on appeal.

2. Mandamus ⇐187(7)

City clerk, in proceeding to compel clerk to certify two petitions for recall election, could not complain on appeal that finding as to arbitrary rejection of signatures, based on comparison of signatures with those on registration affidavits, was not supported by evidence because affidavits had never been formally introduced, where clerk stipulated at trial such records might be used for all purposes therein.

3. Mandamus ⇐168(3)

Whether evidence in proceeding to compel city clerk to certify two petitions for recall election was sufficient to sustain finding that clerk had arbitrarily rejected certain signatures *held* immaterial, where more admittedly valid signatures were restored by court than were necessary to initiate election.

4. Mandamus ⇐174

Finding of fact in proceeding to compel city clerk to certify two petitions for recall election that clerk had legal duty to certify petitions *held* unnecessary, since whether clerk had such duty was question of law to be deduced from provisions of city charter and general law, which showed that such duty was imposed on city clerk.

5. Evidence ⇐31

Courts take judicial notice of city charters promulgated under Constitution as freeholders' charters.

6. Mandamus ⇐174

Finding that city clerk had legal duty to certify petitions for recall election was not without evidentiary support merely because city charter imposing such duty was not introduced in evidence, where charter provisions had been set forth in petition, accompanied by allegations as to clerk's duty thereunder and in view of fact that court would take judicial notice of charter.

7. Mandamus ⇐23(2)

Citizens could compel city clerk by writ of mandate to certify as sufficient petitions for recall election, where rejection of signatures by clerk had been unwarranted, since clerk had duty to examine individual certificates and to certify that fact if sufficient number of valid certificates were filed.

8. Mandamus ⇐72

Mandamus lies to compel public officer to perform specific duties imposed upon him by law, where he arbitrarily refuses to perform those duties, where refusal is based upon erroneous conclusion of his legal duties, or constitutes clear abuse of discretion.

9. Municipal corporations ⇐159(1)

Sponsors of petitions to initiate recall election *held* to have sufficiently complied with provisions of city charter requiring proof of service of notice of intention to circulate petitions to be filed "forthwith" after service upon officer sought to be recalled, where proof was filed within seven days aft-

er notice of intention was filed with clerk and six days after service on officer and more than a month prior to filing of petitions.

10. Municipal corporations ⇐159(1)

Fact that city charter provided that city attorney should be legal adviser of all city officers and that city clerk acted upon attorney's advice in rejecting petitions for recall election would be no defense to charge that clerk acted arbitrarily, where evidence showed that there was no legal justification for such rejection.

11. Mandamus ⇐151(2)

City councilman sought to be recalled by recall election *held* not necessary party to proceeding for writ of mandate to compel city clerk to certify as sufficient petitions filed to initiate such recall election, and not required to be notified thereof.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Application for a peremptory writ of mandate by Charles Lee Tilden and others against Sherman G. Blood, as City Clerk of the City of Alameda. From a judgment granting a peremptory writ of mandate, defendant appeals.

Affirmed.

William J. Locke, City Atty., of Alameda, and Frank W. Creely, of Oakland, for appellant.

H. Albert George, of San Francisco, Stanley D. Whitney, of Alameda, Breed, Burpee & Robinson, of Oakland, Augustine C. Keane, Charles B. Morris, and Gilbert D. Boalt, all of San Francisco, for respondents.

KNIGHT, Justice.

This is an appeal by the city clerk of the city of Alameda from a judgment of the superior court granting a peremptory writ of mandate directing him to certify as sufficient two recall petitions filed with him for the purpose of initiating an election for the recall of a city councilman named Hans W. Roebke.

The minimum number of signatures necessary to initiate the election was 3,818. The first petition referred to in the record as the original, was filed on July 31, 1935. It had attached thereto 5,099 signatures. The provisions of the city charter (section 11, c. II, art. XI) imposed upon appellant the mandatory duty to examine said petition and from the records of registration to ascertain and determine whether it was signed by the requisite number of qualified electors of said city, and within a limited time to attach to said petition his certificate, properly dated, showing the result of such examination. The time allowed for such examination and certification expired on August 12, 1935; but appellant willfully and arbitrarily refused, so the trial court found, to certify whether said petition was sufficient or insufficient until September 25, 1935, at which time he attached his certificate to the effect that 567 signers had withdrawn or revoked their signatures and that he had rejected 1,269 more "as not conforming to law and to the Charter," and that therefore said petition was insufficient. On October 9, 1935, a supplemental petition was filed containing 705 signatures; and on October 21, 1935, appellant attached his certificate thereto setting forth that 197 of the signers had withdrawn or revoked their signatures and that he had rejected 156 more as not conforming to law and to the charter, leaving a net balance on both petitions of only 3,615 names, or 203 less than the requisite minimum number to initiate said election, and thereupon appellant certified both petitions insufficient. Respondents then instituted the present proceeding, and at the trial each disputed signature was taken up and considered separately; the original registration affidavits of the signers were produced in court and used in determining the issues involved; and, from the evidence before it, the trial court found that appellant had either arbitrarily or illegally disallowed 959 signatures which it ordered restored, thereby bringing up the total number of valid signatures to 4,574, or 756 more than the requisite number to call said election; whereupon appellant was directed to certify said petitions as sufficient. Besides finding generally that appellant's disallowance of the 959 signatures so restored was arbitrary or illegal, the trial court in its decision grouped the restored signatures according to the various seventeen grounds upon which appellant had rejected them, and made specific findings as to each group, from which it appears that some groups were rejected by appellant for no apparent reason at all, while others were disallowed upon groundless theories of law. In fact, a large num-

ber of names were restored on stipulation of appellant, and many others on stipulated facts.

[1, 2] Ten points are urged for reversal, but an examination of them in connection with the record demonstrates that the appeal is wholly without merit. Several of the points so urged are, in substance, an attack upon the sufficiency of the evidence to support the findings as to certain groups of signatures which the trial court declared appellant had rejected arbitrarily. These groups included more than 480 names. They had been rejected upon the grounds that the signatures on the petitions did not correspond with those on the registration affidavits, or that the dates were invalid or had been inserted or altered by some other person, or that the signatures had been erroneously precincted. The record discloses, however, that at the trial appellant stipulated to the restoration of approximately 150 of said signatures; and, as to the remainder of them, the trial court's finding that they were arbitrarily rejected by appellant is manifestly binding on this appeal for the reason that such finding is based largely upon the result of the checking of said signatures with those appearing on said registration affidavits, which formed no part of the record on appeal. In this connection appellant raises the technical point that said original registration affidavits were never formally introduced and received in evidence, and that consequently the trial court's findings based thereon are without evidentiary support. Even though they were not so formally introduced and received in evidence, appellant is not in a position to complain about the matter, for the reason that, when said affidavits were produced in court, appellant expressly stipulated not only that they were the original records, but that the same might be used for all purposes in the trial and determination of the issues involved, and the record shows they were so used. Appellant's only objection to their formal reception in evidence was that they would "clutter up" the record.

[3] Entirely aside, however, from the groups of signatures restored upon the ground that they had been arbitrarily rejected, it affirmatively appears that the trial court restored also approximately 280 additional signatures about which appellant raises no question whatever on this appeal. Some were restored on stipulation of appellant; others had been illegally rejected by appellant upon the assumption they were duplicates; and the remainder consisted of purported revocations which appellant erroneously recognized. It will be seen, therefore, that, in any event, there are more than enough signatures which are admittedly valid to overcome the deficiency of 203 declared by appellant.

Then again, the record discloses that a large number of additional signatures which the trial court restored had been illegally rejected by appellant upon the ground that the signers were not lawfully registered to vote at the time of signing said petitions. The court's rulings as to many of those thus restored are not questioned on this appeal, and as to the remainder, the evidence shows that some had been rejected upon the erroneous theory that the deputy clerk before whom the electors made their affidavits of registration had not actually deposited said affidavits in the office of the county clerk prior to the time the electors signed said petitions; while others were illegally rejected by appellant upon extraneous evidence which in the performance of his ministerial duty he had no legal right to consider. Ley v. Dominguez, 212 Cal. 587, 299 P. 713; Ratto v. Board of Trustees, 75 Cal. App. 724, 243 P. 466.

In the state of the record above set forth, it would seem to be quite unnecessary to indulge in further discussion of appellant's contentions that the evidence is insufficient to sustain the trial court's findings because, as above shown, far more admittedly valid signatures were restored by the court than were necessary to meet the required minimum number of signatures to initiate the recall election.

[4-6] Another point advanced by appellant is that the trial court's decision contains no specific finding that it was his legal duty as such clerk to certify to said petitions. The answer to this point is to be found in the very finding quoted by appellant on page 41 of his brief. Furthermore, a finding of fact to that effect was not essential because obviously the conclusion as to whether such duty was enjoined on appellant was one of law to be deduced from the provisions of the charter and the general law; and an examination of both shows clearly that such duty is expressly imposed on the city clerk. In this connection, too, appellant argues that the city charter is "a local law," and that, inasmuch

as the provisions thereof were not introduced in evidence, there is no proof to support the above conclusion. There is even less merit in this latter point than in the former, for the reason that it is elementary that city charters such as the one here involved, promulgated under the Constitution as freeholders' charters, have all the dignity of ordinary statutes (Whitmore v. Brown, 207 Cal. 473, 279 P. 447), and, that being so, courts take judicial notice thereof. Moreover, the charter provisions in question were set forth in the petition for the writ, accompanied by appropriate allegations as to appellant's duty thereunder; and no denial thereof was made in appellant's answer.

[7, 8] Appellant further contends that in any event the rejection by him of said signatures, if unwarranted, amounted to no more than error in the exercise of a discretionary power, which cannot be reviewed or corrected by the court in a proceeding of this kind. The negative answer to this contention is to be found in a number of decisions, among them being Hartsock v. Merritt, 93 Cal.App. 365, 269 P. 757; Hartsock v. Merritt, 94 Cal.App. 431, 271 P. 381, and Ratto v. Board of Trustees, supra. As said in the first Hartsock Case, supra, it is the duty of the city clerk to examine the individual certificates, for the purpose of ascertaining whether they comply with the requirements of the charter, and, if a sufficient number of valid certificates are filed, he must certify that fact to the council, and the election must then be called. Ratto v. Board of Trustees, supra. The citizen is entitled to have this duty performed honestly and fairly, and if it is shown to have been done fraudulently or arbitrarily, the action may be controlled by mandamus. Again, in the second Hartsock Case, supra, the court, in restating the same doctrine, says the general rule is that mandamus does not lie to compel a public official to exercise his discretion in any particular manner, but, where the law imposes upon him specific duties and he either whimsically or arbitrarily refuses to perform those duties, or where his refusal to perform is based upon an erroneous conclusion of his legal duties, or where the right of the individual is so fixed that the refusal of the official to act is a clear abuse of discretion, mandamus is the proper remedy. In re Holmes, 187 Cal. 640, 647, 203 P. 398; Dufton v. Daniels, 190 Cal. 577, 580, 213 P. 949; Bleuel v. City of Oakland, 87 Cal.App. 594, 262 P. 477. And, in dealing generally with this same subject-matter, the Supreme Court, in the case of Ley v. Dominguez, supra, goes on to say that the duties of a city clerk in determining the sufficiency of a petition of this kind are purely ministerial and not judicial, and that under the law he should exercise his powers and perform his duties in such a manner as will, whenever possible, produce rather than defeat the right of the people in the exercise of their electoral franchise.

[9] Another point urged is that the sponsors of said petitions did not comply with the provisions of the charter in that they did not "forthwith" file proof of service of the notice of intention to circulate the recall petitions. In this regard section 3 of chapter II of article XI of the charter provides that, within seven days after the filing of the notice of intention to circulate the recall petition, a copy of such notice shall be served in the manner set forth in said provision upon the officer sought to be recalled, and that the affidavit of the party making such service shall be filed "forthwith" with the city clerk. Here such notice of intention was filed with the clerk on June 17, 1935, and was served on the officer sought to be recalled on the following day, June 18, 1935. On June 24, 1935, the affidavit of service was filed with the clerk. It will be noted, therefore, that said affidavit was filed even within the seven-day limitation of time fixed for the service of said notice and more than a month prior to the filing of said petitions with the clerk, which clearly was a substantial compliance with the provisions of the charter.

[10] Appellant cites a section of the charter providing, among other things, that the city attorney shall be the legal adviser of all city officers; and, in connection therewith, appellant calls attention to testimony given by him at the trial to the effect that in rejecting said petitions he sought and acted upon the city attorney's advice, which he contends serves as a complete defense against the charge that he acted arbitrarily. It is apparent, however, that where, as here, the evidence shows beyond question that there is no legal justification for such rejection, the fact, if it be such, that it is based upon the advice of the city attorney does not alter the situation.

[11] Finally, the validity of the trial court's judgment is assailed upon the

ground that the officer sought to be recalled was not made a party to the present proceeding nor served with notice of the institution and pendency thereof. Appellant did not demur to the complaint upon the ground of nonjoinder of parties, nor was any application ever made by the officer to intervene. But even assuming appellant is in a position now to raise the question of nonjoinder of parties either in his own behalf or in the interests of said officer, there is no merit in his contention because admittedly the sole purpose of the proceeding was to compel the appellant as city clerk to perform a ministerial duty, and it was not necessary to a complete determination of that question that the officer sought to be recalled be made a party to the proceeding or even be notified of the pendency thereof.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



14 Cal.App.2d 254

In re MARCUS' ESTATE.

MARCUS v. REDMOND et al.

Civ. 11001.

District Court of Appeal, Second District, Division 2, California.

May 23, 1936.

Hearing Denied by Supreme Court July 20, 1936.

1. Wills ⇐384

In determining questions, relied on by will contestants appealing from order admitting will to probate, as to whether it was shown that testatrix was competent to execute alleged codicil and whether its execution was sufficiently proved, Appellate Court must view evidence in light most favorable to proponents, though only testimony concerning mental capacity came from them.

2. Wills ⇐384

Order admitting will to probate will not be reversed for error in denying contestant's motion for new trial, where they made no attempt to show abuse of trial court's discretion, but contended merely that injustice would result on merits, if order were permitted to stand.

3. Judges ⇐16(1)

Commissioner of probate court in Los Angeles county may qualify to sit as judge pro tem.

4. Wills ⇐355

Where trial court, in attempting to amend decree admitting will to probate by striking out provision that other proponents than executor were entitled to costs inadvertently struck out estate also, he did not err in subsequently amending decree to conform to oral decision, judgment, fact findings, and conclusions of law.

5. Wills ⇐402

Allowance of costs in will contest to executor before final determination of contest against contestant *held* not error; judgment for costs being granted, not in exercise of discretion, but against unsuccessful party as matter of course in special proceeding (Probate Code, § 1232; Code Civ.Proc. §§ 22, 23; §§ 1022 and 1024, as amended by St. 1933, pp. 1899, 1900).

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge.

Proceeding by Louis Marcus to contest the will of Mary Marcus, also known as Mary Fishbein, deceased, propounded by Arthur Redmond, as executor of deceased's last will and codicil, and others. From an order admitting the will to probate, contestant appeals.

Affirmed.

Benjamin P. Riskin, of Los Angeles, for appellant.

William P. Redmond, of Los Angeles, for respondent Arthur Redmond, as executor.

Lamdan & Damon, of Los Angeles, for respondents Reeva Ruth Simpson and Bertha Marcus.

CRAIL, Presiding Justice.

This is an appeal from an order of the probate court admitting to probate the will of Mary Marcus, deceased. In the action the appellant, Louis Marcus, was the contestant or plaintiff, and the executor named in the will and others were the proponents or defendants.

With considerable skill and much to our convenience, the contestant has set forth in his statement of questions involved, the points upon which he relies, as follows: "1. Was it shown that the testatrix was

sufficiently competent to execute the alleged codicil? 2. Was the execution of the Codicil sufficiently proved? 3. Did the Court abuse its discretion in denying the motion for a new trial? 4. Can a Commissioner of the Probate Court in Los Angeles County qualify to sit as a Judge Pro Tem? 5. Was it an error to amend the decree and to award costs against the contestant?"

[1] Obviously the answers to the first two questions depend upon whether there is any substantial evidence to sustain the findings of the trial court with regard thereto, and in determining them we must view the evidence in the light most favorable to the party who was successful in the trial court. The contestant, however, contends that the following language which he quotes from In re Estate of Arnold, 147 Cal. 583, 82 P. 252, 253, expresses the true rule to be used: "In determining whether or not, in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded."

Contestant admits that this quotation speaks of the amount of testimony required to take a case to the jury, but contends that "the analogy should be allowed in a case where the only testimony concerning mental capacity comes from the proponents on cross-examination or otherwise; and realizing that the witnesses are adverse, all the favorable presumptions should be given it." It is sufficient to say that there is no merit in the contention. The rules for viewing evidence set forth in the Arnold Case, supra, have no application to the situation which confronts us. The answer to each of the first two questions is, "Yes."

[2] There is not even an attempt by contestant to show an abuse of discretion on the part of the trial court in denying the motion for a new trial, but merely that on the merits an injustice will result if the order is permitted to stand. The answer to the third question is, "No."

[3] The answer to the fourth question is, "Yes." In re Estate of Kent (Cal.Sup.) 57 P.(2d) 901.

[4] The findings of the trial court contained a conclusion, among others, that judgment should be entered against the contestant and in favor of the executor for costs. These findings were evidently prepared by the attorneys for the proponents of the will, and the court struck therefrom the sentence which was to the effect that the other proponents of the will were entitled to costs. In attempting to amend the decree in the same way, however, the court inadvertently went further and struck out not only the names of the other proponents, but the estate of Mary Marcus as well. Fifteen days later, upon motion in open court after due notice, the court corrected this obvious inadvertence by amending the decree as follows: "That this decree and judgment is amended to conform to the oral decision and judgment of the court and to conform to the Findings of Fact and Conclusions of Law by this Court rendered on the 3rd day of December, 1934." There was no error here.

[5] The contestant's final point is that "error was committed when an allowance was made for costs in a will contest prior to the time when the contest was finally determined." He relies upon the following cases: In re Jones' Estate, 166 Cal. 147, 135 P. 293; In re Berthol's Estate, 163 Cal. 343, 125 P. 750; In re Yoell's Estate, 160 Cal. 741, 117 P. 1047; In re Johnson's Estate, 198 Cal. 469, 245 P. 1089. These were all cases in which the trial court was attempting to do the unusual by awarding the costs out of the estate instead of entering judgment as of course against the unsuccessful party. Such an exercise of discretion is permitted in the probate court under section 1232 of the Probate Code. But, involving as it does the exercise of discretion upon the part of the trial court, it may not be made until a final determination of the contest on appeal; and our Supreme Court has said: "The circumstances must be peculiar indeed to justify such an order in favor of a contestant who has failed." In re Estate of Yoell, supra; In re Estate of Bump, 152 Cal. 271, 92 P. 642. The court in granting the judgment for costs herein was not exercising its discretion but was granting judgment for costs in a special proceeding (Code Civ.Proc. §§ 22 and 23; In re Estate of Joseph, 118 Cal. 660, 50 P. 768) against the unsuccessful party as a

matter of course (Code Civ.Proc. §§ 1022 and 1024, as amended by St.1933, pp. 1899, 1900). The answer to the fifth question is, "No."

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



14 Cal.App.2d 287

MYERS v. SOUTHERN PAC. CO.

Civ. 5488.

District Court of Appeal, Third District, California.

May 26, 1936.

Rehearing Denied June 25, 1936.

Hearing Denied by Supreme Court July 24, 1936.

1. Judgment ⇐199(3)

Motion for judgment for defendant notwithstanding verdict should be granted under statute only where it appears from full and fair consideration of whole evidence viewed in light most favorable to plaintiff that there is no substantial evidence to support one or more material issues necessary to uphold verdict (Code Civ.Proc. § 629).

2. Master and servant ⇐265(13, 14)

In action against railroad for death of car checker who was killed when knocked off side of car on which he was riding by platform ladder at side of track, railroad had burden to establish defense that car checker met death as result of willfully violating railroad's rule against riding rolling cars in yard or that maintenance of iron ladder leading to platform was risk which was assumed by car checker incident to his employment (Federal Employers' Liability Act, § 4, 45 U.S.C.A. § 54).

3. Master and servant ⇐204(1)

Servant assumes all normal risks incident to his employment which are known to him or which in exercise of ordinary care on part of reasonably prudent person should have been known to and appreciated by him (Federal Employers' Liability Act, § 4, 45 U.S.C.A. § 54).

4. Master and servant ⇐284(3), 289(35)

In action against railroad for death of car checker who was killed when knocked off side of car on which he was riding by iron platform ladder at side of track, evidence whether at time he was killed car checker was engaged in course of his employment or violating rule of railroad against riding on rolling cars *held* for jury (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

5. Master and servant ⇐243(5)

Where there has been habitual disregard of rule amounting to abrogation thereof, such custom will be sufficient to relieve employee of charge of contributory negligence in violation of rule.

6. Master and servant ⇐204(1)

Car checker employed in railroad yards for 9 years who was familiar with impaired clearance between side of rolling car and platform caused by iron platform ladder extending 8 or 9 inches toward track *held* to have assumed risk of danger from obstructed clearance, so that his widow was precluded from recovering damages on account of his death when knocked from side of car by ladder while riding on rolling car at night (Federal Employers' Liability Act, § 4, 45 U.S.C.A. § 54).

7. Master and servant ⇐204(1)

Servant's thoughtlessness regarding known danger constitutes no defense against contention that servant had assumed risk precluding recovery for his death (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

8. Master and servant ⇐228(1)

Mere fact that servant may have been guilty of contributory negligence in act causing his death would not bar widow from recovering damages on account of the death as result thereof (Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53).

9. Master and servant ⇐276(2)

In action against railroad for death of car checker who was killed when knocked off side of rolling car by iron platform ladder at side of track, plaintiff had burden to affirmatively show that death of car checker occurred through fault of railroad company (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

10. Master and servant ⇐106(5)

Railroad company *held* not liable to widow of car checker who was killed when knocked off side of rolling car by iron platform ladder, where ladder was constructed and maintained by third person, and railroad had no authority or control over its maintenance or removal (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Nellie E. Myers, as administratrix of the estate of George M. Myers, deceased, against the Southern Pacific Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Clifton Hildebrand of San Francisco, James E. Martin, of Los Angeles, and Louis E. Goodman and Louis H. Brownstone, both of San Francisco, for appellant.

Devlin & Devlin & Diepenbrock, of Sacramento, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against her pursuant to section 629 of the Code of Civil Procedure, notwithstanding the verdict of a jury which was previously returned against the defendant, Southern Pacific Company, for negligence in maintaining an alleged unsafe place in its railroad yard at Roseville where the plaintiff's intestate was required to work.

Prior to his death, George M. Myers, husband of the plaintiff, was employed by the Southern Pacific Company as a car checker in its railroad yard at Roseville for nine years. It was his duty to procure the numbers and destination of all cars in that yard which were destined for outbound trains, and to examine the seals and ventilators of all such cars which were loaded with produce to see that they were in proper condition and report the same to the manifest clerk at that yard. He was engaged in the performance of that duty at the time of the accident which resulted in his death. The defendant owns and operates an interstate railroad system including the main and sidetracks at Roseville, together with the rolling stock and fruit cars upon which the deceased was working at the time of his death. This action is maintained under the Federal Employers' Liability Act (45 U.S.C.A. §§ 51–59). The switching yard at Roseville includes an intricate system of tracks several miles in length. Track No. 2 was adjacent to an icing plant and platform on its easterly side, which is 3,520 feet in length and about 16 feet in height. It was constructed and maintained by an independent corporation, the Pacific Fruit Express Company, for the purpose of furnishing icing facilities for the cars of the Southern Pacific Company which were loaded with fruit, produce, and other perishable freight. The ice plant and platform were constructed in 1921, after track No. 2 was laid. Midway along this structure adjacent to track No. 2 the fruit company erected an iron ladder in 1924, extending from the ground to the top of the platform. The amended complaint alleges in that regard: "The Pacific Fruit Express Company negligently and carelessly constructed and maintained said steel ladder." This iron ladder protruded from the face of the platform toward the track a distance of 8 or 9 inches. The space between the face of the platform and the nearest side of an average car was but 24½ inches. The ladder consumed 8½ inches of this space. This left only 16 inches clearance between the ladder and the face of adjacent cars. After the accident occurred this ladder was removed or set back plumb with the face of the platform. Signs were maintained at each end of the platform calling attention to the "Impaired Clearance." Printed rules of the Southern Pacific Company were enforced requiring all employees to "inform themselves as to the location of structures or obstructions where clearances are impaired." The deceased had worked in the Roseville yard for nine years, and was familiar with the dangers attending his employment, including the impaired clearance and the dangerous ladder in the space between the icing platform and track No. 2. He had often been seen checking cars in the vicinity of that iron ladder. There was, however, sufficient space between the ladder and a rolling car on track No. 2 to permit a man to pass while he clung to the ladder on the side of the car. Mr. Bolles, who for many years worked for the defendant as a yardman at Roseville, testified that he frequently rode a car through that space adjacent to the icing platform clinging to the ladder on the car, in both the daytime and the nighttime. Several witnesses testified that an oral rule of the company existed prohibiting checkers from riding in the yard on the outside of cars. On the contrary, several witnesses, including the engineer and other yard employees of the defendant, testified they had often seen these checkers, including Mr. Myers, riding the cars from one point to another in the yard to expedite their work. At least one of these witnesses said that he had done this in the presence of the yard superintendent. No one testified that any one had ever protested against that practice. One witness, McCullough, who had worked for the defendant in that yard with the deceased for several years, also testified that

he had frequently seen Mr. Myers and other employees riding the cars in that manner in the presence of yard officials, without objection, along track No. 2 and elsewhere in the yard. He denied that these men secretly "nipped" these rides, and inferred that they openly rode the cars with the approval of the yard officials.

The night of December 9, 1932, Mr. Myers was engaged in checking and examining produce cars which were due to leave Roseville on overland train No. 488 shortly after the arrival of a freight train from Sacramento at 7 o'clock p. m. The accident which caused his death occurred at about that time. With the exception of 13 empty fruit cars, he had already checked the yard list of all cars which were to go east on that train. Forty-six cars which had been already checked were run back on track No. 2 adjacent to the ice packing plant. These 13 empty cars had not been checked. Myers was engaged in completing that job when the switch engine picked up the 13 cars and ran them back on track No. 2 to get them out of the way of the incoming freight train, of which they were to become a part. To save walking back a considerable distance to the point where these cars were to be stationed, and to expedite his time so that he could complete his duty before the train arrived from Sacramento, Myers climbed on to the ladder on the easterly side of one of these empty cars to ride it back along track No. 2, to the place where it would be stationed. It was then dark. He carried a lantern. No one saw the accident, but a brakeman observed the sudden disappearance of his lantern when he reached a point opposite the platform ladder midway along the icing plant. An emergency signal promptly stopped the train. The body of Mr. Myers was found across the track within 7 feet of the protruding ladder of the icing platform. He had evidently been knocked from his position as he clung to the ladder on the side of the moving car. Several cars ran over him. He died within a few moments thereafter.

A suit for damages was commenced. It was tried before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff for the sum of $12,500. On motion of the defendant, under the provisions of section 629 of the Code of Civil Procedure, the trial judge set aside the verdict and rendered judgment in favor of the defendant notwithstanding the verdict. From that judgment the plaintiff has appealed.

In support of this judgment the defendant asserts that the doctrine of the "assumption of risk" precludes the plaintiff from recovering damages for the death of her husband under the circumstances of this case; that Mr. Myers was not engaged in the performance of his duty at the time of his death, but, on the contrary, that he was riding on the outside ladder of a moving car in a place known to him to be dangerous, contrary to an established oral rule of the Southern Pacific Company, and that the dangerous ladder attached to the adjacent icing platform was constructed and maintained by a stranger to this litigation, and that its removal was not within the control of the defendant.

[1] A motion for judgment in favor of a defendant notwithstanding a verdict previously rendered by a jury should be granted under the provisions of section 629 of the Code of Civil Procedure, only when it appears from a full and fair consideration of the whole evidence, viewed in a light most favorable to the plaintiff according to the same rule which applies to the granting of motions for nonsuit or for a directed verdict, that there is no substantial evidence to support one or more material issues necessary to uphold the verdict. Section 629, Code Civ.Proc.; Card v. Boms, 210 Cal. 200, 291 P. 190; In re Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579; Tracey v. L. A. Paving Company, 4 Cal.App.(2d) 700, 41 P.(2d) 942; Landers v. Crescent Creamery Company, 118 Cal.App. 707, 5 P.(2d) 934; Locke v. Meline (Cal.App.) 48 P.(2d) 176.

[2, 3] In the present case, the burden was on the defendant to show either that the plaintiff's intestate met his death as a result of willfully violating his employer's rule against riding rolling cars in the Roseville railroad yard, or that the maintenance of the iron ladder leading to the icing platform was a risk which was assumed by the deceased incident to his employment. It is uniformly held by a multitude of authorities that a servant assumes all the normal risks incident to his employment which are known to him, or which, in the exercise of ordinary care on the part of a reasonably prudent person, should have been known to and appreciated by him. U.S.C.A., tit. 45, § 54, note 24, p. 448; Qualls v. Atchison, Topeka & Santa Fe Railway Company, 112 Cal.App. 7, 296 P. 645. If the record discloses a substantial conflict of evidence regarding the existence or violation of the alleged rule against riding the rolling cars in

the railroad yard, or concerning the assumption of risk on the part of the deceased, the jury became the sole judge of these issues, and under such circumstances a judgment notwithstanding the verdict would be erroneously granted.

[4] It is a reasonable inference from the evidence adduced that the deceased was actually engaged in the course of his employment at the time he was killed. The Sacramento train was then due to arrive. His job of checking the cars which were to go out on that train had not been completed. Thirteen empty cars remained unchecked. He was actually engaged in obtaining their numbers, when they were picked up by the switch engine and run back out of the way on side track No. 2. His time to complete that work was limited. He mounted the rolling cars to save the time of walking down the yard a considerable distance to the point where they were to be stationed. His act of riding the cars was to expedite his work. In riding the cars he was therefore actually engaged in the course of his employment, unless he violated the rules against riding moving cars. At least it was a question for the jury to determine whether he was not then actually engaged in the performance of his duty. For the judge to determine, in view of the conflict of evidence adduced, that the deceased was not engaged in the performance of his duty was an invasion of the province of the jury.

We are also of the opinion the question as to whether the defendant enforced a rule against employees riding upon rolling cars in the Roseville yard was a problem for the determination of the jury, since the evidence regarding that subject is conflicting. Such an order might be said to be important enough to have been included in the printed rules of the company. A bulletin of general written rules, consisting of 12 typewritten pages, was introduced in evidence. No rule prohibiting employees from riding on moving cars in the yard was included therein. We may assume no such written or printed rule was exhibited or enforced. But several employees of the defendant did testify that such an oral rule was called to their attention. On the contrary, several employees of the company testified that they had often seen employees openly riding cars in the yard at Roseville. Mr. Ferguson, an engineer who had worked for the company nine years, said he saw checkers riding the cars "to save long walks" in the performance of their duties. Mr. Brown, who had been employed in that yard for nine years, said he had frequently seen Mr. Myers and other yard clerks riding the cars. Mr. Bolles, who had worked as a yard man for the defendant for 16 years, said he had often seen Mr. Myers and other checkers openly riding the cars in the yard, and that he had done so, even along side track No. 2 where the icing platform ladder in question was located. Mr. McCullough, who served the defendant as a brakeman for 13 years, testified positively that he had often seen Mr. Myers and other yard clerks openly riding the cars "in front of the yardmaster," and that it was the practice of yard employees to do so. It is true the last-named witness had been discharged from his position two or three years previously for the reason that he was injured in a railroad accident, and when he commenced suit against the company he was discharged. But that circumstance merely raised a question regarding his credibility, which was a problem for the jury to determine.

The evidence of the four witnesses last mentioned leaves the reasonable inference that if a rule against riding cars in the Roseville yard was orally conveyed to some of the employees, it was not enforced. On the contrary, it may reasonably be inferred from the evidence that yard employees commonly rode cars in the presence of their superior officers without protest, that it was not expected the oral rule would be enforced, and that the deceased therefore rode the cars with the approval of the officers of the yard, and was not violating any rule in riding the car at the time of the accident. At least this question of violating an oral rule of the company was a problem for the determination of the jury. For the court to determine that the deceased violated the rule of the company against riding cars in the yard was therefore an invasion of the province of the jury.

[5] Where there has been an habitual disregard of rules amounting to an abrogation thereof, this custom will be sufficient to relieve an employee of a charge of contributory negligence. St. Louis, etc., Ry. Co. v. Stewart, 124 Ark. 437, 187 S.W. 920; San Pedro, L. A. & S. L. R. Co. v. Brown (C.C.A.Cal.) 258 F. 806.

[6, 7] It does, however, appear without substantial conflict of evidence that the deceased actually knew of the presence of the dangerous protruding ladder on the side of the icing platform. The ladder was there in clear view during the entire nine years during which he worked in the Roseville yard. He had been seen to frequently check cars on side track No. 2 around and about that very ladder. One witness testified that he had seen Mr. Myers riding cars down that side track past the point where the dangerous ladder existed. Large conspicuous signs at either end of the icing platform advertised the "Impaired Clearance." It would seem to be impossible for any person to work throughout that railroad yard for nine years, examining and checking cars daily in large numbers, without observing and fully appreciating the grave danger of riding cars down track No. 2 with a narrow clearance of only 16 inches for his body to pass the platform ladder. We must assume that no reasonable person could avoid knowledge of the presence of that ladder and the danger of passing it while riding the adjacent side of a moving car. Under such circumstances we are impelled to hold that Mr. Myers assumed the risk of that danger, and that his widow is therefore precluded from recovering damages on account of his death. Upon that point there is no conflict of evidence. It must be true that Mr. Myers had forgotten the presence of the ladder, or did not realize on account of the darkness that he was so close to it when he was suddenly struck and knocked from the car. But thoughtlessness regarding a known danger is no excuse. New York, etc., Ry. Co. v. McDougall (C.C.A.) 15 F.(2d) 283.

[8] The mere fact that the deceased may have been guilty of contributory negligence in riding a car along track No. 2 in dangerous proximity to the adjacent platform ladder would not bar the plaintiff from recovering damages on account of his death as a result thereof. Section 3 of the Federal Employers' Liability Act (45 U.S.C.A., § 53, p. 379) provides in that regard: "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

But the distinction between an assumed risk and contributory negligence is of vital importance in cases arising under the Federal Employers' Liability Act. Pryor v. Williams, 254 U.S. 43, 41 S.Ct. 36, 65 L.Ed. 120; 3 Elliott on Railroads (3d Ed.) p. 704, § 1288a. In the case of Choctaw, Okl. & Gulf R. Co. v. McDade, 191 U.S. 64, 24 S.Ct. 24, 25, 48 L.Ed. 96, Mr. Justice Day said, regarding the exemption of the master from liability for injuries received by the servant on the doctrine of the assumption of risk, that: "Where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover." 3 Elliott on Railroads (3d Ed.) p. 700, § 1288.

The assumption of risk rests on the intelligent acquiescence on the part of the employee and knowledge of the danger of the defective apparatus or place where he is required to work, and appreciation of the risk naturally incident to such employment under the particular conditions existing. In the present case, if the plaintiff is barred from recovering damages for the death of her husband on account of his assumption of the risk of his employment, it is immaterial that he may have also been guilty of contributory negligence in riding the car into that precarious situation. Certainly he was not required by the defendant to ride the cars under such circumstances. There is absolutely no evidence to indicate that the railroad company required its checkers to ride the cars in the performance of their duties even to expedite their work. The courts have frequently held under the particular circumstances of the cases that the injured servants of railroads assumed the risk of their employments as a matter of law, and were therefore precluded from recov-

ering damages. Among these cases which were based on impaired clearances are the following: Southern Ry. Co. v. Carr (C.C.A.) 153 F. 106; New York, etc., Ry. Co. v. McDougall (C.C.A.) 15 F.(2d) 283; Carr v. Grand Trunk Ry. Co., 152 Mich. 138, 115 N.W. 1068.

The preceding cases were determined on the doctrine of assumption of risk as a matter of law on account of long terms of service of the employees having apparent knowledge of the open and visible defect of apparatus or danger incident to their employment, such as the overhanging roof of a house, low bridges, permanent structures, fences, or poles adjacent to the railroad tracks, etc. The theory of these cases is that long service of the employee, which necessarily brought them in daily or frequent contact with these visible and apparent dangers, charged them with the knowledge thereof so as to exempt the railroad companies from liability on the doctrine of the assumption of risk. This is the exact situation in the present case. This record contains no evidence to the contrary.

The case of Kreitzer v. Southern Pacific Company, 38 Cal.App. 654, 177 P. 477, upon which the appellant relies, may be readily distinguished from the preceding cases. In the last-cited case the court says, 38 Cal.App. 654, on page 664, 177 P. 477, 481: "Deceased had never before done any work for defendant at night, and this was his first service as watchman. So far as appears, his knowledge of the construction of this bridge and trestle was such only as he may have acquired in riding over it on a hand car to and from his work elsewhere two or three times a week for some months. It is not shown, nor is it claimed by defendant, that he knew anything about the provisions made for men working on the bridge to avoid passing trains, except such knowledge as he had acquired in the two or three nights he had served as watchman before he was killed."

In the present case it is not denied that the deceased had full knowledge of the danger of the protruding ladder.

We are of the opinion the trial court properly held as a matter of law, under the uncontradicted evidence of this case, that the defendant is exempt from liability for the death of Mr. Myers for the reason that he must be deemed to have assumed the risk of attempting to ride the moving car past the dangerous ladder, since he had full knowledge of its existence and the hazard of doing so.

[9, 10] But even though it should be assumed that this question of the assumption of risk was a problem for the exclusive determination of the jury, and not one to be decided by the court as a matter of law, there is another reason why it becomes necessary to affirm the judgment in favor of the defendant which was rendered notwithstanding the verdict of the jury.

The burden rested on the plaintiff to prove that the defendant constructed, maintained, or possessed control over the location of the ladder in question, or it may not be held liable for the danger which it presented. The plaintiff has specifically alleged in her amended complaint that: "The Pacific Fruit Express Company negligently and carelessly constructed and maintained said steel ladder." It is further alleged that the defendant permitted it to remain in that dangerous position. But it is not alleged that the defendant had any control over the location or removal of the ladder. The evidence is undisputed that the icing plant and the ladder were constructed after the side track was built. It does not appear that either the icing plant or the ladder was located on land belonging to the Southern Pacific Company. The negligence which is alleged in constructing and maintaining an ice platform ladder in dangerous proximity to side track No. 2 is specifically charged to a stranger to this litigation, and not to the defendant. The burden was on the plaintiff to affirmatively show that the death of Mr. Myers occurred through the fault of the defendant railroad company. She failed to do so. The uncontradicted evidence not only fails to show that the dangerous ladder was either constructed or maintained by the defendant, but, on the contrary, it is pleaded and conclusively shown that it was placed there by a stranger to this litigation, and that the defendant had no authority or control over its maintenance or removal.

The judgment is affirmed.

We concur: PULLEN, P. J.; STEEL, Justice pro tem.

BAY CITIES TRANSP. CO. et al. v. JOHNSON, State Treasurer.*

Civ. 10171.

District Court of Appeal, First District, Division 2, California.

June 4, 1936.

Hearing Granted by Supreme Court Aug. 3, 1936.

1. Statutes ⇐245

If there is ambiguity in taxing statute, interpretation most favorable to taxpayer must be chosen.

2. Statutes ⇐228

Where conditions or exceptions are specified in statute, judicial interpretation cannot add other or new conditions or exceptions.

3. Taxation ⇐371

California corporations, 95 per cent. of whose stock was owned by common parent corporation, *held* entitled to file consolidated return, notwithstanding that such parent corporation was foreign corporation not licensed in California or taxable therein (St. 1931, p. 63, § 14).

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Bay Cities Transportation Company and another against Charles G. Johnson, Treasurer of the State of California. From the judgment, the defendant appeals.

Affirmed.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for appellant.

Louis Ferrari and I. A. Cereghino, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The two corporation plaintiffs each sued as a member of a separate group of California corporations to recover corporation franchise taxes claimed to have been illegally levied and collected. Each cause of action presents the identical question whether a consolidated return may be filed by a group of California corporations 95 per cent. of the stock of which is owned by a common parent corporation foreign to California, not licensed in this state, and not taxable herein.

The controversy involves an interpretation of section 14 of the Bank and Corporation Franchise Tax Act (Stats. 1929, pp. 19, 26, as amended in Stats. 1931, p. 63). The material portions of this section read: "An affiliated group of banks or an affiliated group or corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for any taxable year in lieu of separate returns * * * as used in this section an affiliated group means two or more banks or two or more corporations connected through stock ownership, in the case of a bank, with a common parent bank or in the case of a corporation with a common parent corporation, if at least ninety-five per centum of the stock of each of the banks or corporations, except the common parent bank or corporation, is owned directly by one or more of the other banks or corporations, as the case may be, and the common parent bank or corporation owns directly at least ninety-five per centum of the stock of at least one of the other banks or corporations, as the case may be; or if at least ninety-five per centum of the stock of each of the banks in the banking group, or of each of the corporations in the corporate group is owned by the same interests or by the same stockholders."

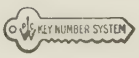
Each of the plaintiff corporations filed a consolidated return under the privilege of this section, each showing that 95 per cent. of the stock of the members of each group was owned by a parent corporation which, however, was not a California corporation and was not taxable in this state. By this means the losses of some of the members of the consolidated group materially offset the profits of others resulting in a substantial reduction in the total tax claimed to be due. The trial court gave judgment for each plaintiff on the pleadings.

[1-3] There seems to be little ambiguity in the language of the section. The privilege is given to any affiliated group of corporations having a common parent corporation under certain conditions. Two settled rules govern the interpretation of the section: First, if there be any ambiguity in a taxing statute the interpretation most favorable to the taxpayer must be chosen. Whitmore v. Brown, 207 Cal. 473, 279 P. 447. Second, where conditions or exceptions are specified in a statute, judicial interpretation cannot add other or new

ones. Here, if the Legislature had intended to limit the privileges of the section to corporations whose parent was a California corporation taxable under the laws of this state, it would have been a simple matter to have included that condition in the statute. We find nothing there which would justify an interpretation which would limit the privilege to California corporations. In a case presenting a point very similar to this, the United States Circuit Court, in Corner Broadway-Maiden Lane v. Commissioner (C.C.A.) 76 F.(2d) 106, held the same way.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



14 Cal.App.2d 450

GUMMERSON v. GUMMERSON.

Civ. 10867.

District Court of Appeal, Second District, Division 2, California.

June 5, 1936.

Hearing Denied by Supreme Court Aug. 3, 1936.

1. Husband and wife ⇐278(5)

Mutual promises of husband and wife in property settlement agreement that husband would pay designated amount per month which would be accepted by wife as full and complete settlement of all property rights or claims against husband and husband and wife relinquished all claims with respect to property of other *held* sufficient consideration to support property settlement agreement.

2. Husband and wife ⇐278(2)

Property settlement agreement whereunder husband agreed to pay designated amount to wife monthly for support of wife and minor daughter *held* not invalid as against public policy, in absence of showing that agreement was made in consideration of promise to secure divorce.

3. Appeal and error ⇐1010(1)

In wife's action on property settlement agreement, trial court's fact finding that agreement was not made in consideration of promise to secure divorce, based on substantial evidence, *held* binding on reviewing court.

4. Husband and wife ⇐278(2)

Husband and wife while married and living apart could enter into valid property settlement agreement which would be enforced by court whether or not divorce action were pending, provided agreement was properly made and not against public policy.

5. Husband and wife ⇐280

Fact that court in divorce action ordered monthly payments provided in property settlement agreement between husband and wife *held* not to deprive wife of right to enforce compliance with terms of agreement in separate action if necessary.

6. Husband and wife ⇐280

Fact that court in divorce action made order reducing amount of payments which had been ordered in compliance with property settlement agreement *held* not to impair right of wife to insist on compliance with agreement in separate action.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Olga M. Gummerson against Charles W. Gummerson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Jennings & Belcher and C. P. Von Herzen, all of Los Angeles, for appellant.

Ellis & MacLaren, Kimpton Ellis, and Towson T. MacLaren, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover from defendant a sum due in accordance with the terms of a property settlement agreement made between the parties on April 1, 1924, at which time they were husband and wife, but not living together. Defendant prosecutes this appeal from a judgment in plaintiff's favor.

The following provisions among others appear in the property settlement agreement: "Whereas, the parties hereto desire to agree upon and forever settle their respective property rights to make and effect a full and complete settlement of their rights and obligations toward each other and all rights that may after accrue by reason of said marriage * * * that the party of the second part shall pay to the party of the first part for her support and the support of said minor child the sum of

$100.00 per month, payable $50.00 on the 1st and 15th of each and every month, beginning April 1st, 1924. Said payments to continue until said minor child will have attained the age of 18 years or completed her education and the party of the second part expressly agrees to continue such payments of $100.00 per month until the said minor child's High School and College education is completed provided said child is not married before her education is completed * * * The party of the first part hereby agrees to accept the payment as hereinabove specified as a full and complete settlement of all property rights or claims against the party of the second part * * * that each of the parties hereto does forever relinquish all claims, as to community property or otherwise to the property in possession of or under the control of the other or to the accumulation of said property and each of the parties hereto does forever relinquish and release any and all earnings and accumulations of the other."

Plaintiff secured a decree of divorce from defendant on August 4, 1924, by the terms of which plaintiff was awarded the custody of the minor child of the parties. The decree provided that defendant should pay to plaintiff "the sum of $100 per month for the support of herself and said minor child * * * all in accordance with an agreement between plaintiff and defendant on file herein." On April 13, 1932, upon application of the defendant, the court in the divorce action modified the divorce decree by reducing the amount of the payments for the support of the minor child to $50 per month until the child should become 21 years of age, or self-supporting, or until further order of the court, and relieving the defendant of the duty of making further payments for the support of the plaintiff herself. Thereafter defendant paid the plaintiff the sum of $50 per month until April 30, 1934, after which date, except for a payment of $25, defendant refused to make further payments either for the support of plaintiff or for the support of the child. It was stipulated that the child's education was completed on January 31, 1935. The payments for which judgment was rendered were for the period ending January 31, 1935.

[1-3] Defendant contends that there was no consideration for the agreement on the part of the husband; that the agreement was void as against public policy; and that it was merged in the judgment of the divorce court by which it is claimed defendant was relieved from making payments in compliance with the terms of the agreement. None of these contentions should be sustained. The mutual promises afforded sufficient consideration for the agreement. Nothing appears in the contract to indicate that the agreement was made in consideration of a promise to secure a divorce. Although there was testimony to that effect by the defendant, the testimony of the plaintiff was to the contrary. There is a conflict in the testimony and the finding of the trial court, based as it is upon substantial evidence, is binding upon the court.

[4-6] It cannot be disputed that the plaintiff and defendant while married and living apart could enter into a valid property settlement agreement and that such an agreement will be enforced by the court whether a divorce action be pending or not, provided it is properly made and is not against public policy. The fact that the court in the divorce action decided at the first hearing to order the monthly payments provided in the agreement did not deprive the plaintiff of her right to enforce compliance with its terms in a separate action, if necessary. Neither did the fact that the court in the divorce action later made an order reducing the amount of the payments in any way impair the right of plaintiff to insist upon compliance with the agreement. In Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826, 828, the court had before it a case in which the facts were quite similar to those of the present case. The court said: "In the exercise of its power as a court of equity it declined to follow the two clauses thereof relating to the matter of fixing the amount of plaintiff's maintenance. It is apparent, however, that this latter action on the part of the court in no way affected its express general finding that otherwise said agreement was valid; and, being valid, its executory terms were not abrogated or rendered ineffectual by plaintiff's subsequent application for a divorce, and she was therefore entitled to enforce the same in the present action." In Griffith v. Superior Court, 1 Cal.(2d) 381, 35 P.(2d) 317, 318, a case in which the court in a divorce action relieved the husband from making payments which had been ordered in the original decree in the same sum as provided in the agreement of the parties, but until the further order of the court, the Supreme Court said: "It therefore follows that the court, in accordance with its statutory power, could modify the order for the payment of alimony by ordering the reduction or cessation of pay-

ments provided thereunder, and that the exercise of the power in this case was within its jurisdiction. The court could not, of course, and did not, attempt to change the terms of the agreement previously entered into and approved by the court in the divorce proceeding, and the terms of that agreement are still binding between the parties, and may be the subject of a civil action for its enforcement."

The judgment is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



14 Cal.App.2d 435

SHAHABIAN et al. v. NAJARIAN et al.

Civ. 1905.

District Court of Appeal, Fourth District, California.

June 3, 1936.

Hearing Denied by Supreme Court July 31, 1936.

1. Appeal and error ⇐193(9)

Although technical objections to pleading were deemed waived where there was no demurrer to amended complaint, objection that complaint did not state cause of action was not waived and could be raised for first time on appeal (Code Civ.Proc. § 434).

2. Money received ⇐1

Action for money had and received will lie where it appears that defendant has received money which in equity and good conscience he should pay to the plaintiff.

3. Money received ⇐17(1)

Complaint alleging that money belonging to plaintiffs was collected by defendants and not paid over to plaintiffs *held* to state cause of action for money had and received as against general demurrer, notwithstanding complaint did not expressly allege that money was had or received by defendants to or for the use of plaintiffs.

4. Parties ⇐92(4)

Objections to misjoinder of parties defendant which were not taken by demurrer or answer were waived.

5. Parties ⇐90

Only those defendants who are shown by evidence to be liable may be held, regardless of whether question of misjoinder is raised.

6. Appeal and error ⇐1042(3)

Where amended complaint was served on defendant 19 months after it had been served on his codefendants, denial of motion to strike amended complaint from files *held* not prejudicial, where defendant stipulated that second amended complaint might be filed and case was tried against defendant on issues raised by such pleading and defendant's answer thereto.

7. Appeal and error ⇐930(1)

All reasonable inferences are to be made in favor of verdict.

8. Appeal and error ⇐930(4)

In action based upon attorney's retention of excessive fees for services performed for incompetent client, in absence of request by attorney for special finding on issue of incompetency, presumption was that jury by its general verdict for plaintiffs found for plaintiffs on each issue and that there was sufficient evidence to support such verdict.

9. Payment ⇐89(5)

Evidence *held* sufficient to sustain judgment for client on ground attorney exacted fees from incompetent client out of proportion to professional services rendered to client.

10. Compromise and settlement ⇐23(1)

In action based upon attorney's retention of excessive fees for services performed for incompetent client, attorney had burden of proving alleged compromise agreement whereby reduction in fees was made and of proving that client had full knowledge of points in dispute at time of compromise agreement.

11. Appeal and error ⇐999(1)

Reviewing court cannot substitute its judgment for that already declared by jury.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Lucy Shahabian, also known as Lucy K. Premier, an incompetent person, by Mesrob Shahabian, her guardian ad litem, and another, against Thomas Na-

jarian and others. From an adverse judgment, the defendant M. G. Ferrahian appeals.

Affirmed.

N. B. Nelson and M. G. Ferrahian, in pro. per., both of Los Angeles, for appellant.

Bartlett, Marion & Lillie and Henry Davidian, all of Los Angeles, for respondents.

MUNDO, Justice pro tem.

Plaintiffs' second amended complaint alleges that the plaintiff is, and at all times mentioned in the complaint was, an incompetent person; that on or about March 27, 1920, plaintiff entered into a partnership with George Carpenter for the purpose of operating a retail drug business; that she contributed as her share of the capital the sum of $1,400 cash and her interest in a business formerly conducted by her then lately deceased husband and the said Carpenter; that in 1924 the business was sold, and with the proceeds thereof they purchased certain real property upon which they erected a theater building with stores and offices; that the title to said property was taken in the name of the said Carpenter; that on March 2, 1927, Carpenter died leaving a will devising his entire estate to plaintiff and naming her as executrix; that she procured the services of the defendant, M. G. Ferrahian, a practicing attorney at law, for the purpose of representing her in the probate proceedings; that the reasonable value of all the services performed by the said M. G. Ferrahian did not exceed the sum of $500; that she reposed explicit faith and trust in appellant to such a degree as to be entirely dominated and influenced by appellant; that by reason of her faith and trust in him she placed him in possession and control of her properties; that upon her information and belief, during the years 1928 and 1929, the said defendant came into possession of $6,950 belonging to plaintiff no part of which has ever been paid to plaintiff; that plaintiff discovered this fact within two years prior to the commencement of this action. Mesrob Shahabian, husband of the plaintiff, Lucy Shahabian, is joined as party plaintiff. He also acted as guardian ad litem of the plaintiff Lucy Shahabian for the purposes of this action.

The defendant Ferrahian answered denying the incompetency of plaintiff and denying he had dominated or influenced plaintiff or that he had been given possession of her property. He alleges that a bank had been appointed to act as administrator and it and not he took possession and control of plaintiff's property. He further alleges that during the partnership of plaintiff and Carpenter he acted as attorney for the firm; that when Carpenter died appellant had a claim of $750 against the firm for services rendered, which plaintiff agreed to pay; that after he had filed the Carpenter will for probate a contest was filed by the defendants, Thomas Najarian and Yeranig Najarian; that this contest and other matters incident to the probate proceedings required considerable work on his part; that for this and all his services and claims plaintiff gave him a promissory note in the amount of $6,000; that afterwards he agreed to discount said note and took from plaintiff the sum of $4,500 in full settlement, and returned the note to plaintiff.

As separate defenses the defendant Ferrahian alleges that plaintiff's alleged cause of action is barred by the statute of limitations, and that plaintiff's claim had been satisfied by virtue of a settlement had between her and other defendants.

[1] Originally the complaint, filed November 24, 1930, was upon five separate causes of action; the defendant Ferrahian, and Thomas Najarian and his wife, Yeranig Najarian, being joined as defendants. The defendant Ferrahian, appearing for himself alone, demurred to the complaint, which demurrer was overruled and he filed his answer. The other defendants also filed a demurrer which was sustained with leave to amend. The complaint was duly amended and served on the defendants Najarian. They answered and the case was set for trial. Upon the trial the defendant Ferrahian moved that no testimony be introduced against him on the ground that he had not been served with a copy of the amended complaint, which motion was granted. The trial proceeded as to the other defendants, and before a termination thereof, a settlement was effected and dismissal with prejudice entered as against the defendants Najarian, leaving the defendant Ferrahian as the only defendant. On August 24, 1932, the first amended complaint was served on Ferrahian, who made a motion to strike same from the files on the ground that it had not been served on him within the time required by the or-

der of the court. This motion was denied and Ferrahian answered. Thereafter with consent of Ferrahian plaintiff filed a second amended complaint which was duly served upon Ferrahian. Issue having been joined thereon, the matter went to trial before the court sitting with a jury, and a verdict and judgment was had for the plaintiff in the sum of $3,000.

Upon this appeal by the defendant Ferrahian, it is contended first that the complaint does not state a cause of action. He argues that the court erred in overruling his demurrer. It must be remembered at the outset that no demurrer was interposed to the second amended complaint, consequently all technical objections thereto are deemed waived. This, of course, does not mean that the objection that the second amended complaint does not state facts sufficient to constitute a cause of action is waived. Such an objection is not waived by a failure to raise it by demurrer or answer, but may be made at any stage of the controversy. It may be raised for the first time at the trial or upon appeal. Code Civ.Proc. § 434; 21 Cal.Jur. 267.

[2, 3] Appellant refers to paragraph IX of the second amended complaint and argues that it imports a cause of action for money had and received. That paragraph recites: "That the plaintiffs are informed and believe and therefore allege that during the years 1928 and 1929 the defendants and each of them, came into possession and exercised control of moneys belonging to the said plaintiff, Lucy Shahabian, in the sum of Sixty Nine Hundred Fifty Dollars, ($6950.00) no part of which has been paid to the plaintiffs or either of them." Appellant says that this paragraph is not sufficient as a basis of an action for money had and received, in that it does not allege that the money was received for the use or benefit of the plaintiffs. Although the paragraph does not expressly allege that the money was had or received by the defendants to or for the use of plaintiffs, and therefore departs from the approved and usual form for this form of pleading, it nevertheless alleges that the money belongs to the plaintiffs and was collected by the defendants, and was not paid over to the plaintiffs. Having collected money belonging to the plaintiffs, equity and good conscience required that the defendants should pay it over to the parties entitled thereto. "The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he shall pay to the plaintiff." Fox v. Monahan, 8 Cal.App. 707, 97 P. 765. As a count for money had and received we should say that it is not in a form that is to be commended; but we think that in the face of an attack by general demurrer only—and that is what the objection amounts to—it sufficiently appeared that the money sued for had been received for the use of the plaintiffs.

However, we shall pass this point and consider the contention of the respondents. They contend that their complaint is not upon money had and received, but is upon the theory that the relation of attorney and client existed between the appellant and the respondent, Lucy Shahabian; that during the course of this relationship the appellant obtained an unfair advantage over his client; that by reason thereof respondent suffered injury and is entitled to recover damages therefor. "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Code Civ.Proc. § 452. The second amended complaint construed in this manner does, we believe, state all the facts necessary to support a cause of action conforming to respondents' theory of the case. No doubt had appellant raised by special demurrer the objections now made, respondents would have been required to overcome them, but, as it is, the complaint is sufficient against the general objection raised. Appellant's answer indicates that he was not misled by the theory of the action; he accepted the issue as involving a question of damages rather than money had and received.

[4, 5] Appellant next complains that he was joined with other defendants who were not attorneys at law; that there is a misjoinder of parties defendant. All objections to the misjoinder of parties defendant must be taken by demurrer or answer, and if not so taken they are waived. Heinlen v. Heilbron, 71 Cal. 557, 12 P. 673. Appellant, by not interposing a demurrer to the second amended complaint or raising the objection in his answer, waived his right to complain on that score. Moreover, it is fundamental that only those defendants who are shown by the evidence to be liable may be held, regard-

less of whether the question of misjoinder is raised. The original complaint contained five different causes of action against all three defendants. When the complaint was amended it withdrew therefrom four causes of action, leaving the one cause of action against appellant and to which all proof was directed. Thus the technical misjoinder of parties defendant in nowise affected the substantial rights of appellant.

[6] On January 20, 1931, plaintiffs amended their complaint, served the same upon the other two codefendants, but failed to serve appellant. When the case was called for trial, appellant successfully moved the court to preclude the taking of evidence against him on the ground that he had not been served with a copy of the amended complaint. The case against the other defendants went to trial. Some nineteen months later the amended complaint was served on appellant and he promptly moved to strike same from the files. The motion was denied. This ruling, appellant contends, was erroneous. Whether erroneous or not, we fail to see how the ruling could be prejudicial since appellant stipulated that a second amended complaint might be filed. The case against appellant was tried on the issues raised by this pleading and his answer thereto. The sufficiency of the superseded pleadings and the correctness of the rulings thereon cannot now be considered in view of appellant's stipulation.

[7, 8] When respondents rested their case appellant made a motion for nonsuit upon two grounds: (1) "That plaintiff has utterly failed to prove any facts whatever within the issues presented by her complaint." (2) "That the cause of action is barred by the statute of limitations." This motion, also, was denied by the court, which ruling appellant claims was error. A reading of the record clearly shows that appellant had received as his fees an amount which the triers of the facts might reasonably determine to be the result of an advantage unfairly taken over the respondent Lucy Shahabian, who without question was illiterate and unversed in business affairs. The strong inference at the conclusion of the plaintiff's case was that the appellant had wrongfully exacted and retained money belonging to his client. The action even under the theory of money had and received was not barred by the statute of limitations, for it was not until about ten days before their marriage that the facts giving rise to the cause of action were discovered by respondents. They were married November 2, 1928, and the action was commenced November 24, 1930. The testimony shows that Lucy Shahabian did not have the slightest comprehension of what the transactions were, and the jury with opportunity to observe her on the stand could well form an opinion as to her competency. All reasonable inferences are to be made in favor of the verdict, and in the absence of a request by the appellant for a special finding on the issue of incompetency it must be presumed that the jury by its general verdict found for the plaintiffs on every issue and that there is sufficient evidence to support that verdict. The evidence on the part of the plaintiff was ample to convince the jury that appellant had retained more money than he was entitled to for his fees; and upon this showing made the burden then shifted to appellant of going ahead with the evidence to show clearly that the transaction was fair and reasonable and that no advantage was taken by him. Certainly the obtaining of this large fee is an advantage and appellant cannot safely rest without affirmative proof of the facts surrounding the transaction, proof sufficient to overcome the presumption that the transaction was without sufficient consideration and under undue influence. The jury might reasonably have believed from the evidence that appellant had not clearly shown his right to retain this amount of money. Treat v. Treat, 170 Cal. 329, 150 P. 53, 57; Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265.

In Thornley v. Jones, 96 Cal.App. 219, 274 P. 93, 96, it was shown that the deceased was over 80 years old, of a trusting and confiding disposition, and had very little business experience; that she gave defendant attorney stock worth $2,500 for services rendered; that no agreement as to compensation had been made; that for three years the deceased made frequent calls on defendant, mostly social or relating to collection of a $900 note of an execution proof debtor; that the reasonable value of defendant's services in prosecuting a certain action was $150 and in drawing some wills was not to exceed $75; and that he collected $100 and held possession of certain securities which he caused to be transferred from the possession of another attorney. It was held under these facts that the mere proof of negative conduct on the part of defendant and the absence of any false or fraudulent representations were not sufficient to

overcome the presumption of fraud and unfair dealing which was automatically raised by the law. The court said: " 'An attorney may make an enforceable contract with one about to become his client for the payment of compensation for services to be rendered, and such a contract is not subject to the particular scrutiny of the court.' 6 C.J. 735; 3 Cal.Jur. 626; Cooley v. Miller & Lux, 156 Cal. 510, 524, 105 P. 981. 'A contract between an attorney and client for the former's compensation, entered into during the existence of the relation, is not void, although presumptively invalid, the burden of showing fairness resting on the attorney.' 6 C.J. 735; Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 630, 66 P. 21. 'All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid on the ground of constructive fraud and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length.' Estate of Witt, 198 Cal. 407, 419, 245 P. 197, 202; Magee v. Brenneman, 188 Cal. 562, 567, 206 P. 37."

[9] The court in the Thornley Case said further: "There are cases, of course, where the knowledge and experience of the client are such as to overcome the presumption referred to; but the facts of this case are such as to require the strict application of the foregoing rule." This language, we believe, aptly applies to the present case. There cannot be the slightest doubt from the evidence that Lucy Shahabian was inexperienced, nor can it be held that she was "fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length." The evidence clearly shows that she was an illiterate and incompetent woman, unable to read or write English or write Armenian, her native language. She was unable to speak either English or Armenian, except with difficulty. Appellant did not inform her that the compensation she was tendering him was several times the amount his professional services were worth and several times the amount usually charged for similar services. The evidence was sufficient to entitle the jury to believe that the amount received by appellant was out of all proportion to the professional services rendered by him.

[10, 11] Appellant contends that after the execution of the note for $6,000 there was a compromise effected between him and the respondent whereby a reduction of $1,500 was made, bringing the fees down to $4,500. The burden of proving this compromise agreement was upon appellant, and it was incumbent upon him as an attorney dealing with his client to show by clear and satisfactory evidence that it was entered into by his client with full knowledge of the points in dispute. Upon this point, as upon others, there is considerable conflict in the evidence, and since the instructions have not been legally attacked it must be presumed that the jury was properly instructed as to the law applicable and that they weighed the evidence in accordance with such instructions. This court cannot substitute its judgment for that already declared by the jury. McNutt v. Pabst, 25 Cal.App. 177, 143 P. 77.

The release referred to by appellant covered another and separate matter and concerned the defendants Najarian only; this release and the dismissal of the action against the Najarians did not affect the cause of action set forth in the second amended complaint. The case against appellant is based and was tried upon the theory that appellant had exacted attorney fees which were excessive. We are of the opinion that the case was fully and fairly tried and that the verdict for $3,000 in favor of the plaintiff was justified under the pleadings and proof.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

14 Cal.App.2d 448

PUBLISHERS DISTRIBUTING SERVICE, Inc., v. SOUTHERN CALIFORNIA SCHOOL BOOK DEPOSITORY, Limited.

Civ. 10893.

District Court of Appeal, Second District, Division 2, California.

June 5, 1936.

1. Stipulations ⇐14(1)

Finding that commissions had been paid in full *held* not in conflict with stipulation that certain amount had been paid for commissions and that certain amount was unpaid.

2. Appeal and error ⇐931(4)

Blanket finding that defendant made no fraudulent representations *held* sufficient to support judgment denying plaintiff relief asked on ground of fraudulent representations; it being a necessary inference from finding that court found adversely to plaintiff as to each of allegations of fraud.

3. Appeal and error ⇐931(1)

Findings should be interpreted to uphold judgment if reasonable construction thereof permits such interpretation.

4. Appeal and error ⇐931(3)

Where omitted finding must be inferred from consideration of ultimate fact found, reviewing court will recognize necessary inference and consider omitted finding as having been made.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by the Publishers Distributing Service, Inc., against the Southern California School Book Depository, Limited, wherein defendant filed a cross-complaint. From that portion of the judgment denying plaintiff any relief, plaintiff appeals.

Affirmed.

Hansen & Sweeney and Francis W. Read, all of Los Angeles, for appellant.

Lin Price, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff sued in two counts for the recovery of commissions under a sales agency agreement and for damages for fraudulent representations alleged to have been made by defendant to induce plaintiff to enter into said agreement. Defendant countered with a claim for damages for alleged breach of the same contract. The trial court, sitting without a jury, denied plaintiff any relief and likewise gave defendant nothing upon its cross-complaint. Plaintiff now appeals from that portion of the judgment determining that it was entitled to recover nothing.

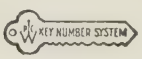
[1] As to the count for the recovery of commissions, appellant asserts that the court's finding that appellant had been "paid in full" is directly contrary to and in conflict with a stipulation entered into by counsel for both sides in open court, by which stipulation, appellant contends, it was conceded that respondent was indebted to it in the sum of $537.34. Examination of the record does not uphold this contention. While respondent's counsel in the course of the lengthy colloquy regarding the form and extent of the stipulation agreed that the amount in question had not been paid to appellant, he added: "This is not a stipulation that the amount is due." The stipulation cannot be construed to be anything more than an admission that a certain amount had been paid appellant for commissions, and that a certain amount was unpaid. It is in harmony with respondent's answer and contention in the case that no further sum of money was due "under the terms and conditions of said agreement," and also in harmony with the court's finding that nothing further was due appellant.

[2-4] As to the second cause of action, concerning alleged fraudulent representations, appellant complains that the findings do not answer the questions raised by the pleadings and that they are not so drawn as to demonstrate the truth or falsity of every material issue. It is true that the allegations of fraudulent representations are disposed of by one blanket finding to the effect that "defendant made no fraudulent representations or inducements to procure said agency contract," without particularizing as to each alleged item of fraud. The court's general finding that no fraudulent representations or inducements were made to procure the agency contract would of itself be sufficient to support the judgment denying appellant any relief. It is not claimed that there is no substantial evidence to support this finding. Findings should be interpreted to uphold the judgment if that may be done by a reasonable construction (Chow v. City of Santa Bar-

bara, 217 Cal. 673, 22 P.(2d) 5), and where a finding on a particular point, though omitted, must be inferred from a consideration of the ultimate fact found, "the appellate court will recognize the necessary inference and consider the finding in question as having in effect been made" (Reiniger v. Hassell, 216 Cal. 209, 13 P.(2d) 737, 738). Following this rule in the case before us, we have the court's ultimate finding of fact that no fraudulent representations were made, and we may properly consider by necessary inference that the court to reach that ultimate fact found adversely to appellant as to each and every of its allegations of fraud and misrepresentation.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 403

PEOPLE v. FATOR.

Cr. 2866.

District Court of Appeal, Second District, Division 2, California.

June 2, 1936.

1. **Automobiles** ⊂=357

Refusal to instruct jury, in trial for violating Vehicle Code by backing automobile into complaining witness while driving under influence of intoxicating liquor, that such witness' contributory negligence constituted valid defense, *held* not error (St.1935, p. 174, § 501).

2. **Criminal law** ⊂=35

Contributory negligence is never defense to charge of, nor excuse for, crime, and cannot in any degree purge act otherwise constituting public offense of its criminal character.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Harold Fator was convicted of violating the Vehicle Code, and he appeals.

Affirmed.

Waldo & Waldo, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., by Warner I. Praul, Deputy Atty. Gen., for the People.

McCOMB, Justice pro tem.

Appellant was convicted after trial before a jury of having violated section 501 of the Vehicle Code (Stats.1935, p. 174). This appeal is from (1) the judgment and (2) the order denying his motion for a new trial.

Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal. App. 657, 659, 266 P. 558), the facts in the instant case are:

Shortly after midnight, December 22, 1935, Mr. Kiernan, the complaining witness, while walking in an easterly direction in the intersection of Sixth and Main streets in the city of Los Angeles, was injured by appellant's car precipitately backing into him. Appellant was driving the car and at the time was under the influence of an intoxicating liquor.

Appellant relies for reversal of the judgment on the following propositions:

First. The evidence is insufficient to sustain the verdict and judgment.

Second. The trial court erred in refusing to instruct the jury that contributory negligence on the part of the complaining witness constituted a valid defense.

As to appellant's first contention, we have examined the record and are of the opinion there was sufficient evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdict of guilty was predicated.

[1, 2] Appellant's second contention is untenable. The law is well settled that contributory negligence is never a defense nor an excuse for crime, nor can it in any degree serve to purge an act otherwise constituting a public offense of its criminal character. People v. McKee, 80 Cal.App. 200, 205, 251 P. 675; People v. Leutholtz, 102 Cal.App. 493, 498, 283 P. 292.

The judgment and order are, and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

14 Cal.App.2d 431

CITY LUMBER CO. et al. v. PARK et al.

Civ. 1909.

District Court of Appeal, Fourth District, California.

June 3, 1936.

1. Mortgages ⇐245

Bank, without knowledge of lack of consideration for note and trust deed, assigned to it as security for balance due on purchase price of lot in lieu of mortgagor's prior note and trust deed, took assigned instruments free from such defense and became holder thereof in due course for value to extent of claim secured.

2. Mortgages ⇐151(3)

Bank's lien on lot as holder in due course for value of note and trust deed, assigned to bank as security for balance due in lieu of prior note and trust deed to bank, dated from recording of assigned trust deed, and hence was prior to mechanic's liens acquired after such recording but before assignment.

3. Liens ⇐22

Corporations, furnishing labor and material for erection of building on lot subject to trust deed, assigned, with note secured thereby, to bank as security for balance due on purchase price of lot in lieu of purchaser's prior note and trust deed to bank, *held* not entitled to equitable lien for full amount of assigned note, where no right to such lien was pleaded by them in their action to establish priority of their mechanic's lien over assigned trust deed, which complaint and court's findings showed was without consideration.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by the City Lumber Company and others against William F. Park, the Citizens National Trust & Savings Bank, and others. From a judgment for defendant bank, plaintiffs appeal.

Affirmed.

Robert E. Abbott and John F. Poole, both of Los Angeles, for appellants.

W. L. Pollard and H. E. Gleason, both of Los Angeles, for respondents.

BARNARD, Presiding Justice.

In this action the plaintiffs sought to have their mechanic's liens declared prior and superior to the lien of a trust deed held by the defendant bank.

The defendant bank sold a lot to the defendant William F. Park, taking back a deed of trust securing a note for $1,250, the balance of the purchase price. Shortly after that deed of trust was recorded, Park and his wife gave to the defendant McKay a second deed of trust, securing a note for $8,000, which was recorded on January 13, 1931. Some time thereafter the plaintiffs furnished labor and materials in connection with a building being erected on the property, for which they later filed mechanic's liens.

The complaint, filed on October 30, 1931, alleged that materials had theretofore been furnished by the plaintiffs and verified claims of lien filed; that the $1,250 trust deed above referred to had been recorded, but that the same was wholly released and discharged on March 13, 1931; that the $8,000 trust deed above referred to was recorded on January 13, 1931, but that no consideration of any kind had been given therefor; that this $8,000 deed of trust had been recorded for the purpose of cheating and defrauding persons who furnished material and labor in the construction of a building upon the property; and that the claims of the plaintiffs were prior and superior to the purported claims of the defendants. The answer of the defendant bank denied the allegations of the complaint and as a separate defense alleged the execution and delivery to it by Park of a note for $1,250, that for the purpose of securing this note the said McKay had indorsed and transferred to the bank the note for $8,000, together with the trust deed securing the same, and that the note for $1,250 had not been paid in whole or in part.

The court found that the plaintiffs had furnished materials and labor of a certain value and had filed liens therefor; that the trust deed securing the $1,250 note had been recorded, but had been released and discharged on March 13, 1931; that a trust deed for $8,000 had been recorded on January 13, 1931, naming McKay as beneficiary; that this trust deed was given without consideration; that it was not true that this trust deed had been recorded for the purpose of cheating and defrauding persons who had furnished material in the construction of a building on the property; that in March, 1931, the defend-

ant Park executed and delivered to the defendant bank another note for $1,250; that at the time of the execution of said note and for the purpose of securing the payment thereof the defendant McKay indorsed to and deposited with the defendant bank, as collateral security, the $8,000 note and trust deed referred to in the complaint; that the defendant bank took the last-mentioned note and trust deed as an innocent purchaser for value before maturity to the extent of $1,250; that no part of the original debt of $1,250 had been paid; and that the lien of the defendant bank is prior and superior to any interest of the plaintiffs or either of them. Judgment was entered in favor of the defendant bank decreeing that it had a lien upon the premises in question in the sum of $1,250, together with interest and certain amounts expended in the preservation of its security, and that this lien is prior to any right or lien held by the plaintiffs. From this judgment the plaintiffs have appealed upon the judgment roll and a bill of exceptions.

[1, 2] From the evidence it appears that on or about March 13, 1931, at the request of Park and of McKay, the payee named in the $8,000 note, the respondent bank released its trust deed securing the balance due on the purchase price of the lot, and in lieu thereof took as security for its claim an assignment of the $8,000 note and trust deed. The essential question involved is whether the bank, in thus accommodating the other parties, lost its lien as against the appellants who now claim to have acquired mechanic's liens after the $8,000 trust deed was recorded but before the same was assigned to the bank.

The appellants argue that, since the court found that the $8,000 trust deed was given without consideration, the same was "lifeless and dead" at least until it was used as collateral and transferred to the respondent bank in March, and that, since their liens had then attached, the same are prior to the bank's lien. They rely on Western Loan & Bldg. Co. v. Scheib, 218 Cal. 386, 23 P.(2d) 745, as holding that, where there is no debt, there is no mortgage. A different situation is presented where such an evidence of debt, although without consideration between the parties thereto, has passed to an innocent holder for value. In Hayward Lumber & Inv. Co. v. Naslund, 125 Cal.App. 34, 13 P.(2d) 775, 777, this court said: "In this connection appellant argues that 'there cannot be a mortgage if there is no debt or other obligation to be secured'; and that the absence of consideration for the note and trust deed in controversy was an absolute defense against Stapp, the beneficiary and holder of the note and trust deed, at the time appellant's materialman's lien accrued, because at that time the trust deed was 'only a piece of paper; * * * it did not secure a debt because there was no debt between the parties to the note, actually or in contemplation.' Such a contention has merit, no doubt, when applied to the parties to the original instruments and those holding under them with notice. It is without merit, however, when extended to bona fide purchasers for value, before maturity, without notice of any defects. As stated in section 3109 of the Civil Code, 'absence or failure of consideration is matter of defense as against any person not a holder in due course, * * *' Although, in the instant case, the note while in the hands of the payee was subject to impeachment for lack of consideration, still, even from the time of its execution, this instrument was not 'only a piece of paper,' as contended by appellant, but it had a potential validity, which, by reason of the statute, became a real, enforceable instrument immediately upon being negotiated to an innocent purchaser for value, before maturity. Such transfer purged the instrument of any imperfections or defenses available to others than a holder in due course. Jones on Mortgages (7th Ed.) vol. 1, §§ 525, 612, 616; vol. 2, § 827a, p. 324."

It is not contended that the bank had any knowledge of any lack of consideration for the substituted security which it took, and there is nothing in the record to sustain such a contention if made. Under the circumstances shown, the bank took the $8,000 trust deed and note free from the defense suggested and was a holder in due course and for value to the extent of the claim for which it was given as security. Tilden Lumber & Mill Co. v. Bacon Land Co., 116 Cal.App. 689, 3 P. (2d) 350. To that extent and for that purpose its lien dates from January 13, 1931, and is prior to the liens of the appellant.

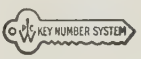
[3] The appellants further claim that they had a right to rely on the fact that there was a fund of $8,000 available for the payment of their bills for material and labor, and that they have an equitable lien

on the full amount, and they cite such cases as Pacific Ready Cut Homes v. Title Ins. & Trust Co., 216 Cal. 447, 14 P.(2d) 510. The line of cases referred to involves actions to subject the unexpended balance of a building loan to an equitable lien in favor of the holder of a mechanic's lien which has become worthless due to the amount of the prior encumbrances. No such right to an equitable lien was here pleaded, and the entire matter of whether or not there is any balance which might be made available is not involved on this appeal. It would appear from the complaint and the findings that the $8,000 note and trust deed were given without consideration, that no unexpended balance is available. In any event, such a theory cannot affect the respondent bank which, being a holder in due course and for value, has a prior lien to the extent of its claim under the $1,250 note.

It may be added that it does not appear from the pleadings, the evidence, or the findings, that the appellant's liens accrued before the $8,000 note and trust deed were assigned and delivered to the respondent bank.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



14 Cal.App.2d 419

KRIZMAN v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 10134.

District Court of Appeal, First District, Division 2, California.

June 3, 1936.

1. Marriage ⊂⊃50(1)

Commission's finding that claimant was not deceased employee's wife *held* unsupported by evidence that parties conducted themselves as husband and wife for almost 11 years, even though claimant, having partaken of liquor during journey to another state to have marriage ceremony performed, was not certain what occurred, but thought that employee's friends produced license and that justice performed ceremony (St.1919, p. 917, § 14; Code Civ. Proc. § 1963, subd. 30).

2. Marriage ⊂⊃32

Marriage in foreign state *held* not invalidated by failure to record marriage certificate.

3. Marriage ⊂⊃40(1)

Every pertinent presumption is against existence of bad faith, as on question whether claimant was wife of deceased employee or member of his household in good faith within Compensation Act (St.1919, p. 917, § 14; Code Civ.Proc. § 1963).

Application by Catherine G. Krizman for a writ of review directed to the Industrial Accident Commission, which found adversely to petitioner's claim under the Workmen's Compensation Act for the death of her alleged husband.

Award annulled and proceeding remanded.

Breed, Burpee & Robinson, of Oakland, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

STURTEVANT, Justice.

Claiming to be the surviving widow of Vincent Krizmanich, commonly called Krizman, on his death petitioner filed with the respondent board a petition to have her claim adjusted. The board made findings against her and ordered that she take nothing. The petitioner applied for a rehearing. The application was denied, and she has applied to this court for a writ of review.

The application presents only one question. Was the petitioner the wife of the deceased within the meaning of section 14 of the Workmen's Compensation Act (St. 1917, p. 844, as amended by St.1919, p. 917)?

[1, 2] The petitioner's maiden name was Catherine Gwendolyn Helms. She married J. D. Collin, from whom she was divorced June 7, 1919. Vincent Krizmanich, commonly known as and called Vincent Krizman, while employed by the Anker Meat Company, met his death July 3, 1935. At that time he and the petitioner were living as man and wife at 291 Lester avenue in Oakland. Since October or November, 1924, they had been so conducting them-

selves, but had occupied apartments at different addresses during that time. Each claimed to be the legal spouse of the other and so introduced each other, opened joint bank accounts, and purchased and conveyed real estate. Mr. Krizman so took out life insurance and carried the policy until the date of his death. Likewise he so applied for membership in Emeryville Post of Veterans of Foreign Wars of the United States, was admitted, and maintained his membership until his death. Prior to the date above mentioned, the petitioner was employed as a telephone operator and Mr. Krizman was employed as a butcher. After the union above mentioned, both continued to work. After a while, the petitioner gave up her employment, and for three years prior to the death of Mr. Krizman she was unemployed. Mr. and Mrs. Helms, the father and mother of the petitioner, own their home, but otherwise are without means. At all times after the said union Mr. Krizman contributed, as son-in-law, in food and funds from $15 to $20 a month toward their support.

The petitioner met Mr. Krizman about July 1, 1924. Soon afterwards they became engaged and announced the fact generally and in particular to the parents of the petitioner, to Mrs. Ohe, her landlady, and to Mr. and Mrs. Loveland, petitioner's intimate friends. In November they arranged to get married. Mr. Krizman wanted to have a party. Knowing some comrades who were in the liquor business in Reno, he arranged that the petitioner and he should go by train to Reno, get married, and have their party. They commenced the festivities in Oakland by playing cards with Mr. and Mrs. Ohe, having several drinks, and then the latter drove them to the midnight train and bid them Godspeed. On the train the couple had more drinks. On arriving in Reno at about 4:30 p. m. they went to join Mr. Krizman's friends, who had been advised of their expected arrival. In about two hours the couple went out to get married. Their friends accompanied them. The petitioner was not clear where they went, nor what they did, but she thought Mr. Krizman's friends produced the license, and that they were married by a justice of the peace—but she was not certain. She saw a paper produced which she believed to be a license, but she did not read it. On leaving that office petitioner testified she did not remember more until they awoke the next morning in a room in an hotel in Reno. That same day they took a train and returned to Oakland. In the course of a few days a large envelope came to Mr. Krizman. He opened it and said it was their marriage certificate. On arriving in Oakland, they at once took a room in the house of Mrs. Ohe and continued to live together as man and wife until Mr. Krizman died. The legality of their marriage was never questioned by either of them nor by any one else except the respondent board. As soon as they returned to Oakland, each immediately advised his or her relatives and friends of the marriage at Reno. When the hearing in this proceeding was held, it transpired that in the recorder's office of Washoe county, the county in which Reno is located, there is no record of the marriage of Vincent Krizman and Catherine G. Collin. No evidence was offered that there was no record of the marriage of Vincent Krizman*ich* and Catherine G. Collin. No evidence was offered that a marriage license was not issued to Vincent Krizmanich and Catherine G. Collin or that they were not married. The record contains no single conflict in the evidence on any fact hereinabove set forth.

Among others, the respondent board made the following finding: "2. Catherine G. Krizman was *not* legally married to the employee at the time of the injury, and was *neither* his wife *nor* a member of his household in good faith within the meaning of the Workmen's Compensation Act at the time of said injury. The commission further finds that at the time of the alleged marriage that Catherine G. Krizman was fully familiar with the requisites of a valid marriage, and that she either had knowledge or is chargeable with knowledge that *no* valid ceremony was performed." The negative words therein contained are not supported by a scintilla of evidence. It is presumed "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." Code Civ.Proc. § 1963, subd. 30. All of the evidence introduced was to the same effect. The fact that the marriage certificate was not recorded, if it be a fact, did not invalidate the marriage. Nor was such fact a controlling factor in the case. The case clearly falls within the doctrine stated in such cases as Temescal Rock Co. v. Industrial Acc. Comm., 180 Cal. 637, 182 P. 447, 13 A.L.R. 683, and Louden v. Industrial Acc. Comm., 105 Cal. App. 65, 286 P. 1045.

[3] Something is said about "good faith." We are unable to ascertain why.

Every incident above recited goes to show "good faith" and to disprove "bad faith." He who would assert "bad faith" should be able to point to some evidence proving or tending to prove "bad faith." Every pertinent presumption is against it. Code Civ. Proc. § 1963.

As there was no evidence that Vincent Krizmanich, commonly called Krizman, and the petitioner were not duly married, the award is annulled and the proceeding is remanded for further action not inconsistent with this opinion.

We concur: NOURSE, P. J.; SPENCE, J.



14 Cal.App.2d 396

LAWRENCE v. DUCOMMUN.

Civ. 9969.

District Court of Appeal, Second District, Division 1, California.

June 2, 1936.

Hearing Denied by Supreme Court July 31, 1936.

1. Appeal and error ⇐179(1)

Where answer, in action on notes, did not properly plead a failure of consideration, but there were sufficient facts pleaded upon which to predicate such an affirmative plea, and evidence was introduced at trial on such issue and it was pleaded as an issue in the case, point could be raised for first time on appeal, notwithstanding absence of such allegation.

2. Cancellation of Instruments ⇐22

Generally, a notice of rescission must be served before an action to declare that a rescission has taken place can be brought, but such rule does not apply where the plaintiff is entitled to retain that which he has received, where rights of defendant can be fully protected by decree or where an accounting is necessary to determine relative rights of parties, and where, without fault of plaintiff, peculiar complications have arisen making it impossible for plaintiff to offer full restoration (Civ.Code, § 1691).

3. Cancellation of Instruments ⇐22

Where defendant, sued on notes given by him pursuant to a contract in payment of certain rights to an invention, alleged in his answer, and was borne out by evidence, that falsity of representations upon which he based his right to rescission of contract was not discovered until shortly prior to commencement of action, and further made offer in his answer to restore any benefits received, trial court could properly grant rescission notwithstanding notice of rescission had not been served prior to commencement of action (Civ.Code, § 1691).

4. Trial ⇐370(2)

Where defendant, sued on notes given by him pursuant to contract in payment for certain rights to an invention, interposed a claim for rescission on ground of fraud, trial court sitting as court of equity had discretion to retain jury in an advisory capacity, even if defendant was not entitled to a jury trial as matter of law as to such claim.

5. Appeal and error ⇐1170(9)

Where no prejudicial error had been committed in the giving of certain criticized instructions and in the charge as a whole, judgment would be affirmed (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by A. T. Lawrence, as administrator of the estate of George A. Smith, or George A. V. Smith, deceased (substituted as party plaintiff), against E. F. Ducommun, also known as Edmund F. Ducommun. Judgment for defendant, and plaintiff appeals.

Affirmed.

Arthur F. Larrabee, of Los Angeles (Lee Baylor Stanton, of Los Angeles, and Nixon A. Lange, of Huntington Park, of counsel), for appellant.

Reay, Scharf & Reay and Oliver O. Clark, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

Appellant is the administrator of the estate of George A. V. Smith, deceased. Appellant was substituted in this action as plaintiff, the case having been originally filed by Smith, who died thereafter. For purposes of convenience, however, plaintiff and appellant will be sometimes referred to as Smith. As a result of a contract executed on May 29, 1931, Smith obtained from the defendant, in addition to

other consideration, four several promissory notes of $12,500 each, in return for the exclusive rights in the United States (except the state of Oregon) to an invention of a particular type of turntable which was covered by certain letters patent.

There were a number of transactions between Smith, one A. T. Lawrence, and defendant, prior to the execution of said contract. The facts pertaining to each, while pertinent to the instant inquiry, are so extended and ramified in nature that it would require several pages of concise resume to set them forth with any sort of clarity. It is sufficient to say that Smith and Lawrence, aided and abetted by Reverend A. B. Gardner, a psychic divine, known as "Mother Gardner," who conducted and operated "The Church of the Open Door of Truth," and who held herself out as being able to give business and financial advice obtained from "divine" psychic sources, practiced with success a series of impositions upon defendant to their mutual profit, although the lion's share went to Smith. With the constant help of Lawrence and the continuous "divine" assistance of "Mother Gardner," Smith managed to administer the final coup de grace to defendant in the form of the contract referred to. Before the blow was dealt, however, there were a variety of representations made, all of which the evidence in a superabundance reveals to have been without a basis in fact. Some of these representations were as follows:

(1) That this turntable was perfected excepting for a few minor improvements.

(2) That Smith had spent $40,000 in perfecting this device.

(3) That Smith had five bona fide orders for this turntable.

(4) That Lawrence had paid Smith $10,000 for a one-half interest in the Los Angeles county rights to this turntable device.

(5) That this device could be manufactured and sold at a profit of $200 to $300 per table.

(6) That there was a great demand for said product.

[1] Since the notes were not paid, Smith brought the present action, which was tried before a jury, the jury finding for the defendant. To Smith's complaint, in four counts (one for each note), defendant pleaded several defenses, including fraud, rescission, and failure of consideration. No damages were pleaded in the fraud defense, and this, as well as a number of other defects, is called to our attention as a reason for reversing the judgment entered upon the verdict of the jury. The facts, however, are ample support for the implied finding of the jury that there was fraud, a failure of consideration, and that a rescission ought to be had. The answer does not properly plead a failure of consideration, but there are sufficient facts pleaded upon which to predicate such an affirmative plea. Evidence was introduced at the trial on this issue, and it was treated as an issue in the case. Under such circumstances, even though there is an entire absence of an essential allegation, the point may not be raised for the first time on appeal. 2 Cal. Jur. 246, 247, 254; King v. Davis, 34 Cal. 100; 2 New Cal.Dig. 166, Appeal and Error, § 135; Daly v. Cruse, 108 Cal.App. 713, 292 P. 166. Appellant asserts, further, that the jury did not have any right to consider the issue of rescission because no notice of rescission had been served prior to the bringing of the action. It should be mentioned, further, that with reference to the issue of rescission, no question of laches was raised in the trial court and none is raised in appellant's brief. In any event, there is no evidence that defendant had notice of any of the facts for a sufficient length of time prior to his answer to support a finding of laches.

[2] Generally speaking, a notice of rescission must be served before an action to declare that a rescission has in fact taken place can be brought. Civil Code, § 1691. There are, however, several well-settled exceptions to this rule. Some of the exceptions are: (1) Where the plaintiff is entitled to retain that which he has received; (2) where the rights of the defendant can be fully protected by the decree, or where an accounting is necessary to determine the relative rights of the parties; (3) where, without any fault of the plaintiff, peculiar complications have arisen which make it impossible for plaintiff to offer full restoration. California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593; Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797; Zeller v. Milligan, 71 Cal.App. 617, 236 P. 349; Black on Rescission and Cancellation (2d Ed.) p. 1402. In Kelley v. Owens, supra, 120 Cal. 502, at page 510, 47 P. 369, 371, 52 P. 797, the court says: "There are exceptional cases where restoration or an offer to restore before suit

brought is not necessary, as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties, or where the plaintiff has merely received the individual promissory note of the defendant, or where the contract is absolutely void, or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may, by a final decree, fully adjust the equities between the parties."

In Zeller v. Milligan, supra, 71 Cal.App. 617, at page 627, 236 P. 349, 353, the court says: "The instant action was commenced on the day following the discovery by plaintiff of the alleged fraud which had been practiced upon her by the defendants. The law abhors idle acts. A formal notice of rescission on the same day on which the suit was instituted would have given the defendants no information differing either in nature or extent from that contained in the allegations of the complaint; nor were defendants' rights in the premises in any manner changed or prejudiced by reason of the plaintiff's failure to give such notice."

[3] According to the allegations of defendant's answer, which were borne out by the evidence, he "only shortly prior to the commencement of (the) action learned that said representations were false and untrue"; and in his answer defendant alleges: "That the defendant has received nothing from plaintiff except some alleged assignments of patent applications and these he now offers to cause to be reassigned to plaintiff upon plaintiff paying to him the sums of money paid by him to plaintiff and the cancellation of said notes which were executed by defendant to plaintiff, and further offers to do equity." This offer was repeated by defendant in open court, upon the conclusion of the evidence and before the case went to the jury.

[4] Defendant did not initiate the instant proceedings. His answer affirmatively shows an offer to restore. He might have served a notice of rescission and then filed his answer, or properly a cross-complaint. The case of Zeller v. Milligan, supra, is direct authority to the effect that the service of a notice under such circumstances would have been an idle act. Furthermore, there is no doubt that the court "by a final decree (could) fully adjust the equities between the parties." We therefore conclude that the jury was well within its rights in finding that a rescission should be adjudicated. A question was raised in the trial court that in view of the equitable nature of the defense defendant was not entitled to a jury trial, and a motion was made to dismiss the jury. Defending the motion, defendant agreed to dismiss "from the action our claim for cancellation." The motion was denied. Defendant's agreement was not equivalent to a dismissal of his right to a rescission in the event the fraud pleaded and proved showed that defendant was entitled to one. In any event, the trial court, sitting as a court of equity, had the discretion to retain the jury in an advisory capacity. Even though the verdict of the jury, because of the equitable issue, be considered an advisory one, it is clear that it was satisfactory to the trial judge, who, not only accepted it and caused judgment to be entered thereon, but in addition denied a motion made by appellant for a new trial.

[5] Our attention has been directed to certain instructions requested by appellant and refused by the trial court, and to others which are alleged to have been erroneously given. We have examined and scrutinized the instructions called to our attention, as well as the charge as a whole, and we are satisfied that no prejudicial error has been committed. Article 6, § 4½, Calif. Const.; Clark v. McClurg, 215 Cal. 279, 285, 9 P.(2d) 505, 81 A.L.R. 908; Anderson v. Southern Pac. Co., 129 Cal.App. 206, 18 P.(2d) 703; Halbertstadt v. Nielsen, 113 Cal.App. 313, 298 P. 37.

The judgment is affirmed.

We concur: YORK, J., Acting P. J.; DORAN, J.

14 Cal.App.2d 467

KEELEY v. ANDERSON.

Civ. 5461.

District Court of Appeal, Third District, California.

June 5, 1936.

1. Appeal and error ⇐1011(1)

Trial court's findings will not be disturbed on appeal if there is substantial conflict in the evidence.

2. Fraudulent conveyances ⇐104(1)

In determining whether deed from husband to wife was made to defraud creditors, evidence must be examined to ascertain, not only grantor's intent at time deed was executed, but also all circumstances incident thereto.

3. Fraudulent conveyances ⇐299(12)

In wife's suit to quiet title to property which creditor contended had been conveyed by husband to her to defeat husband's creditors, evidence *held* insufficient to support finding of good faith and solvency.

4. Fraudulent conveyances ⇐239(2)

Generally, creditor must exhaust his remedies at law before proceeding in equity, and that such remedies have been exhausted may be established by return of execution unsatisfied, by showing of debtor's insolvency or that issuance of execution would be unavailing.

5. Fraudulent conveyances ⇐277(3)

In wife's suit to quiet title to property which creditor contended had been conveyed to her to defeat husband's creditors, evidence that husband at time he executed deed owned no property other than his salary and his interest in homestead created prima facie presumption of fraud and shifted burden to wife to show husband's solvency.

Appeal from Superior Court, Stanislaus County; L. J. Maddox, Judge.

Suit to quiet title by Lillie Ida Keeley against J. A. Anderson, who filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed.

N. A. Hawkins and J. W. Hawkins, both of Modesto, for appellant.

Vernon F. Gant, of Modesto, for respondent.

STEEL, Justice pro tem., delivered the opinion of the court.

Defendant appeals from a judgment quieting plaintiff's title to certain real property in Stanislaus county.

On October 19, 1929, J. C. Keeley, a son of H. C. Keeley and Lillie Ida Keeley, respondent herein, was indebted to appellant J. A. Anderson, in the sum of $1,000, or thereabouts, for repairs upon a certain truck or trucks belonging to said J. C. Keeley, and at that time the appellant Anderson was holding the equipment as security for the payment of such repair bill.

Upon the date above mentioned, and in consideration of the release of the equipment, H. C. Keeley and his said son J. C. Keeley executed their promissory note in favor of Anderson for $1,000. Subsequently, and on the 14th day of February, 1930, H. C. Keeley, by deed of gift, conveyed to his wife, Lillie Ida Keeley, all of his real property situate in Stanislaus county, and consisting of two lots in Adams colony and residential property in the city of Modesto. This deed, when executed, remained in the possession of the local title company who prepared it, until October 20, 1931, at which time it was recorded. On October 5, 1932, H. C. Keeley wrote a letter to J. C. Anderson as follows:

(Letterhead of Howard C. Keeley, Auditor of Stanislaus County.)

"Modesto, Oct. 5, 1932.

"J. A. Anderson,

"Modesto, Calif.

"Dear Sir: Enclosed find $10.00 bill to apply on my account. In regard to that note of Jesses I am trying to get him to make some payments on this. I have paid in the past so many bills for him in the past, a few years ago I deeded all my property over to my wife so if any suits was brought to collect this on my part no doubt you would get judgment but when could you collect it.

"Yours truly,

"H. C. Keeley

"Please send receipt and statement of balance H.C.K."

On the 28th day of October, 1932, Anderson commenced an action on said promissory note against H. C. Keeley and J. C. Keeley, the makers thereof, service was had, defendants defaulted, and judgment was entered on the 18th day of November, 1932, in favor of the plaintiff for $1,330,

together with $15 costs. An abstract of said judgment was filed on the same day in the office of the county recorder of Stanislaus county.

The record discloses that on November 2, 1932, five days subsequent to the commencement of the aforesaid action, the respondent, Lillie Ida Keeley, filed a homestead on the residential property of herself and husband, H. C. Keeley, situate in the city of Modesto, and in March, 1934, commenced the instant action against defendant, Anderson, to quiet title to the property which her husband, H. C. Keeley, had theretofore conveyed to her by the deed of gift aforesaid.

An answer and cross-complaint was filed wherein, by way of affirmative defense, the facts hereinabove set forth were substantially averred, and it being further alleged that the deed from H. C. Keeley to his wife Lillie Ida Keeley was made for the purpose of defrauding creditors; that the execution of the deed and the filing of the homestead rendered said H. C. Keeley insolvent and did thereby prevent cross-complainant from satisfying his judgment.

Upon trial the court found in favor of the plaintiff relative to the regularity of the transaction, and further found that the judgment of defendant Anderson, against H. C. Keeley, was not a lien upon the property involved herein, and thereupon entered a decree quieting plaintiff's title.

It is urged as grounds for a reversal thereof that the material findings of the trial court are not supported by the evidence for the following reasons:

(1) The evidence shows that the deed from the husband, H. C. Keeley, to the wife, Lillie Ida Keeley, was made for the purpose of defrauding creditors.

(2) The execution of the deed and the filing of the homestead resulted in H. C. Keeley being insolvent.

(3) There is no evidence to sustain the findings of the court concerning the income received by Keeley.

[1] It is not necessary to cite authority in support of the well-established rule that if there is substantial conflict in the evidence, the findings of the trial court will not be disturbed on appeal.

[2] The major question presented centers upon whether or not the deed from H. C. Keeley to his wife, Lillie Ida Keeley, was made for the purpose of defrauding creditors. The evidence must be examined with a view to ascertaining, not alone the intent of the grantor at the time the deed was executed, but all the circumstances incident thereto, and in this connection the record contains the following: "Q. When this transfer, this deed, was executed from you to Mrs. Keeley, you have already testified, I believe, that prior to that time Mr. Anderson had made no demand on you,—did the matter of the obligation to Anderson enter into your mind at all at the time this deed was executed to Mrs. Keeley? A. No, it did not. That deed was made pure and simple for to protect myself and my family. I felt like I was getting along in years and I wanted to take care of my wife and family in some kind of shape, and I made this deed." Opposed to this testimony relative to the moving cause prompting the execution of the deed, we have the written letter of H. C. Keeley to Anderson hereinbefore set forth, specifically stating his reason for deeding all of his property over to his wife. It is true he disclaimed an intention to defraud appellant, and it may be said that it is quite natural that such denial be made. However, it has been held that one's mere ipse dixit that it is not to defraud one's creditors, would hardly create a bona fide conflict in the testimony. Tobias v. Adams, 201 Cal. 689, 258 P. 588; Benson v. Harriman, 55 Cal. App. 483, 204 P. 255; Allee v. Shay, 92 Cal. App. 749, 268 P. 962.

In the case of Knox v. Blanckenburg, 28 Cal.App. 298, 152 P. 59, 60, we find the following bearing upon the weight of such testimony: "According to the defendant Theodore's own testimony, he transferred all his property, both real and personal, to his wife without securing any consideration therefor and when in debt to his brother and others, thus making himself impotent, however willing, to pay any of his debts, removed all his property from the reach of his creditors and put it beyond their power, if the transfer is to stand, to enforce payment. The inevitable result of this act on the part of the defendant Theodore was to hinder and delay his creditors in the enforcement of their just claims. His own bare statement, unsupported by any facts, that in giving the property to his wife he did not intend to hinder or delay his brother in collecting his debt, cannot overcome the presumption that he intended the inevitable consequences of his willful and intentional acts."

[3] An examination of the entire record fails to furnish sufficient material evidence to create a substantial conflict in support of the finding of good faith and solvency.

Respondent contends, in support of the judgment, that an action will not lie on behalf of a judgment creditor to set aside an alleged fraudulent conveyance by the debtor until execution has been issued and returned unsatisfied, citing the case of First National Bank v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am.St.Rep. 64; and Rossen v. Villanueva, 175 Cal. 632, 166 P. 1004; also, 12 Cal.Jur. 1038.

[4] The authorities cited do not sustain such contention. Jenner v. Murphy, 6 Cal. App. 434, at page 440, 92 P. 405; Sewell v. Price, 164 Cal. 265, 270, 128 P. 407; Ohm v. Superior Court, 85 Cal. 545, 26 P. 244, 20 Am.St.Rep. 245; Sewell v. Johnson, 165 Cal. 762, 767, 134 P. 704, Ann.Cas. 1915B, 645. Generally, a creditor must exhaust his remedies at law before proceeding in equity, and this may be established by return of the execution unsatisfied; by a showing of the debtor's insolvency; or that issuance of an execution would be an idle act and of no practical utility. 12 Cal.Jur. 1038, 1039.

[5] The testimony of respondent, as well as that of her husband, H. C. Keeley, was that at the time he executed the deed he owned no property other than his salary and his interest in the homestead which showing creates a prima facie presumption of fraud (Benson v. Harriman, supra), and shifts the burden to the grantee to show solvency in the grantor. 27 Cal.Jur. 796, 797.

The finding as to the annual salary of H. C. Keeley, as county auditor of Stanislaus county, finds no support in the record, and if supported, would not alter the situation. Other points urged in support of the judgment are likewise untenable.

It must necessarily follow from the authorities applicable to the facts herein that the lien of appellant's judgment in and to the property in question is superior to the title of respondent, and that the judgment must be reversed with directions to the trial court to enter judgment upon proper findings accordingly.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

BROCK & CO. v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al.*

Civ. 10848.

District Court of Appeal, Second District, Division 2, California.

June 2, 1936.

Hearing Granted by Supreme Court July 31, 1936.

1. Appeal and error ⇐996

Findings could not be reversed, where there was substantial evidence, considered in connection with such inferences as trial court may have reasonably drawn therefrom, to sustain findings.

2. Taxation ⇐98

Merchandise owned by California resident which is out of state on tax day, first Monday of March, is not subject to taxation in California, when owner has caused it to be removed for joint purposes of escaping taxation and offering merchandise for sale.

3. Taxation ⇐98

Merchandise is generally taxable only in jurisdiction where it is actually located, and its taxability is not dependent upon domicile of its owner (Pol.Code, § 3628).

4. Taxation ⇐57

Transaction within exception of tax law does not become taxable because actuated by desire to evade taxation.

5. Taxation ⇐57

There is no moral turpitude in arranging one's business so as to evade taxation, but transaction must be more than merely colorable.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Brock & Co. for a writ of mandate to compel the Board of Supervisors of the County of Los Angeles, State of California, and others, to cancel an alleged illegal tax assessment levied on personal property of petitioner. From a judgment denying the petition, petitioner appeals.

Reversed, with direction.

Holbrook, Taylor, Tarr & Reed (by Sumner Holbrook Jr.), all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 65 P.2d 791.

McCOMB, Justice pro tem.

This appeal is from a judgment denying a petition for a writ of mandate to compel the board of supervisors of Los Angeles county to cancel an alleged illegal tax assessment levied on personal property of appellant.

The facts are:

For a number of years prior to the first Monday of March, 1935, the tax date, appellant was engaged in the jewelry business in the county of Los Angeles, state of California. February 22, 1935, appellant shipped to Honolulu, territory of Hawaii, from its stock in Los Angeles county, jewels and jewelry of the value of $143,465. From March 4th to March 14th, the stock was placed on display and offered for sale in a room located in the Hawaiian Trust Company. Thereafter, all of the jewelry, except a ruby bracelet which was left for sale with a Honolulu jeweler, was returned to Los Angeles county.

The Los Angeles county tax assessor assessed this stock as being property of appellant subject to taxation in Los Angeles county on the first Monday of March, 1935.

In denying the petition for a writ of mandate to compel the board of supervisors to cancel the assessment, the trial court found:

"Said jewels and jewelry herein assessed were removed and taken out of the territorial boundaries of * * * the county of Los Angeles, for a pre-determined, prearranged and limited short time, and for ten days of said time, to wit, from March 4 to March 14, 1935, were in said vault of said Hawaiian Trust Company * * *; that from said March 4 to March 14 said jewels and jewelry were open to display to and inspection of certain persons in Honolulu pursuant to petitioner's invitation to them in said vault, but on said latter date were withdrawn from further display or inspection, and excepting one article which was left in Honolulu for sale, were shipped back to Los Angeles and arrived there March 22, 1935; * * * said jewels and jewelry were at all times, except for such short period of time, part and parcel and portion of and present with its jewels and jewelry and stock in trade and merchandise for sale at said stores * * *

"That the jewels and jewelry herein assessed were by petitioner removed from * * * the county of Los Angeles, and shipped to Honolulu for the purpose of and with the intention to evade the just and legal taxes due thereon * * * in said county and of defrauding * * * said county thereof and to evade any and all taxation thereon; and for the further purpose of and with the intention to advertise and offer the same for sale, and to advertise and make known petitioner, Brock and Company, as a jewelry seller, having for sale such and like jewels, jewelry and merchandise, and to advertise petitioner's jewels, jewelry and merchandise for sale in its said Beverly Hills and Los Angeles stores."

The sole questions necessary for us to determine are:

First. Is there substantial evidence to support the findings of fact set forth above?

Second. Is merchandise owned by a resident of the state of California, which is out of the state on the tax day (the first Monday of March), subject to taxation here, when the owner has caused it to be removed for the joint purposes of (1) escaping taxation, and (2) offering it for sale?

[1] As to the first question, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain all of the findings of fact hereinbefore set forth, except that there was no substantial evidence to sustain the finding that appellant removed its merchandise from the state of California for the purpose "of defrauding * * * said county" of taxes. Further discussion of the evidence is unnecessary. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Thatch v. Livingston (Cal. App.) 56 P.(2d) 549.

[2] The second question must be answered in the negative. The trial court found that the merchandise in question was in the city of Honolulu, territory of Hawaii, on the tax day (the first Monday of March, 1935); also, that appellant shipped it there for the purposes of (1) offering it for sale, (2) advertising appellant as a jewelry seller, and (3) advertising the merchandise of appellant for sale in its Beverly Hills and Los Angeles stores.

[3] The rule is well settled that merchandise is taxable only in the jurisdiction where it is actually located (General Oil

Co. v. Crain, 209 U.S. 211, 212, 230, 28 S. Ct. 475, 52 L.Ed. 754; Section 3628, Pol. Code; 24 Cal.Jur. 112, sec. 97), and its taxability is not dependent upon the domicile of its owner. People v. Niles, 35 Cal. 282. There are certain well-defined exceptions to this rule, which it is unnecessary for us to here consider, as the instant case does not fall within any of them.

[4, 5] The fact that appellant shipped its merchandise to Honolulu for the purpose, among others, and with the intention of evading a tax in California, was immaterial since the trial court found, based on substantial evidence, that the merchandise was also removed for legitimate purposes. A transaction within an exception of the tax law does not become taxable because it was actuated by a desire to avoid or evade taxation. Any taxpayer may so arrange his affairs as to minimize his taxes. It is not even a patriotic duty to follow that course which will result in his paying a maximum tax. Helvering v. Gregory (C.C.A.) 69 F.(2d) 809, 61 Cor.Jur. 207, note 19-b. Mr. Justice Plummer in Boessow v. Johnson (Cal.App.) 52 P.(2d) 505, 508, announces the rule correctly thus: "While the courts hold, and the law seems to be well settled, *that there is no moral turpitude in arranging one's business so as to evade taxation,* it must be more than a mere colorable transaction." (Italics ours.)

Judge Hand, speaking for the United States Circuit Court of Appeals, Second Circuit, in Helvering v. Gregory, supra, 69 F.(2d) 809, at page 810 said: "We agree with the Board and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes. United States v. Isham, 17 Wall. 496, 506, 21 L.Ed. 728; Bullen v. Wisconsin, 240 U.S. 625, 630, 36 S.Ct. 473, 60 L.Ed. 830."

Mr. Justice Holmes in Superior Oil Co. v. State of Mississippi, 280 U.S. 390, 395, 50 S.Ct. 169, 170, 74 L.Ed. 504, says: "The only purpose of the vendor here was to escape taxation. * * * The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it."

For the foregoing reasons, the judgment appealed from is reversed, and the trial court is ordered to issue the peremptory writ for which petitioner prayed.

It is so ordered.

We concur: CRAIL, P. J.; WOOD, J.

6 Cal.2d 480

PEOPLE v. MORENO.

Cr. 3963.

Supreme Court of California.

June 16, 1936.

1. Criminal law ⇐1184

Supreme Court has jurisdiction to reduce degree of offense for which defendant was convicted when evidence requires such course and direct entry of judgment accordingly without ordering new trial (Pen.Code, § 1181).

2. Homicide ⇐253(3), 254

Evidence *held* insufficient to disclose willful, deliberate, and premeditated killing essential to justify conviction of first degree murder and warrant imposition of death penalty, but to warrant conviction of second degree murder only.

3. Homicide ⇐23(2)

Murder not of first degree is "murder in the second degree," which is unlawful killing with malice, but without deliberation or premeditation.

[Ed. Note.—For other definitions of "Murder in Second Degree," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Fermin Moreno was convicted of first degree murder, and he appeals.

Judgment modified, and cause remanded, with directions.

S. W. Green, of Isleton, and Guy P. Johnson, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Following his trial on a charge of murder, found by the jury to have been murder of the first degree, the defendant was sentenced to pay the extreme penalty; the verdict being without recommendation. He prosecutes this appeal from the judgment and from the order denying his motion for a new trial. His sole contention upon appeal is that the evidence is insufficient to support the judgment and that the admitted killing was perpetrated in self-defense.

[1] We have examined the entire record, and it is our conclusion that the evidence is not such as to warrant a verdict of murder of the first degree or to justify the infliction of the death penalty. However, we are not prepared to accept the defendant's contention that the homicide was perpetrated in self-defense and was therefore justifiable. Instead, and motivated solely by a desire to prevent the destruction of human life on evidence that lacks certainty as to the circumstances leading to the homicide and an admitted inability on our part to accurately and definitely ascertain therefrom the facts as they actually existed immediately prior to and at the time of the homicide, we prefer to take a middle ground, well supported in authority, and to characterize the offense as murder of the second degree. We now possess the necessary jurisdiction to reduce the degree of an offense, when the evidence requires such a course, and to direct the entry of judgment accordingly without ordering a new trial. Section 1181, Pen.Code; People v. Kelley, 208 Cal. 387, 391, 281 P. 609; People v. Howard, 211 Cal. 322, 330, 295 P. 333, 71 A.L.R. 1385.

The uncertain state of the record now before us is well exemplified by, and some support for our conclusion is found in, the frank admission appearing in the brief of the Attorney General "that the prosecution introduced evidence in its case which tended to show that the appellant killed the decedent in self defense." He points out, however, that the jury might, and apparently did, reject this particular evidence, electing to base its verdict on other evidence which he asserts supports its action.

[2,3] The defendant, the deceased, and the several witnesses to the fatal shooting were illiterate Mexican farm laborers who worked together by day and more or less lived together by night. They were apparently on friendly terms, for the homicide was preceded by a poker game of several hours' duration, interspersed with the consumption of wine. At approximately 10 o'clock on the evening of September 7, 1935, several of these men drew up their chairs in an effort to tempt the fickle goddess of luck. The defendant and the deceased were participants in this uncertain undertaking. According to all accounts, the game progressed without un-

toward happening, with the possible exception of minor diversions incidental to the pastime, until along about 3 o'clock of the following morning. Up to this point we have no difficulty in following and determining the conduct of the principal actors in the tragedy so shortly to be enacted. From this point on, however, the varying accounts narrated by eyewitnesses make anything approximating a definite conclusion as to their actions a thing to be hoped for but hardly realized.

At about 3 o'clock in the morning a dispute arose between the deceased and defendant over a poker hand that had been dealt. In the course of this dispute, and according to the two eyewitnesses called by the prosecution, the deceased directed an ugly epithet at the defendant, who remonstrated with him not to so offend him again, whereupon the defendant left the room, went to an adjoining room, returned, and was about to depart. As defendant approached the door in an apparent effort to leave the building, the deceased went toward him in a threatening manner, prompting the defendant to warn the deceased "to go away and not to get close to him." The warning went unheeded, as the deceased approached the defendant with one hand in his pocket. The defendant thereupon took a gun out of his pocket and pointed it at the deceased, who attempted to "grab" it and at the same time remove his (deceased's) right hand from his trousers' pocket. Two shots were fired, one of which struck the deceased, killing him almost instantly. The prosecution, in an effort to overcome the effect of this testimony of the two eyewitnesses called by it, and to impeach said two witnesses, thereupon read into evidence the testimony given by these two witnesses at the preliminary hearing. At this earlier hearing each denied having heard any quarrel preliminary to the shooting, relating merely that the deceased and defendant left the table, and, as they approached the door, the defendant pulled out a gun and shot the deceased. Upon the trial, each of the two witnesses attempted to explain the variation in his story upon the ground that he was intoxicated when testifying at the preliminary hearing. The prosecution, of course, offered evidence that the witnesses were not intoxicated at the earlier hearing. On its face, the story told by the witnesses at the preliminary hearing seems highly improbable. It is incredible to believe that the defendant shot the deceased, with whom he and others had been engaged in a friendly game of cards, without some preliminary quarrel between them.

After having established its inability to locate and subpœna two other eyewitnesses who had also participated in the card game with deceased and defendant, the prosecution read into evidence the testimony given at the preliminary hearing by said absent witnesses. At the preliminary hearing, one of the witnesses testified that he was present at the shooting, that he had become intoxicated, that he heard shots but saw nothing. The other person testified at the preliminary hearing that he heard no prior quarreling, but, as the deceased and defendant went toward the door, the latter pointed a gun at deceased, whereupon the witness heard two shots. This latter story is also subject to the criticism that it is highly improbable that the defendant shot and killed a person with whom he worked, lived, and was friendly without some preliminary misunderstanding or quarrel.

The defendant took the witness stand in his own behalf, and, after relating certain preliminary matters, testified that at about 3 o'clock in the morning a dispute arose over a poker hand; that deceased thereupon and on several occasions called him a vile name; that he told deceased to "shut up" and not to so address him; that deceased arose and replied, "I am mad and I can kill you right now"; that the deceased at the same time attempted to take a razor from his pocket; that he (defendant) thereupon left the room and got his gun from a trunk in an adjoining room and placed it in his pocket; that he returned to the room where the card game was being played and was about to leave by another door leading to the outside when the deceased approached him, repeating the epithet, and adding, "It is time to kill you anyway"; that he stepped back, took the gun from his pocket, and told deceased not to come any closer; that deceased continued coming toward him with his right hand in his pocket; that deceased grabbed the defendant's hand and struggled with him, whereupon he shot the deceased.

Defendant also offered evidence that after the shooting, and in the presence of a constable, a razor was removed from a pocket of deceased's trousers. The person who removed it said it was open in the pocket and cut his hand slightly.

In substance, the foregoing represents the complete showing as to the circumstances immediately surrounding the shooting. As stated above, the record, in our opinion, does not satisfactorily disclose a willful, deliberate, and premeditated killing essential to characterize it as murder of the first degree and warrant the imposition of the death penalty. All murders not of the first degree are of the second degree. Murder in this degree is an unlawful killing with malice, but without deliberation or premeditation. 13 Cal.Jur. 603, § 18; People v. Semone, 140 Cal. App. 318, 323, 35 P.(2d) 379. In our opinion, the homicide disclosed by the unsatisfactory record in this case falls within the latter category. We are not satisfied that the record indisputably discloses that it was executed without malice and upon such provocation and sudden passion as to reduce the offense to manslaughter.

The judgment of murder of the first degree is modified, and the cause is remanded to the trial court, with directions to enter a judgment against the defendant finding him guilty of murder of the second degree, and to thereupon pronounce judgment upon him as prescribed by law.

We concur: LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.



6 Cal.2d 529

RILEY, State Controller, et al., v. JOHNSON, State Treasurer.

S. F. 15679.

Supreme Court of California.

June 18, 1936.

1. States ⇐115

State treasurer *held* bound to register warrant as legal obligation of state, notwithstanding lack of sufficient unappropriated money in general fund to pay warrant during existing biennium, as against contention that registration of warrant would create indebtedness in violation of Constitution and would permit Legislature to exceed amount of budget (Const. art. 4, § 34; art. 16, § 1).

2. States ⇐131

Legislature *held* authorized to make appropriations in anticipation of receipt of necessary revenues.

3. States ⇐132

Legislature, having legally appropriated, for payment of warrants from general fund, necessary moneys as received, cannot thereafter repeal or render ineffectual such appropriation as against warrant holders.

In Bank.

Application by Ray L. Riley, as State Controller, and another, for a writ of mandate against Charles G. Johnson, to compel respondent, as State Treasurer, to register a certain warrant.

Peremptory writ issued.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for petitioners.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for respondent.

WASTE, Chief Justice.

The state controller and William F. Peters pray for a writ of mandate directing the respondent, as state treasurer, to register a warrant drawn by the controller in favor of Peters, for an amount, stated therein, due and unpaid by the state to the payee named therein. The respondent demurs to the petition, and makes further return by way of answer presenting issues of law. He admits the due and legal execution, issuance, and presentation of the warrant, and that the petitioner Peters is entitled to be paid by the state the amount of the warrant, but disputes the right of petitioners to have the warrant registered. Succinctly stated, the allegations, admissions, and denials made by the parties establish the fact that the finances of the state of California have reached a point where warrants which are now being drawn by the state controller upon the state treasurer against the general fund, and which are being registered by the treasurer because there are no funds presently available for their payment, probably cannot and will not be paid during the present biennium which will end on June 30, 1937, because there will not be sufficient unappropriated money in the general fund to meet them until some time after that date,

and when another biennium will have begun.

[1] The state treasurer therefore refuses to register the warrant on the ground that, since it cannot be paid during the present biennium, it does not constitute a legal obligation of the state of California, and consequently he has no authority under the law to register such an obligation. This contention cannot be approved. The answer is found in the decision of this court in Riley v. Johnson, 219 Cal. 513, 27 P. (2d) 760, 92 A.L.R. 1292. In that case the court passed upon the validity of warrants issued and registered under the act of 1933 (chapter 605, p. 1547) although the warrants were not carried over until a succeeding biennium. Therefore, one of the questions now presented was not before the court in that case, but the considerations there had and the decision given on the other questions now raised were sufficiently in point to make the decision of persuasive force and conclusive here. We there held (219 Cal. 513, at page 519, 27 P.(2d) 760, 92 A.L.R. 1292) that the provisions of law requiring the warrants to be paid from the unapplied moneys in the general fund, as such moneys are received into such fund, constitute a legal appropriation of so much money as will be necessary to make payment of the amount of the warrants with interest. (Citing the earlier decisions of the court as authority.)

The further contention that the registration of the warrants, at a time when there are no unapplied moneys in the general fund to meet payment, amounts to the creation of an indebtedness in violation of article 16, § 1 of the Constitution relating to the creation of an indebtedness by the state), was also answered by our decision in Riley v. Johnson, supra, 219 Cal. 513, at page 520, 27 P.(2d) 760, 763, 92 A.L.R. 1292. While some authority from other jurisdictions might lead to a different conclusion, in our decision we said: "It is well settled in this state that revenues may be appropriated in anticipation of their receipt just as effectually as when such revenues are physically in the treasury. The appropriation of such moneys and the issuance of warrants in anticipation of the receipt of revenues in effect operates in the nature of a cash payment and therefore does not create an indebtedness or liability within the meaning of the debt limitation clause" (citing earlier decisions of the court on the subject). On this phase of the case the Supreme Court of Iowa, in an exhaustive discussion and study of the question, reaches the same conclusion, and adds: "Nor do we find the weight of authority otherwise." Rowley v. Clarke, 162 Iowa, 732, 144 N.W. 908, 914. We are of the view that the decision in Riley v. Johnson, supra, sufficiently and definitely settles the foregoing two propositions advanced by the respondent treasurer and other questions which might arise in considering this case.

There remains for our consideration only the additional fact that in this case the warrant will probably not be honored and paid during the present biennial period. Again, decisions from other jurisdictions, on their face, seem to sustain the position of the respondent; but on analysis they are found to have no bearing on our case. The Iowa decision rested on earlier decisions of the same court to the effect that succeeding legislatures may repeal appropriations made by former legislatures. That is not the law in this state. People v. Bond, 10 Cal. 563, 571. In Riley v. Johnson, supra, 219 Cal. 513, at page 521, 27 P.(2d) 760, 763, 92 A.L.R. 1292, we held that as "the statute contains an appropriation from the unapplied moneys in the general fund of such amount as will be necessary to pay such registered warrants, with interest thereon, the Legislature could not hereafter repeal or render ineffectual such appropriation as against warrant holders by repealing the appropriation act or by appropriating to other uses any part of such moneys as would otherwise accumulate in such fund and be applicable to the payment of such registered warrants." State v. Medbery, 7 Ohio St. 522, was based on a provision of the State Constitution restricting appropriations to a period of two years. No such limitation confronts us here.

[2, 3] The Legislature is vested by our Constitution with the burden and responsibility of making appropriations, and may do so in anticipation of the receipt of the revenues necessary to pay them. It has long been the accepted law in this jurisdiction that when the state, through its Legislature, makes a legal appropriation of so much money as will be necessary to pay the warrants from the general fund, as such moneys are received, the Legislature cannot thereafter repeal or render ineffectual such appropriation as against the warrant holders. Therefore, the lapse of the

present biennium presents an immaterial element for consideration in the case.

The objection is raised that a holding authorizing the registration of these warrants will permit the Legislature at any session to exceed the amount of the budget for state expenditures adopted as required by the Constitution (article 4, § 34). There is nothing in the point. The section provides, as it must, that other appropriation bills may be passed when "the budget bill has been finally enacted." See Railroad Commission v. Riley, 192 Cal. 54, 57, 218 P. 415. For an example of appropriations covering expenditures in more than one biennium, see Stats. 1931, c. 472, p. 1033, and chapter 489, p. 1064.

Let a peremptory writ of mandate issue, as prayed for by petitioners, directing the respondent state treasurer to register the warrant.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.



6 Cal.2d 504

PADGHAM v. STATE BAR OF CALIFORNIA.

L. A. 15441.

Supreme Court of California.

June 17, 1936.

Attorney and client ⇐53(2)

Evidence *held* sufficient to warrant disbarment of attorney for professional misconduct in misappropriating clients' funds and property.

In Bank.

Proceeding by George W. Padgham against the State Bar of California to review the recommendation of the Board of Governors of the State Bar that the petitioner be disbarred from the practice of law.

Petitioner disbarred.

S. J. Silverman and Shattuck, Davis & Story, all of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

THOMPSON, Justice.

This proceeding is one to review the recommendation of the Board of Governors of the State Bar that the petitioner be disbarred. Three complaints were lodged against him by four of his former clients and three notices were directed to petitioner requiring him to show cause before the local administrative committee why he should not be disciplined for the professional misconduct. The first complaint contained two counts and the others one each. We shall set forth separately the facts necessary to an understanding of each count of the complaints.

The committee found, responsive to the averments of the first count of the first notice, substantially as follows: On February 18, 1929, Frank Bryan of Pasadena died intestate, leaving surviving him three children, one son and two daughters. At the time of his death Bryan held insurance in the fraternal organization known as the Ancient Order of United Workmen, commonly referred to as the A. O. U. W., in the sum of $2,000, but subject to a loan of $440 and also subject to a delinquency for the nonpayment of dues for the months of December, 1928, and January and February, 1929, in the total sum of $33.78. The petitioner had represented Frank Bryan in his lifetime and was familiar with his affairs. The children were not residents of this state. The petitioner immediately notified the son, Harry Bryan, who came from Chicago to attend the funeral. While in Pasadena Harry Bryan employed petitioner to collect the insurance mentioned, explaining to him that he did not know the whereabouts of his sister Ethel Bryan (Barton), but that he believed he could procure a power of attorney from his other sister, Fredricka Ernestine Bryan (Biles). Harry Bryan knew nothing about the policy except as informed by petitioner between about February 27th and about March 2d, at which later date he returned to Chicago. On February 19 petitioner wired the home office of A. O. U. W. at Newton, Kan., advising it of Bryan's death and asking if the latter was in good standing and for the name of the beneficiary and asking for proof blanks. On the day following the lodge telegraphed petitioner names of the three beneficiaries and said "letter follows." The letter which the grand recorder testified he

sent on February 21st advised petitioner of the status of the policy, the amount of the loan, the amount necessary to reinstate the policy by payment of the delinquent dues, and contained forms for proof of death. However, petitioner did not inform Bryan of these facts, but rather told him of the loan against the policy, that the policy had lapsed for nonpayment of dues, but that he had formerly been connected with the A. O. U. W. in the field, that he was a member thereof, and that though there might be serious complications, he thought perhaps he might be able to effect a recovery. On this basis petitioner made a contract with Harry Bryan to handle the matter on a 50 per cent. contingent basis.

Subsequently petitioner forwarded $33.78 for dues to the lodge and thereafter sent forward proof of death. On May 6th checks to each of the three beneficiaries were mailed in the sums of $518.67, which petitioner cashed by signing the names of the payees by himself as attorney. At the time he had powers of attorney from Harry Bryan and Fredricka E. Bryan (Biles), but no authority of any kind from Mrs. Ethel Bryan (Barton).

It is further found in effect as follows: From petitioner's testimony it appears that Harry Bryan had requested him to endeavor to get each of the other two beneficiaries to allow him (Bryan) one-third of his expense in connection with his trip and the funeral. Petitioner failed to make any accounting for the money so collected, advancing as an excuse for such failure, that he had not been able to get the two sisters to agree to contribute their proportionate share of such expenses and further that he was not able to locate Mrs. Ethel Bryan Barton. However, she was located in the early part of 1932, and the letters written by petitioner to her, particularly those of February 22, 1932, and March 29, 1932, are found to have been written for the sole purpose of beclouding the issue and of delaying the necessity for making an accounting. Finally, three actions were commenced by the three beneficiaries on November 7, 1932, and on January 7, 1932, after petitioner had interposed demurrers and pleas of the statute of limitations, judgments were recovered. After being cited on supplemental proceedings, during which counsel was unable to discover from the testimony of petitioner any property on which to levy, and in May, 1933, approximately four years after the money was collected, petitioner settled with his former clients by paying the sum of $1,250.

We are not inclined to set forth any more of the evidence than is recited in the statement of the effect of the findings. We have carefully read the transcript, and it is manifest therefrom that the committee fairly arrived at its conclusions. In fact, as we read the testimony, the conclusions could not well have been other than they were. The committee might, however, have called attention to the fact that the money was first of all deposited in petitioner's general account in a bank in Pasadena; that, shortly thereafter, $750 from that account was deposited in a bank in Los Angeles in petitioner's name, but not as a trustee, for a period of about two weeks, which petitioner says he had intended to treat as a trust account; and that, after two weeks, this sum of $750 was kept in cash either at his office or at his home along with other trust funds. Furthermore, Harry Bryan testified positively that he did not agree to pay 50 per cent. of his proceeds for the collection of the insurance. This latter fact is recited to indicate that petitioner's version of the facts has been adopted. Petitioner questions the sufficiency of the facts to establish the findings but his claim in this particular must be denied. His other assertion applies to the other charges and will be considered when they have all been set forth.

We turn, therefore, to the second count in the first notice to show cause. With respect to this count the local administrative committee concluded that petitioner had acted in bad faith in withholding a part of a sum of money collected for his client, S. E. Bevis, and in failing or refusing to properly account therefor. We are in accord with that conclusion. Without setting forth all of the testimony, it appears from the transcript that Bevis placed with petitioner, for immediate suit thereon, a promissory note in the principal sum of $800, executed by one J. E. Bridges and others and gave petitioner $35 to pay filing fees and not to exceed $10 on an attachment bond. The petitioner agreed to collect the note with accrued interest on the basis of the 10 per cent. attorney's fee provided for in the note. On the day following, Bevis took the complaint and other papers to Riverside for filing and instructed the sheriff to levy attachment. While the petitioner paid the filing fee of

$7, Bevis was compelled to pay $35 to the sheriff for his fee. Prior to December 2, 1932, and apparently about November 19 or 20, petitioner received from the defendants in the action $964.09, made up of the following items: Principal, $800; interest to November 19, $30.49; filing fee, $7; cost of attachment bond, $20; sheriff's costs, $23.60; and attorney's fees, $83. In addition, some time between December 2, 1932, and January 5, 1933, petitioner received an additional $50.25 for interest on the sum of $800 prior to the execution of the note which evidenced the loan. On December 2, petitioner mailed Bevis a check for $500, although it is apparent that he held, after allowing him credit for the filing fee and bond, about $900. On January 5, 1933, after collecting the additional $56.25, for which a charge of $15 was made, petitioner tendered Bevis a check in the sum of $326.45, as payment in full of the account. His misleading and erroneous manner of accounting is best exemplified in the statement rendered:

"The Bridges matter is worked out as follows:

Principal of note	$800.00	
Interest	32.15	
Difference due you as follows:		
$35.00 check advanced by you to sheriff		
24.35 sheriff's costs deducted		
10.65 Balance as a credit	10.65	
Difference due you as follows:		
$35.00 cash advanced by you		
17.00 filing fee and attachment bond		
18.00 Balance as a credit	18.00	$860.80
Less phone calls and personal services at Riverside $19.35		
Less account owing office 15.00		34.35
Total		$826.45
Less payment advanced		500.00
Balance check enclosed		$326.45
Back interest collected $56.25		
Collection fee and charges 15.00		
Balance due $41.25"		

It is to be noted that the $15 charge under the heading "account owing office" was correct as was also the collection charge of $15. After crediting him with these items as well as those already mentioned, it is obvious that he owed Bevis approximately $100 additional. Without unduly prolonging the facts, it is sufficient to say that Bevis refused the check and demanded an itemized account. Petitioner declined to render any such account until Bevis placed the matter in the hands of attorneys. Finally, on March 14, 1933, action was filed and judgment recovered April 10, 1933, for the principal sum of $418.40. Petitioner at the hearing of the charge attempted to justify his retention of approximately $100 by claiming that he was handling another matter for Bevis and was told by the latter to retain the money. This assertion the record conclusively shows to be without foundation. Bevis disputed this contention, and the petitioner's own exhibits disclose that the other matter was concluded before the Bridges note was placed with him. Further, the purported account makes no such claim. Further, Padgham mailed Bevis a statement on November 15 covering a charge for this other case and included it in his statement of January 5, 1933. Lastly, he filed no counterclaim for such a sum, but in his answer admitted owing $396.50. Enough has been said to indicate that the evidence fairly warrants the committee's conclusion. No other claim is advanced by petitioner with respect to this count.

We may now consider the second notice to show cause involving a charge dealing with petitioner's financial transactions but of a somewhat different character. Petitioner, in the year 1931, was the attorney for a Miss Warrington, as executrix of the estate of May B. Hardman, deceased. In addition to being a devisee under the will of Mrs. Hardman, Miss Warrington was the beneficiary in an accident policy in the sum of $5,000, which sum she received some time prior to July, 1931. Of this sum Miss Warrington used $3,000 to repay to Miss Mildred Vollmer moneys borrowed from her. They were intimate friends, and when Miss Vollmer put the $3,000 on deposit in her account she arranged so that Miss Warrington might draw checks in case anything happened to her (Miss Vollmer). The estate had been involved in litigation with the surviving husband and, during the latter part of July, 1931, petitioner suggested to both women that inasmuch as Mr. Hardman was trying to claim the insurance money it should be hidden and asked how Miss Vollmer would like to loan him the $3,000 on his own home on a first trust deed with interest at 8 per cent. Both women testified he assured them the property was clear. Petitioner denies that he made the statement, but, in view of other portions of his testimony, which are obviously incorrect, and of the further fact that when testifying to the purported conversations he never gave the

substance other than to say he advised them of the exact status of the title, it must be determined, in accordance with the committee's conclusion, that he did so represent the title of the property. Instead of being free from encumbrance, however, it had been sold on foreclosure for $5,392.54. The $3,000 was used to make the first payment on the redemption. Subsequently and some time in October, 1931, the remainder of the redemption money was paid. Another deed of trust securing a note of $2,150 appeared of record but had apparently been satisfied. It was satisfied of record by petitioner in 1933. In addition the property had been sold to the state for county taxes of 1930, which with subsequent delinquencies and penalties amounted to $228.19, and sold to the city of Pasadena, the total to redeem from which last sale amounted to $194.32. The petitioner claimed that these taxes had been paid, but offered no proof outside of his statement to that effect. The property stood of record, subject to the encumbrances in the name of petitioner's wife. The trust deed was executed shortly after Miss Vollmer gave petitioner the $3,000, but it was not recorded, nor was an escrow had nor title brought down. Both Miss Warrington and Miss Vollmer testified that Miss Vollmer demanded the trust deed many times but without success but petitioner claims he delivered it to Miss Vollmer, who asked him to put it in a tin box belonging to Miss Warrington in his safe. Also both women told of numerous requests for interest but that none was paid. In this connection, petitioner first asserted that he had never been employed by Miss Vollmer as her attorney, hoping, as is shown by objections in the record, that such a position would remove the transactions from the realm of professional conduct. Subsequently, when it came to the question of interest, he attempted to assert that Miss Vollmer had employed him in conjunction with Miss Warrington and that the interest had been paid by the rendition of service. He failed, however, to set forth by statement or otherwise any specific work performed for her, or any claim other than in his testimony that would indicate such a state of affairs. It seems clear to us from a reading of the cold record that no such services were in fact rendered.

From our recital of the salient facts relating to this charge, it is manifest that petitioner took an unfair advantage by misrepresenting the condition of the title of the property. Hence we must conclude as did the committee and the board of bar governors.

Turning to the third notice to show cause we find involved a number of transactions, although set forth in one count. And while we have heretofore discovered that petitioner had an unusual and unprofessional method of and inclination toward holding onto the funds of his clients, the testimony on this branch of the case reveals an amazing proclivity for juggling the property of his clients and involving them in the snarls resulting therefrom. Mrs. Grace M. Wright was the client in all the transactions involved in the third notice to show cause and we shall first discuss, as briefly as possible, what has been termed the Banning Ranch. Before employing petitioner, which was some time in February, 1930, Mrs. Wright had foreclosed and purchased the ranch at foreclosure for the sum of $15,272 and had received the commissioner's certificate of sale. Theretofore she had entered into an agreement with one L. H. Lucas to sell him the property in the event that she became the purchaser. Petitioner advised Mrs. Wright, after being retained by her, that she should take action to terminate or rescind the contract with Lucas, and in order to make it easier for him to defeat any claim Lucas should assert that she should assign her certificate of sale to Frances Warrington, a client of his, who has heretofore been mentioned in this proceeding, and incidentally an intimate friend of Mrs. Wright. The assignment was made, and in November, 1930, the commissioner issued his deed to Miss Warrington. Shortly thereafter, and by advising Miss Warrington that she might be involved in litigation arising out of the Hardman estate, the petitioner secured from Miss Warrington a deed to the ranch with the name of the grantee left blank, in which space the petitioner later inserted his own name. While it appears that Mrs. Wright knew that title would not be vested in her or Miss Warrington, it does not appear that she knew or consented to its transfer to petitioner. After this deed was recorded, petitioner continued his efforts to settle with Lucas and on July 7, 1931, secured from him a cancellation of the agreement. In the meantime he insisted that Mrs. Wright deny any claim or interest in the property. Subsequent to July, 1931, and instead of

reconveying the property to Mrs. Wright, petitioner of his own volition and without the permission of his client executed a note secured by a trust deed on the property to James Yoakam, another client, for the principal sum of $20,000. This transaction was purely fictitious and petitioner at the time took from Yoakam a reconveyance so that he might clear the record at any time. Petitioner says this encumbrance was apparently placed against the property not only for the purpose of keeping the title out of the names of Mrs. Wright and Miss Warrington but also for trading purposes. Be that as it may, it is sufficient to say, although the Lucas contract was terminated July 7, 1931, petitioner continued to hold the property until December 21, 1932, at which time the first or preliminary settlement was effected between him and Mrs. Wright, in which petitioner required Mrs. Wright to give him a note secured by a trust deed for the sum of $4,058.06, representing what he claimed to be his interest in the property or one-half of its value in excess of $15,272, and the unpaid balance of his fees and costs advanced in the sum of $558.06. This trust deed was subsequently released in connection with the Harkness avenue property, and in the final settlement.

In the order of the testimony, the next transaction has to do with the Beaumont property. During 1929 Mrs. Wright exchanged this property for a residence in Pasadena, and as a part of the transaction, took back a mortgage for $375, executed by one Bert Wilson and his wife. Subsequently, Lucas, who had acted as agent for Mrs. Wright, took title in the name of his two children to the Beaumont property subject to the mortgage. The property, either in the hands of Wilson or Lucas, became subject to a mechanic's lien filed by the Hayward Lumber Company in the sum of $175. In June, 1929, Mrs. Wright assigned the note and mortgage to a Mrs. Orbison. Some time in 1930 a settlement with respect to this property was effected between Mrs. Wright and Lucas and the latter caused to be executed a deed conveying it to Mrs. Wright. Prior to May 7, 1931, petitioner advised Mrs. Wright that, in order to preclude the lumber company from collecting its lien and certain other persons which petitioner testified claimed some interests from asserting their claims, she should have the note and mortgage taken over by a third party and foreclosed. On that day Mrs. Wright delivered to him a check for $400 for the purpose of buying the mortgage. Instead of immediately purchasing the mortgage, petitioner cashed the check and paid Mrs. Orbison as follows: May 10, $50; May 14, $150; August 29, $100; January 12, 1932, $100; and January 15, 1932, $33.65—all of which were indorsed as payments, although he did procure an assignment to James Yoakam.

He then took the deed which Lucas had given Mrs. Wright, erased her name as grantee thereon, and inserted in its place the name of one George F. Cook. He recorded the altered deed and then began an action on behalf of Yoakam against Cook for the purpose of foreclosing the mortgage. A reference to the bill subsequently rendered by petitioner discloses that it cost Mrs. Wright, in addition to the $400 advanced to purchase the mortgage, in excess of $400, including the petitioner's fee of $250, to follow the course we have outlined, instead of settling the mechanic's lien as would have been the usual procedure. However, inasmuch as we have mentioned fees, it ought to be noted at this juncture that petitioner is not accused of charging such exorbitant fees as to warrant disciplinary action.

In November, 1931, without the knowledge or consent of Mrs. Wright and without any accounting therefor, petitioner rented the Beaumont property to one Ben Richards for $10 a month. Richards testified that he mailed petitioner $120 in cash and made improvements aggregating the same amount. Petitioner denies receipt of any money, but his own letter evidences the rental. Furthermore, Richards was evidently an unprejudiced and unbiased witness.

The next transaction, and the last one we shall discuss, involves the Harkness avenue property. Some time in 1930 Mrs. Wright advised petitioner she had $2,000 to invest. He advised her he had a client who wished to borrow $3,500 and would secure the same by a first trust deed on property on Harkness avenue, Pasadena; that his client desired to borrow the money for use in improving the building and would not need the entire amount immediately; that he knew the property was free from encumbrance and that it would not be necessary to have the title searched. Mrs. Wright investigated the property and was satisfied with the security offered. She gave petitioner a check for $2,000 made payable to James Yoakam (the same person

heretofore mentioned) and dated April 22, 1930, and made arrangements at a bank to borrow the additional $1,500 and to pledge as collateral the note and trust deed that she expected to receive from Yoakam. It developed that the property shown was property which had belonged to Mrs. Bryan, the wife of Frank Bryan, whose insurance was involved in another count of this proceeding, and who had predeceased her husband. It appears that the property had been deeded to Grace Padgham, petitioner's wife, and petitioner testified there was an oral understanding that she was to hold it in trust for Mrs. Bryan's son, Everett Allen. He further testified that he (petitioner) had arranged to sell it to Yoakam and that it was to be improved, but by reason of being unable to have it zoned for some particular purpose, the deal was not consummated. On April 26, Mrs. Wright drew her check to Yoakam for $1,500. She says petitioner never advised her that there was any question about the deal but he says he told her the situation. The fact remains that she never received a deed of trust. She renewed her note at the bank on July 25, 1930, and, on November 6, 1930, was obliged to borrow the money from Miss Warrington for the purpose of paying the bank because the bank would no longer carry it without the trust deed as security. She agreed that Miss Warrington should have the Yoakam trust deed and mortgage as security for the loan. About this time petitioner transmitted to the bank a certificate for a beneficial interest owned by him in the Norumbega Town and Country Club of the face value of $5,000. Instead of the trust deed, petitioner on January 29, 1931, mailed Miss Warrington Mrs. Wright's note for $1,300, which the latter had delivered to him for the former, together with certificates of beneficial interest in the same organization for the face value of $2,500, and also delivered other certificates to Mrs. Wright. Both checks of Mrs. Wright to Yoakam bore the indorsement of Yoakam, followed by that of petitioner. The latter testified that he paid out the sum for Yoakam. The fact remains that Mrs. Wright received very little interest on the note although she says she requested Mr. Padgham to collect it for her many times. Also she says she requested proper security, that is, the trust deed, on many occasions. Petitioner wrote her on June 1, 1932, saying that he was adjusting the interest by crediting Mrs. Wright with payment on account of his fees. It must be stated that Mrs. Wright believed she was lending her money on good security to a responsible person without knowledge of the condition of the title. Another very significant fact was testified to by her. The original note of Yoakam and his wife for $3,500 was delivered to the petitioner for Miss Warrington when Mrs. Wright borrowed the $1,300 from her and, when Mrs. Wright received the note back in the settlement with petitioner, the clause reciting that it was secured by a deed of trust to a certain title company had been deleted. Upon discovering many of the things which have been recited herein, Mrs. Wright employed other counsel and secured a final settlement with petitioner in which he accepted the Yoakam note for the note of $4,058.06, which she had given him in the purported settlement of December, 1932.

Testimony was introduced concerning some other transactions which, if it be true, subjects petitioner to criticism, but we have recited the important matters. It has been impossible to set forth all of the testimony, but from a careful consideration of the transcript we are satisfied that the salient features have been amply demonstrated as we have set them forth; and there is no room for the contention that the evidence is insufficient to warrant the recommendations of the board of governors.

The contention is advanced by petitioner that he was not adequately represented by counsel of his own choosing. We are unable to agree with him in this regard. The conduct of his attorney, so far as it appears from the record, seems to have been well calculated to serve the best interests of petitioner. If there be any complaint to be made of the defense it must fall upon petitioner. It is manifest from a reading of the record that many of his answers were designed to confuse rather than clarify, probably because to clarify would have been to confess.

There is no evidence in the record justifying the claim of petitioner that he was in ill health during the hearing before the board of bar governors.

With respect to the discipline, the local committee recommended and the board adopted its recommendations as follows:

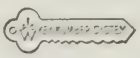
Count I of the first notice to show cause, disbarment; count II of the first notice to show cause, suspension for one year; second notice to show cause, suspension for one year; Banning ranch transaction, sus-

pension for three years; Beaumont property transaction, suspension for one year; Harkness avenue property transaction, disbarment; and two other matters, reprimand.

We have no doubt, in view of the flagrant nature of the proceedings, that in petitioner's case we are not confronted with an isolated instance of an attorney stepping beyond the rules of professional conduct, perhaps because of the pressure of forces beyond his power to resist temporarily, but rather by a confirmed policy of endeavoring to enrich himself by artifice and device at the expense of those who reposed confidence in him. We have difficulty in finding apt words in which to properly stigmatize the conduct of one who stoops so far from the professional attitude to further his own ends that truth and veracity become strangers in his dealings with his clients. Such a one cannot be tolerated among the ranks of those whose duty it is to serve first, and whose remuneration, although essential, is a matter of secondary importance.

The order is that petitioner be disbarred from the practice of the law in all of the courts of this state, commencing 30 days from June 17, 1936.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.



6 Cal.2d 493

In re McCONNELL'S ESTATE.

McCONNELL v. BIBLE INSTITUTE OF LOS ANGELES et al.

L. A. 14748.

Supreme Court of California.

June 17, 1936.

Rehearing Denied July 16, 1936.

1. Bills and notes ⇐316

Assignee of note giving no consideration therefor stands in shoes of assignor.

2. Gifts ⇐32(1), 67

Gift of note, either inter vivos or causa mortis, cannot create obligation in favor of donee against estate of donor.

3. Partnership ⇐83

One partner is entitled to no more compensation than another in absence of agreement to contrary.

4. Wills ⇐59

Execution of prior will providing for legacy does not create vested right in absence of agreement to provide for legacy supported by valuable consideration.

5. Contracts ⇐76

Statute providing that moral obligation originating in some benefit conferred on promisor or prejudice suffered by promisee may be good consideration for promise means that moral obligation is sufficient to support express promise only where good and valuable consideration has once existed (Civ.Code, § 1606).

6. Limitation of action ⇐15

That instrument was executed which would have amounted to waiver of statute of limitations or renewed promise if legal debt had existed cannot create debt which was not existent in fact.

7. Bills and notes ⇐92(7)

Services rendered by member of partnership without agreement for additional compensation from copartner, and advice to former partner after dissolution of firm for which no payment could have been enforced, and fact that note was executed in lieu of bequest to payee in maker's will, *held* insufficient consideration for note reciting services and advice to maker over period of 15 years as consideration for its execution.

8. Bills and notes ⇐493(4)

Where testimony of payee of note conclusively establishes that no consideration was given for note, presumption that note was supported by consideration disappears as to payee and his assignees, notwithstanding that payee was called as witness by representative of estate of maker (Code Civ. Proc. § 1963, subd. 21).

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Proceedings in the matter of the estate of Lee A. McConnell, deceased, on the petition of the Security-First National Bank of Los Angeles for approval of its account as special administrator of the estate of Lee

A. McConnell, deceased. From a portion of an order approving the account which allowed the claim of the Bible Institute of Los Angeles and overruled objections thereto, Frank E. McConnell contestant appeals.

Reversed.

Prior opinion, 50 P.(2d) 505.

Meserve, Mumper, Hughes & Robertson and William Larrabee, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Newby & Newby, Nathan Newby, Walter F. Haas, and Jones, Stephenson, Palmer & Moore, all of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondents.

PER CURIAM.

This case was taken over after decision by the District Court of Appeal, Second District, Division 1. After further consideration of the points raised by respondent we are satisfied with the disposition made by the District Court and we adopt the following portions of the opinion by Mr. Justice Roth, sitting pro tempore, as a portion of the opinion of this court, with the addition of two insertions indicated by the punctuation:

"This is an appeal from that portion of an order approving an account in the above estate, which allows the claim of the Bible Institute of Los Angeles in the sum of $5,000, and overrules the objections of Frankie E. McConnell, appellant and contestant, wife of the deceased, to such claim.

"The claim is predicated on a promissory note in words and figures as follows:

"'Los Angeles, California,

"'Dec. 6th, 1927

"'For value *received* I here *by* instruct the administrator or executor of my estate to pay to J. M. Irvine or order the sum of Five thousand Dollars within six months from date of my death.

"'[Signed] Lee A. McConnell,

"'1701 North Ogden Drive

"'Hollywood, Calif.

"'The above note is payment of service and advice rendered for a period of 15 years. Dec. 6th, 1927.

"'Lee A. McConnell

"'Without recourse, I hereby assign and transfer the within note to the Bible Institute of Los Angeles, (a Religious corporation).

"'Dated January 9th, 1928.

"'[Signed] J. M. Irvine.'

[1] "The sole question presented on this appeal is whether J. M. Irvine, the payee named in the note and assignor of the claim herein, gave valuable consideration for the note, or whether the deceased, the maker of the note, attempted to make a gift thereof. It is admitted that the Bible Institute gave no consideration for the note. It, therefore, stands in the shoes of the payee and assignor.

[2] "It is settled that the gift of a promissory note, either inter vivos or causa mortis, cannot create an obligation in favor of the donee against the estate of the donor. Coon v. Shry, 209 Cal. 612, 289 P. 815; Tracy v. Alvord, 118 Cal. 654, 50 P. 757; Wisler v. Tomb, 169 Cal. 382, 146 P. 876; Hironymous v. Hiatt, 52 Cal.App. 727, 199 P. 850.

"The evidence shows without dispute that Irvine and deceased had been in partnership approximately 12 years beginning in 1906 and ending in 1918, on which latter date the partnership was terminated, and the assets thereof equally divided" and their accounts as partners settled. "During the existence of the partnership, because of illnesses of and certain trips made by deceased, Irvine put in more time on partnership affairs than did the deceased. This fact was not taken into account at the time the partnership affairs were settled in 1918, nor did the articles of copartnership provide for extra compensation to either of the partners for extra or unusual services rendered to the partnership. After the dissolution of the partnership, both men continued what appeared to be a cordial social relationship. It appears that Irvine on at least two occasions advised deceased with reference to things that deceased was doing or had in contemplation for the Bible Institute. The evidence on this phase of the matter is vague and unsatisfactory. There is, however, no evidence that Irvine expected to be paid, or that the deceased expected to pay for such advice. Further, the circumstances under which the note was given, as hereinafter detailed, do not remotely suggest that the note was given in consideration for such advice. The note in question appears to have been executed on the date it bears, December 6, 1927, which was approximately nine years after the actual and legal termination of the partnership which had existed between the two men. At that time the following conversation took place, according to the uncontradicted testimony of Irvine:

" 'He said to me that he had made a new will and that in place of specifying the amount of five thousand dollars to be paid to me out of his estate, that he had given me this estate note in its place; that he felt it would be a more satisfying thing to have, that there would be less possibility of its being contested; and he said also that he was placing this endorsement on the note so that there would be no question as to its validity. * * * He said that he recognized the fact that he was under obligations to me, and for that reason he had in *one or more wills preceding this date,* remembered me in his will for the amount of five thousand dollars, but that he was changing the will now and placing it in this form.' (Italics ours.)

"Irvine further testified showing the nature of the services rendered as follows: 'I don't recall that there was anything very definitely stated on that line, Mr. Newby. He recognized the fact that during his European trip I had been under a very severe strain, due to the sudden death of my mother, and sudden collapse of my sister, and the responsibility for her care on my shoulders, and the entire business affairs; and it happened to be an active period in the business; and one remark—when he returned, was that he felt he had better remain away, because the business prospered more during his absence than when he was present. I recollect that distinctly. Q. And in which he informed you that he felt that he was indebted to you for the extra services you had rendered? A. He so stated. * * * A. The entire business of the copartnership was in my hands during the latter years of the partnership, except that Mr. McConnell would take some interest in negotiating a real estate loan, or if a sale of property was in progress, he would take some interest in that; but so far as the management of the properties under our control was concerned, and the matter of insurance and the question of rents, and all of those details of the office, he had nothing whatever to do with it, and refused to discuss them with anyone in the office, referring them in every case to me.'

[3, 4] "All of the services above referred to were rendered during the existence of the partnership," the affairs of which had been settled and adjusted between them, "and it was undisputed that the partnership agreement which existed between the two men required each to render equal services. It is also undisputed that in previous wills, which had been executed prior to the execution of the note in question by deceased, the deceased had provided a legacy of $5,000 for Irvine. While it is true that there is vague testimony which shows that Irvine gave advice to the deceased after the dissolution of the copartnership on two occasions concerning matters the deceased had in contemplation for Bible Institute, there is no showing of any circumstances which would have enabled Irvine to state a cause of action for the reasonable value of said advice, if he had been so inclined, and the foregoing excerpts from Irvine's testimony demonstrate that the 'service and advice rendered for a period of 15 years' recited in the note refers to service and advice rendered during the existence of the partnership between the two men. This conclusion is strengthened further by the admitted fact that the deceased, prior to delivery of the note here in question, had remembered Irvine 'in one or more wills preceding * * * date' of the note. It is settled that one partner is entitled to no more compensation than another, in the absence of an agreement to the contrary. Cook v. Bryson, 89 Cal.App. 445, 265 P. 289; Nevills v. Moore Min. Co., 135 Cal. 561, 67 P. 1054; Wright v. Robinson, 51 Cal.App. 461, 197 P. 149. In view of the fact that the partnership affairs were settled in 1918 and no provision made for the extra services rendered by Irvine, and the further fact that the agreement of partnership called for no extra or special compensation for extra or special services rendered by the partners, it cannot be said that the execution of the note in 1927 was in payment of a legal claim. Osment v. McElrath, 68 Cal. 466, 9 P. 731, 58 Am.Rep. 17. The execution of the prior wills providing for a legacy does not, in the absence of an agreement so to do, supported by valuable consideration, create any vested right. Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P. 242; In re Estate of Berger, 198 Cal. 103, 243 P. 862; Cohn v. Klein, 209 Cal. 421, 287 P. 459. * * *

[5] "Respondent contends that even though there is no valuable consideration for the note in question, that there is such a moral consideration or obligation as will support a contract within the meaning of section 1606 of the Civil Code. Said section is as follows: 'An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suf-

fered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.'

"It is true that in some states a moral, as distinguished from a legal consideration, will under some circumstances be sufficient to form a valid and binding contract (Rask v. Norman, 141 Minn. 198, 169 N.W. 704, 17 A.L.R. 1299), but such has never been the rule in this state. California cases have construed said code section to mean that 'a moral obligation is sufficient to support an express promise, where a good and valuable consideration has once existed.' 6 Cal.Jur. 181, § 124; Sullivan v. Sullivan, 99 Cal. 187, 33 P. 862; Peek v. Peek, 77 Cal. 106, 19 P. 227, 1 L.R.A. 185, 11 Am.St.Rep. 244; McCormick v. Brown, 36 Cal. 180, 95 Am.Dec. 170; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; Bickerdike v. State, 144 Cal. 681, 78 P. 270; Pacific Rys. Adv. Co. v. Carr, 29 Cal.App. 722, 157 P. 529; Royer v. Kelly, 174 Cal. 70, 161 P. 1148; 13 Cor.Jur. 360.

[6] "The uncontradicted evidence in this case demonstrates that Irvine, conceding that he performed more services than did the deceased for the partnership which existed between himself and deceased, never had a legal claim for extra compensation for such services against the partnership or against the deceased. If Irvine had had such a legal claim and the statute of limitations had run against the same, then a subsequent written promise in the form of a promissory note, or in any form, by deceased to pay $5,000 would be binding, whether it arose 'upon the fact that the debtor has received and the creditor parted with the consideration for the debt, that it has never been in fact paid, and that in foro conscientiae, it ought to be paid, notwithstanding the bar' (6 Cal.Jur. 182); or, because a debt once incurred is always a debt until paid or discharged. The law may and does permit a debtor to prevent collection of a debt by a plea of the statute of limitations or by bankruptcy, but there is no requirement of the law that a debtor shall insist upon such benefits; and there is no doubt that they may be waived. There is no evidence in this case which shows that the assignor of respondent Bible Institute ever had a legal claim. It follows that there was no occasion for the alleged debtor to waive anything. The fact that an instrument was executed which would have amounted to a waiver or a renewed promise if a legal debt had existed, cannot create a debt, when none in fact existed."

[7, 8] The respondent relies upon the presumption of consideration arising from the written instrument (Code Civ.Proc. § 1963, subd. 21) as creating a conflict with the testimony of Irvine sufficient to support the implied finding of consideration. It insists that Irvine having been called by the appellant, the presumption in favor of the respondent creates a conflict with his testimony. Smellie v. Southern P. Co., 212 Cal. 540, 299 P. 529. While this case does not come squarely within the rule that a fact is proved against a presumption and causes it to disappear when it is established by the uncontradicted testimony of the party himself or of his witnesses (Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269), nevertheless, under the peculiar facts here, it is apparent that the witness Irvine, the original payee and respondent's assignor, although called by the appellant, was in reality so closely identified with the respondent that, as against the uncontradicted and unimpeached testimony, a contrary presumption in favor of the respondent cannot be given any weight. The respondent, having paid no consideration to Irvine on the transfer of the note, is his assignee and as such whatever rights it has are wholly dependent upon the rights of Irvine. As such assignee it stands in the shoes of its assignor. Irvine was the only witness. His testimony summarized above conclusively established that the note was unsupported by consideration. Under such circumstances we must hold that when the testimony of the payee of a note conclusively establishes that no consideration was given for the note, the presumption that it is supported by consideration, so far as the payee and his assignees are concerned, disappears from the case.

That portion of the order appealed from which approves the allowance of the claim on the Irvine note is reversed.

6 Cal.2d 485

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. CRYER et al.

L. A. 15620.

Supreme Court of California.

June 17, 1936.

1. Corporations ⊜237

Liability of stockholder under former statute is limited to debts or obligations of the corporation contracted or incurred during time he was a stockholder, and no subsequent acknowledgment or promise by corporation will make one liable who was not a shareholder when debt was incurred (Civ. Code, § 322, as amended by St.1917, p. 786, § 1).

2. Corporations ⊜237

Where notes were given by agent of disclosed corporate principal and later corporation guaranteed the notes after defendants became stockholders, defendants *held* not liable under statute imposing liability on stockholders for proportionate share of debts or obligations incurred during time they were stockholders (Civ.Code, § 322, as amended by St.1917, p. 786, § 1).

3. Principal and agent ⊜132(1)

A disclosed principal may be held liable on a contract made solely in the name of the agent.

4. Principal and agent ⊜132(1)

Where, at the time a contract is made with agent of disclosed principal there is an election or intent by third party to take agent as debtor or obligor, the principal is not liable, but where no such election or intent appears, the principal is bound.

5. Principal and agent ⊜131

Where a person is known to be acting as agent of disclosed principal, the presumption is that the principal and not the agent is bound.

6. Corporations ⊜414(1)

Liability of a corporate disclosed principal for obligations evidenced by notes signed by agent is based on quasi contractual rules and is not barred by statute declaring only persons whose signatures appear on negotiable instruments are liable (Civ.Code, § 3099).

7. Bills and notes ⊜59

A disclosed or partially disclosed principal is not liable as a party to a negotiable instrument in which he is not named, but may be subject to quasi contractual or other liability where he has received benefits of the contract.

8. Appeal and error ⊜854(1), 1122(1)

Supreme Court is not bound by reasons assigned by trial court for its conclusion, but may make such additional findings under evidence as necessary to affirm the judgment (Code Civ.Proc. § 956a).

9. Courts ⊜30

Where complaint sought recovery from several stockholders for amounts within jurisdictional limits of trial court, fact that ultimate judgment was entered against one or more of several stockholders for an amount below such jurisdictional limit did not deprive trial court of jurisdiction.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by the Bank of America National Trust & Savings Association against George E. Cryer and others. From a judgment for defendants on the first cause of action, plaintiff appeals, and from a judgment for plaintiff on the second cause of action, certain of the defendants appeal.

Affirmed.

Prior opinion, 49 P.(2d) 864.

Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for appellant.

George E. Cryer, R. Alston Jones, Hurt, Farner & Hurt, William A. Farner, and Arthur C. Hurt, all of Los Angeles, Nichols, Cooper & Hickson and Bert L. Cooper, all of Pomona, and John A. Jorgenson and S. W. Newman, both of Los Angeles, for respondents.

WASTE, Chief Justice.

This is an action against several stockholders of the Blue Bird Furniture Manufacturing Company to enforce payment of the respective amounts alleged to be due on their statutory liability for certain debts of the corporation incurred prior to the repeal of the statute imposing such liability. Judgment went for the defendants on the first cause of action and for the plaintiff on the second cause of action. Plaintiff and certain of

the defendants appeal from that portion of the judgment adverse to them.

On May 29, 1923, one Erma Blacksmith, who was then employed as secretary to the president of the Blue Bird Furniture Manufacturing Company, executed a mortgage in favor of plaintiff's predecessor in interest to secure a loan of $125,000 and a further loan subsequently to be made. At a later date, August 11, 1925, an additional sum of $50,000 was loaned on the security of the mortgage. The evidence undisputably discloses, and the trial court found, that in arranging these two loans and in executing the notes and mortgage incidental thereto, Erma Blacksmith was acting as the agent of the corporation. In fact, the property mortgaged was owned by the corporation and almost immediately after the execution of the mortgage was deeded back to the corporation. It was also found that the proceeds of the loans were paid to the corporation and employed by it in the conduct of its business. All interest payments on the loans were made by the corporation. In short, the loans were handled through an agent solely for the convenience of the corporation. The evidence is also uncontradicted, and the trial court found, that the mortgagee, plaintiff's predecessor in interest, was apprised of the true situation and was fully cognizant of the fact that Erma Blacksmith was acting as the agent of the corporation.

At this point we pause to state that it is neither alleged nor proved that any of the defendants owned stock in the corporation at the time of the execution of the mortgage or the making of the two loans mentioned. However, on April 23, 1930, the corporation requested of plaintiff an extension of one year on the notes for which the security had been given. In the communication to plaintiff the corporation reviewed the facts as to the execution of the Blacksmith notes and mortgage, recited that title had been vested in Erma Blacksmith "for the purposes of convenience" and promised to pay the amount of the notes in the following language: "The undersigned corporation also covenants and agrees to pay or cause to be paid by or in the name of the mortgagor in said mortgage named, the principal and interest of the promissory notes secured thereby on or before the date of the extended maturity thereof." The extension was granted by plaintiff and the notes not having been paid within the extended period, this action was commenced on March 7, 1933, against the defendants who, though apparently not stockholders at the times of the execution of the notes, had become and were such at the time of the "guaranty" thereof by the corporation.

[1] In the first cause of action the plaintiff seeks to recover from each defendant his proportionate share of the deficiency remaining after foreclosure of the mortgage. It is, of course, well established that the liability of a stockholder, under our former statute (Civ.Code, § 322, as amended by St.1917, p. 786, § 1), was limited to a proportionate share of the debts or obligations of the corporation contracted or incurred during the time he was a stockholder and did not exist as to corporate debts or obligations contracted or incurred before he acquired the status of stockholder and no subsequent acknowledgment or promise by the corporation, whatever its form, could make one liable who was not a share owner when the debt was incurred. These principles are stated and supporting authorities are cited in 6a California Jurisprudence, 1000–1008, §§ 567–569.

[2] In substance, it is the plaintiff's theory in support of its first cause of action that the corporate liability for the indebtedness represented by the two notes above described was contracted or incurred not as of the times of the execution of the notes, at which times the defendants apparently owned no stock, but rather as of the time of its guarantee of the notes, approximately seven years later, when they were stockholders. This contention is untenable.

[3] As we have already stated, the loans giving rise to the indebtedness were as a matter of "convenience" made to an agent of a disclosed principal. At the time the money was advanced and the notes therefor executed, it was known to the creditor, plaintiff's predecessor in interest, that the maker of the notes was acting as agent for the Blue Bird Furniture Manufacturing Company, which company actually received the money so advanced, employed the same in the conduct of its business and thereafter paid all interest installments on such indebtedness. While some confusion and uncertainty existed in our early cases, it is now definitely settled

in this state that a disclosed principal may be held liable on a contract made solely in the name of the agent. Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 696, 697, 272 P. 579, 582. The cited case quotes from the case of Geary St., P. & O. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539, to the following effect:

[4, 5] "We are also of the opinion that the better reason, as well as the weight of authority, is against the proposition that the mere fact that the principal is known to the third person at the time he contracts with the agent prevents such third person from holding the principal liable on the contract made in the name of the agent. * * * That the principal is not liable in such a case if the circumstances, or the terms of the contract, or the two combined, show an intent by the other party to take the agent as his debtor or obligor, in preference to the principal, is, as we have said, well established, and it is manifestly in accordance with reason and justice. In such a case the election takes place at the time of the making of the contract. But where no such election or intent appears, and there is nothing more than a contract made in the name of the agent, knowing him to be such and with knowledge of the identity of his principal, the case is, and should be, governed by the well-known principle that he who acts by another acts by himself, that the contract of the agent, within the scope of his authority, is in legal effect the contract of the principal. * * * An examination of the decisions on the subject shows that the idea that the principal cannot be held liable in cases where the third person, at the time of contracting, knew the principal and his relation to the transaction, arises from the unfounded assumption that, since the decisions holding the principal liable when the contract does not disclose his name or interest, refer to him as the 'undisclosed principal,' the doctrine does not prevail when he is known. But this language is used because the principal was insisting, not that he is not liable when he is known, but that he is not liable when the contract does not on its face purport to bind him, or to be for his behoof or benefit. It is this circumstance that is referred to by the word 'undisclosed.' The principal would have no standing in court to say he is not liable when his authorized agent makes a contract purporting to be for him and the party taking it had full knowledge of the fact that it was for him. The liability when he is undisclosed does not arise from his not being known, although sometimes fraud from that fact is also involved, but from the fact that the contract of his authorized agent, though not in his name, is really for his benefit and in his business. Thus Mr. Mechem says: 'The principal is also liable on all informal contracts entered into on his account and by his authority and not expressly made on the agent's responsibility rather than the principal's. * * * Where a person is known to be acting as the agent of a disclosed principal, the presumption is that the principal and not the agent is to be bound.' (2 Mechem on Agency, sec. 1710; see, also, sec. 1717.)"

This principle is determinative of plaintiff's appeal from the judgment in favor of the defendants on the first cause of action. In other words, the creditor, plaintiff's predecessor in interest, being aware of the fact that the loans were being made through the medium of an agent to a disclosed principal who intended to and did employ the same in the conduct of its business, paying all interest charges thereon, from the inception of the contract could have looked to and held the corporate entity liable for the indebtedness so incurred. There is nothing in the record showing an intent on the creditor's part to take the agent as his debtor or obligor, in preference to the principal. As stated in the case above quoted from, the mere execution of the contract in the name of the agent, knowing him to be such and with knowledge of the identity of his principal, is not indicative of an intent to accept the agent alone as the debtor or obligor. This being so, it necessarily follows that the corporate indebtedness was contracted or incurred at a time when the defendants apparently owned no stock in the corporation and they are not therefore proportionately liable for any part of said indebtedness. However, even if they had owned stock in 1923 and 1925, when the two loans referred to in the first cause of action had been made, their statutory stockholders' liability based thereon would have been barred long prior to the institution of this action in 1933. 6a Cal.Jur. 1026–1037, §§ 574, 575, and authorities there cited. The subsequent guaranty of said indebt-

edness by the corporation in 1930, when the defendants were stockholders, could not serve to impose any liability on them or extend any liability that may have theretofore existed. 6a Cal.Jur., supra.

[6] In announcing our conclusion on this phase of the litigation we are fully aware of the effect of section 3099 of the Civil Code, which, in substance, declares that only persons whose signatures appear on negotiable instruments are liable thereon. The liability incurred by the corporation at the inception of these loans was not, and could not be on the notes executed in the name of the agent alone. Our language in the above discussion was carefully framed to state that the corporate liability existed as to the indebtedness represented by the notes. This liability of the corporation, at the times of the making of the loans and prior to the written guaranty thereof some seven years later, is based on accepted rules of quasi contract and is the result of the legal effect of the benefits of the transactions having been received by the disclosed principal. The principle finds expression in 2 Mechem on Agency (2d Ed.) 1319, § 1736, where, after stating the usual rule that persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, it is declared that "it is entirely possible, however, notwithstanding this rule, that an action may, in many instances, be maintained by the original creditor against the principal, not upon the note itself, but upon the consideration for which it was given." To the same effect see Coaling Coal & Coke Co. v. Howard, 130 Ga. 807, 61 S.E 987, and other cases cited in the annotation thereof in 21 L.R.A.(N.S.) 1071, 1074. The plaintiff here stands in the shoes of but acquired no greater rights than its predecessor in interest.

[7] Our conclusion also finds support in the Restatement of the Law of Agency, § 152, wherein it is stated that while "a disclosed or partially disclosed principal is not liable as a party to a negotiable instrument in which he is not named," nevertheless, in comment "C" appearing under said section, it is declared that "he may be subject to quasi-contractual or other liability, as where he has received the benefits of the contract." See, also, section 141, subdivision b.

[8] From what has been said, it necessarily follows that the trial court was correct in entering judgment for the defendants on the first cause of action. We are not bound by the reasons assigned by the trial court for its conclusion (2 Cal.Jur. 808, § 476), but we may, pursuant to the authority conferred by section 956a of the Code of Civil Procedure, make such additional findings under the evidence as may be necessary to affirm the judgment. The findings and conclusions of the court below as to the action having been prematurely commenced and as to the invalidity of the corporate guaranty may be, and are, therefore, disregarded as surplusage. In lieu thereof, the findings of fact and conclusions of law are amended by adding thereto the following: That as a result of the execution and delivery of the notes and mortgage described in finding No. III, by Erma Blacksmith as the agent for the Blue Bird Furniture Manufacturing Company, and the receipt and use of the proceeds by said company, as described in finding No. IV, the company became liable to the creditor, not on the notes but for the indebtedness represented thereby, as of the time of the making of the loans.

Consistently, the conclusions of law are also amended to provide as follows: The plaintiff is not entitled to judgment on the first cause of action for either of the following two reasons:

1. There is neither allegation nor proof that any of the defendants were stockholders in the company in 1923 or 1925 when the corporate indebtedness was incurred; and

2. Any stockholders' liability based thereon, even if it existed as to some or all of the defendants, had become barred by the running of the statute of limitations prior to the commencement of this action.

Our conclusion makes it unnecessary that we here consider other contentions of the parties incidental to the propriety or impropriety, as the case may be, of that portion of the judgment on the first cause of action.

[9] As stated at the commencement of this opinion, certain of the defendant stockholders noticed an appeal from that portion of the judgment on the second cause of action wherein they were respectively adjudicated to be liable to the plaintiff for their proportionate share of an indebtedness incurred by the company in its own name when it borrowed $20,000 on July 25, 1930, at which time the several defendants owned stock in the company. The indebtedness alleged in the second cause of action was contracted and incurred by

the company within three years of the commencement of this action. The defendants who have appealed from that portion of the judgment adverse to them on the second cause of action urge that the court below was without authority to proceed because the amount involved was below the jurisdictional limit of said court. We find no merit in the contention. As originally filed, the complaint sought recovery from the several stockholders in varying amounts, all within the jurisdictional limits of the trial court. The fact that ultimately judgment was entered against one or more of the several stockholders for an amount below such jurisdictional limit is immaterial. Moreover, this identical contention was advanced in an application for a writ of prohibition heretofore filed with and denied by this court.

The judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; THOMPSON, J.



6 Cal.2d 477

ENGELBERTSON et al. v. LOAN & BUILDING ASS'N OF SANTA BARBARA et al.

L. A. 15602.

Supreme Court of California.

June 12, 1936.

1. Mortgages ⇐346

Notice to trust deed grantor of default *held* to sufficiently comply with statutory requirement that notice set forth nature of breach of obligation, although not stating amount of items in default (Civ.Code, § 2924, as amended by St.1933, p. 1669).

2. Mortgages ⇐346

Notice of default, stating that beneficiary had exercised its option and declared all sums secured by trust deed immediately due and payable, *held* to constitute declaration of exercise of option to accelerate maturity of entire trust deed obligation (Civ.Code, § 2924, as amended by St.1933, p. 1669).

3. Mortgages ⇐335

Sale of property under trust deed *held* not constructively fraudulent on ground that sale was made after tender of amount due, where tender did not include costs incurred.

4. Mortgages ⇐369(3)

Mere inadequacy of price, without other irregularity, unfairness, or oppression, is not sufficient ground for setting aside sale under trust deed.

5. Mortgages ⇐357

General depression of market for realty does not entitle trust deed grantor to demand postponement of sale under trust deed.

6. Pleading ⇐36(2)

In action to set aside sale under trust deed, where complaint alleged recordation of notice of default in S. county, where property was situated, although answer mistakenly alleged recordation in L. county, finding that notice was recorded in S. county was authorized, since complainants were bound by admission in their pleading.

In Bank.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by C. W. Engelbertson and another against the Loan & Building Association of Santa Barbara and others. Judgment for defendants, and plaintiffs appeal. On defendants' motion to dismiss the appeal or affirm the judgment.

Motion to dismiss the appeal denied, and judgment affirmed.

C. W. Engelbertson, of Santa Barbara, for appellants.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondents.

THOMPSON, Justice.

The respondents have moved to dismiss this appeal or affirm the judgment on the ground that the questions raised are without merit and so unsubstantial as not to require further argument. The action is one to quiet title and to set aside a sale under a trust deed. From a judgment in favor of the defendants, the plaintiffs have appealed upon the grounds that the notice of default fails to comply with section 2924 of the Civil Code, as amended by St.1933, p. 1669, the terms of the deed of trust were not complied with, in that no notice was given by the beneficiary of the exercise of his option to accelerate the due date of the note secured, constructive fraud in the sale, failure to al-

lege or prove recordation of the notice of default in the county where the property was situated, failure of the court to find upon the value of the property, and, finally, it is asked that if the sale be held valid the plaintiffs be paid the surplus of the purchase price over the sum in default. This last point is based upon the contention that there had been no acceleration of the entire obligation.

[1] As to the notice of default, the appellants contend that the requirement of section 2924, as amended that the notice of default shall contain "a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, * * * setting forth the nature of such breach" is not met for the reason that the notice does not specify the amounts of the items in default. The notice specifies default as to "the instalment of interest falling due on December 1, 1933, and all installments of interest subsequently falling due," balance of $2.32 on the September 1, 1932, installments of dues on Building & Loan shares pledged by the trustors and all subsequent installments and "certain sums of money advanced or expended under the terms of said deed of trust, together with interest thereon as provided in said deed of trust." We think this sufficiently complies with the requirement that the nature of the breach be set forth. There is nothing in the section which warrants the construction that a statement of the amount of the items is required.

[2] The notice of default also stated that the beneficiary had exercised its option and declared "said indebtedness and all sums secured by said deed of trust immediately due and payable." That this is a declaration of the exercise of the option to accelerate maturity of the entire obligation secured by the deed of trust is settled by Williams v. Koenig, 219 Cal. 656, 28 P.(2d) 351, and R. G. Hamilton Corp., Ltd., v. Corum, 218 Cal. 92, 21 P.(2d) 413. This conclusion also disposes of the appellants' last contention.

[3-5] The claim of constructive fraud in the sale by the trustee is founded upon sale to the beneficiary for $2,500 (the value of the property being alleged in the complaint to be $5,000), refusal to postpone the sale because of the poor market for real estate during the general economic depression, sale on insufficient notice and after a tender of the amount due. The notice has been determined to have been sufficient. The point as to tender has no merit, in that it admittedly did not include the costs incurred. Mere inadequacy of price without other irregularity, unfairness, or oppression is not sufficient ground for setting aside a sale legally had under a trust deed. Sargent v. Shumaker, 193 Cal. 122, 223 P. 464. Nor does the general depression of the market for realty bestow upon the obligor the right to demand a postponement. Brennan v. American Trust Co., 3 Cal.(2d) 635, 45 P.(2d) 207; California Securities Co. v. Grosse, 3 Cal.(2d) 732, 46 P.(2d) 170.

[6] Since inadequacy of price is not alone ground for setting aside the sale, the failure of the court to find upon the value of the property is immaterial. Nor do we think there is any merit in the contention that the finding that the notice of default was recorded in Santa Barbara county was unsupported by the evidence. While it is true that the answer mistakenly alleged recordation in Los Angeles county, the complaint alleged recordation in Santa Barbara county. The appellants are bound by this admission in their pleading.

The motion to dismiss the appeal is denied, and the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.



6 Cal.2d 778

KIRK et al. v. LOAN & BUILDING ASS'N OF SANTA BARBARA et al.

L. A. 15603.

Supreme Court of California.

June 12, 1936.

Appeal and error ⇐801(1), 1126

On motion to dismiss appeal or affirm judgment on ground that no substantial questions had been raised, where propositions relied on as requiring reversal of judgment were determined contrary to contentions of appellant, motion to dismiss appeal was denied and judgment was affirmed.

In Bank.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by Elmer H. Kirk and another against the Loan & Building Association of Santa Barbara and others. Judgment for defendants, and plaintiffs appeal. On defendants' motion to dismiss the appeal or affirm the judgment.

Motion to dismiss the appeal denied, and judgment affirmed.

C. W. Engelbertson, of Santa Barbara, for appellants.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondents.

THOMPSON, Justice.

This is an appeal from a judgment for the defendants in an action to quiet title and set aside a sale under a deed of trust. Motion to dismiss the appeal or affirm the judgment upon the ground that no substantial questions have been raised has been made by the respondents. The propositions relied upon as requiring a reversal of the judgment were all urged in Engelbertson v. Loan & Building Ass'n (Cal.Sup.) 58 P. (2d) 647, this day decided, and were therein determined contrary to the contentions of the appellants.

The motion to dismiss the appeal is denied, and the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.

6 Cal.2d 464

KELLETT v. MARVEL.

L. A. 13246.

Supreme Court of California.

June 10, 1936.

1. Appeal and error ⇐657(1)

Appellant *held* not entitled to have clerk's and reporter's transcripts which had been certified by trial judge returned to trial court for correction because of erroneous inclusion of certain orders and papers in clerk's instead of reporter's transcript.

2. Appeal and error ⇐417(1)

Notices of appeal are liberally construed to preserve the right of review, unless it appears that respondent has been misled by the misdescription.

3. Divorce ⇐181

Notwithstanding notice of appeal in divorce action was ambiguous in that it named the order appealed from, gave date on which no adjudication was made, and described it by reference to date, book and page of entry of final divorce decree in book of judgments, appellant would be considered as having noticed an appeal from the final judgment of divorce, where respondent had obviously not been misled.

4. Appeal and error ⇐428(1)

Although filing of a notice of appeal is a jurisdictional requirement and cannot be waived, absence of prejudice and efficacy of things done to give notice to other party that appeal has been taken may be considered in determining whether there has been a sufficient compliance with requirement of statute that notice stating the appeal be filed with clerk of court (Code Civ.Proc. § 1048).

5. Appeal and error ⇐428(1)

Where four actions growing out of divorce proceeding had been consolidated, if only for purpose of trial, and were bound to be considered together upon appeal if only because evidence taken applied to all, an entry in register of actions under the number of each case with a reference to place where notice of appeal was to be found in files constituted a substantial compliance with requirement that notice of appeal be filed in each case (Code Civ.Proc. § 1048).

6. Judgment ⇐633

Where it was apparent that action in which was rendered the judgment relied upon as res judicata as to three other actions growing out of a divorce proceeding was mistakenly included in stipulation for consolidation, and was before the court only for consideration on res judicata plea and in connection with issue of plaintiff's competence at time of rendition of judgment, plea *held* not to have been waived or case reopened by stipulation of consolidation.

7. Appeal and error ⇐925(1)

Notwithstanding statements of court and counsel relative to consolidation of four actions growing out of divorce proceeding may have been ambiguous, all presumptions were that trial court took proper course in asking for the consolidation in order that issues of fact might be tried together and

without delay, and that plea of res judicata was taken under submission as to each of them.

8. Judgment ⇐743(2)

That quiet title action relative to property involved in divorce proceeding was not commenced by plaintiff in divorce proceeding until after rendition of judgment in another action relied upon as res judicata as to issues involved in quiet title action, did not prevent successful intervention of such plea where plaintiff had proved no acquisition of title since rendition of judgment relied upon as res judicata.

9. Appeal and error ⇐910

Where complaint and findings on which was entered the judgment relied upon as res judicata as to three other actions growing out of certain divorce proceeding had not been brought up on appeal, Supreme Court was bound to presume that identical issues were determined therein as found by trial court.

10. Appeal and error ⇐1071(5)

Action of trial court in making additional findings in four consolidated actions growing out of a divorce proceeding *held* not error, in absence of prejudice, notwithstanding findings were unnecessary and immaterial in view of holding that judgment in one of such actions was res judicata as to others.

11. Appeal and error ⇐110, 870(6)

Order denying motion for new trial was not an "appealable order," but was reviewable upon appeal from the judgment.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Marion Clara Kellett against O. R. Marvel, administrator of the estate of Thomas N. Kellett, deceased, substituted for Thomas N. Kellett, deceased. From various orders, plaintiff appeals, and defendant moves to dismiss the appeals.

Judgment in accordance with opinion.

Prior opinion, 51 P.(2d) 183.

L. H. Phillips, Charles R. Thompson, and C. C. Caswell, all of Los Angeles, Marion Clara Kellett, in propria persona, and R. C. W. Friday, J. Paul Elliott, and James R. Jaffray, all of Los Angeles, for appellant.

William M. Morse, Jr., Sidney A. Shoop, George R. Maury, Neil G. Locke, C. S. Wagner, and Joe M. Crail, Jr., all of Los Angeles, for respondent.

THOMPSON, Justice.

This appeal involves four actions, all growing out of a divorce proceeding instituted by Marion Clara Kellett on July 29, 1927, and numbered D57350 in the trial court. Thomas N. Kellett defaulted and an interlocutory decree was entered incorporating a property settlement providing for a reconveyance to the husband of certain described realty, previously held by the parties in joint tenancy, payment to the plaintiff of $2,400 in monthly installments of $300 and the allotment to her of certain household furniture and personal property.

On April 16, 1928, Mrs. Kellett presented to the trial court a motion for relief under section 473 of the Code of Civil Procedure, seeking an order setting aside the interlocutory decree which had been granted her and also the contract of property settlement incorporated in the decree and two deeds executed in pursuance thereof. The motion was made upon the ground that the defendant had induced her to obtain the interlocutory decree and execute the property agreement through fraudulent misrepresentations, undue influence, and coercion. The motion was denied by the trial court, and the order of denial affirmed upon appeal by the District Court of Appeal on December 29, 1930 (Kellett v. Kellett, 110 Cal.App. 691, 294 P. 755) upon the ground that it was not a proper case for relief under that Code section.

After denial of her motion, Mrs. Kellett filed three other actions, all having for their object the nullification of the interlocutory decree which she had previously obtained. On May 31, 1928, pending the appeal from the order denying her motion under section 473 of the Code of Civil Procedure, complaint was filed in action No. D65544 seeking to set aside the interlocutory decree. The complete record of this action is not in the record now before us, but it was introduced in the trial court and the record brought up does contain a judgment in this action rendered in favor of the defendant on March 15, 1929. Up-

on this judgment, from which no appeal appears to have been taken, the defendant bases his plea of res judicata.

The complaint in action No. 306434 was filed by Mrs. Kellett on July 25, 1930. She therein asked to have her title quieted to an undivided share in joint tenancy of the property awarded to the defendant by the interlocutory judgment of divorce.

Action No. D92871 was begun by Mrs. Kellett on February 18, 1931. By her complaint in this action she asked to have set aside the decree in the divorce action (D57350) and the decree in action No. D65544 refusing to set aside the interlocutory decree.

On December 27, 1930, the plaintiff filed her opposition to the defendant's application for a final decree, supported by an affidavit setting forth as grounds of her resistance, cohabitation since the granting of the interlocutory decree and her incompetence at the time of its entry and during the divorce proceeding. The defendant filed a counter affidavit. On February 10, 1931, the plaintiff also filed (in the divorce action) a motion to deny the defendant's application for a final decree, and, on February 19, 1931, in open court and at the time set for hearing of the first-mentioned motion, moved to abate the entry of the final decree upon the ground of the pendency of action No. D92871, the complaint in which action had been filed by Mrs. Kellett the day before. After statement of counsel for defendant that the matter then before the court was the plaintiff's resistance to the filing of the final decree based upon the same matters as were relied upon in support of the motion for relief under section 473 of the Code of Civil Procedure and set up as grounds for relief in equity in action No. D65544, in which action the judgment had gone against her, and the disclosure of the pendency of actions numbered 306434 and D92871, the trial court requested a stipulation consolidating the whole matter for trial. The following written stipulation, which is the center of most of the controversies involved in this appeal, was filed in each case, including case numbered D65544, on February 20, 1931: "It is hereby stipulated by and between the attorneys for the plaintiff and the attorneys for the defendant herein, that the cases numbered D-65544, 306434, and D-92871, all being between Marion Clara Kellett and Thomas N. Kellett, may be consolidated with the above case No. D-57350, for hearing, and that all the matters therein contained may be heard and adjudicated at this time, and the decision entered herein shall be in complete adjudication of each case herein designated. It is further stipulated that a motion of resistance to the final decree, may also be heard at this time."

Under this stipulation, and the further stipulation that all testimony taken should apply in each case so far as competent, relevant, and material, the cases were tried on February 19, 20, and 24, 1931. Both parties produced witnesses who testified on the issues of the plaintiff's mental and physical condition, competency, and ability to understand the nature and effect of the divorce proceedings and action No. D65544, fraud and coercion on the part of the defendant, inducing her to obtain the interlocutory decree, collusion and condonation, reconciliation and cohabitation both prior and subsequent to the interlocutory decree.

On March 26, 1931, the court made an order in action No. D57350 denying the plaintiff's motion to resist the entry of the final decree of divorce. The order recited the consolidation of the motion in that case with cases Nos. D92871 and 306434 and the finding that "all of the matters set up in plaintiff's affidavit in said motion * * * are res adjudicata by virtue of said case numbered D-65544, said last named cause having been tried before the Honorable Leonard Wilson, in March, 1929. That said cause not having been appealed from has become final, and is, therefore, res adjudicata."

On the same day (March 26, 1931) the trial court rendered judgment for the defendant in action No. 306434, the quiet title action, reciting in its findings that the action was consolidated with D57350 and D92871; that Thomas N. Kellett was the owner of the property described by reason of the conveyances between the parties approved by the court in action D57350, and that the plaintiff raised the same issues in action D65544, which were there fully determined by the court and judgment rendered which had not been appealed, and concluded that the issues therein raised were res judicata by reason of the decree in action No. D65544.

Also on March 26, 1931, the trial court rendered judgment for the defendant in action D92871, refusing to set aside the decrees in cases numbered D57350 and

D65544. The findings upon which this judgment is based include findings that Mrs. Kellett commenced action for divorce (D57350) as her own independent and voluntary act and not at the instigation or request of the defendant; that, subsequent to the hearing and determination that she was entitled to an interlocutory decree of divorce, she procured the services of another attorney and caused the action to be reopened to ratify and incorporate in the decree the property settlement previously entered into; that this action also was the independent action of the plaintiff; that the plaintiff began a new action, numbered D65544, seeking to set aside the interlocutory judgment in D57350, in which judgment was entered denying the plaintiff the relief sought, which judgment was never appealed from and has become binding and final; that during all this time the plaintiff was not sick in mind or body to such an extent that she did not comprehend the nature of her acts or the actions or her rights therein, but was competent to understand the matters therein involved and fully cognizant of the fact that she was becoming divorced and did so become by her free and voluntary act; that in action D65544 the court fully found upon the matters of the plaintiff's mental and physical condition, competency, and that these findings are final and binding upon the plaintiff.

On March 27, 1931, final judgment of divorce was entered, the order reciting that it was granted of the court's own motion. The respondent states that the motion to abate was denied by minute order on the same date, but this order is not contained in the record.

On April 9, 1931, the plaintiff filed separate notices of intention to move for a new trial in actions D57350, 306434, and D92871. On May 19, 1931, the court ruled that the motion "be and the same is hereby denied in each case." The plaintiff thereafter filed notice of appeal in case No. D57350 only. The certificate of the county clerk of Los Angeles county, attached as an exhibit to the appellant's petition for hearing by this court, shows that the notice of appeal was placed in the files of action D57350, that the entry, "Notice of Appeal filed," was made in the Register of Actions as to D57350 on May 26, 1931, and the entry, "Notice of Appeal filed—see case D–57350," made on that date in the registers of actions as to cases D65544, 306434, and D92871. The notice of appeal was entitled No. D–57350, but stated that the plaintiff appealed "from the order denying plaintiff's motion to resist defendant's application for final decree of divorce, entered and rendered in said action in favor of the defendant, Thomas N. Kellett, and against the plaintiff, Marion Clara Kellett, on the 19th day of March, 1931, and entered in Book 787, page 112, on the 27th day of March, 1931, and the whole thereof; and from the order rendered in the above entitled action, in favor of the defendant and against the plaintiff, but being case No. D–65544, on the 26th day of March, 1931, and the whole thereof; and from the judgment rendered in the above entitled action, but being case No. D–92871, in favor of the defendant and against the plaintiff, on the 19th day of March, 1931, and entered in Book 773, page 188, on the 28th day of March, 1931, and from the whole thereof; and from the judgment rendered in the above entitled action, but being case No. 306434, in favor of the defendant and against the plaintiff on the 19th day of March, 1931, and entered in Book 772, page 150, on the 27th day of March, 1931, and from the whole thereof; and from the order denying plaintiff's motion for new trial entered on the 19th day of May, 1931, in Book 61, page 3, and the whole thereof."

[1] The appellant has made what she terms a "preliminary motion" to withdraw the record and rearrange the clerk's and reporter's transcripts for the reason that certain papers, affidavits, and orders which can only be brought up to this court by means of a reporter's transcript or bill of exceptions certified by the trial judge were improperly included in the clerk's transcript, which, however, was certified by the trial judge, as well as the clerk. Similar motions were made by this appellant in two appeals growing out of this same series of litigation and earlier considered by this court. In each case the motion was based upon the same errors in preparation of the record and it was in each case denied. Kellett v. Kellett, 2 Cal.(2d) 45, 39 P.(2d) 203, and Kellett v. Kellett, 2 Cal.(2d) 50, 39 P.(2d) 206. For the reasons therein stated the present motion to withdraw and correct the record should be denied.

Thomas N. Kellett having died pending the appeals, O. R. Marvel, administrator of his estate, was substituted as respond-

ent in each of the cases. He has moved for a dismissal of each of the appeals, or, in the alternative, for an order affirming each of the judgments and orders appealed from. The motion is made upon the grounds that no proper appeal was taken in cases Nos. D65544, 306434, and D92871; that the orders denying the motions for new trial are not appealable, and that none of the appeals presents any substantial question, but all are entirely without merit and require no further argument. This motion is before us for consideration with the appeal on the merits.

[2, 3] The notice of appeal specifies that the appeal is taken from the order denying the plaintiff's motion to resist the defendant's motion for a final decree "entered and rendered * * * on the 19th day of March, 1931, and entered in Book 787, page 112, on the 27th day of March, 1931." This order was actually made on March 26th. The record discloses no order made on March 19, 1931. The date, book, and page of entry recited in the notice of appeal are those of the final judgment of divorce. The respondent contends, in its brief on hearing in this court, that no appeal was taken from the final judgment of divorce and that the order denying the plaintiff's motion to resist entry of the final decree was an order before final judgment and not appealable. The notice of appeal is ambiguous in that it names the order, gives a date on which no adjudication was made, and describes it by reference to the date, book, and page of entry of the final decree in the book of judgments. The appellant will be considered as having noticed an appeal from the final judgment of divorce under the rule that notices of appeal are liberally construed to preserve the right of review unless it appears that the respondent has been misled by the misdescription. Title Guarantee & Trust Co. v. Lester, 216 Cal. 372, 14 P.(2d) 297; In re Estate of Smead, 215 Cal. 439, 10 P.(2d) 462. Far from being misled by the misdescription or ambiguity in the notice of appeal, respondent, in his motion to dismiss, treated the appeal in action No. D57350 as having been taken from both the order and final judgment and confined his argument on the motion, with respect to this action, to the lack of merit in the appeal.

The second specification in the notice of appeal is the "order rendered in the above entitled action * * * but being case No. D-65544, on the 26th day of March, 1931." No order was entered in this case on this date. Moreover the record shows that final judgment was entered in this case on March 19, 1929, and satisfaction of judgment filed April 16, 1929, and the portion of the register of actions which is included in the transcript shows no order entered thereafter other than the order denying the plaintiff's motion to resist entry of the final decree, which is numbered D57350 and apparently filed in D65544 by mistake. The order itself recites the recovery of final judgment in D65544 which had not been appealed and hence was conclusive of the matters urged in the motion to resist. There was no adjudication in this case from which an appeal could be taken.

With regard to actions Nos. D92871 and 306434, the respondent has treated the notice as referring to the judgments rendered in those actions, although, once again, the dates of rendition of the judgments are erroneous, although the date, book, and page of entry are as given in the notice. The respondent's contention is that no notice of appeal was filed in these cases, that the consolidation, being for purpose of trial only, and not a consolidation under section 1048 of the Code of Civil Procedure, the filing of a notice of appeal in each case is a jurisdictional requirement.

[4, 5] Conceding without deciding the point that there was no such consolidation here as to merge these various actions into one so that, in strictness, a notice of appeal should have been filed in each case, nevertheless the cases were in some respects treated as merged by both the parties and the trial judge. While there are separate findings, conclusions of law and judgments, and the plaintiff presented separate motions for new trial, there is but one transcript on appeal entitled "No. D57350 and Consolidated actions per Stipulation and Order." While it is true that the filing of a notice of appeal is a jurisdictional requirement and cannot be waived, the absence of prejudice and the efficacy of the things done to give notice to the other party that the appeal has been taken may be considered

in determining whether there has been a sufficient compliance with the requirement of section 940 of the Code of Civil Procedure that a notice stating the appeal from the judgment or order be filed with the clerk of the court in which the judgment or order is entered. Since the amendment of section 940 eliminating the requirement of service of the notice upon the adverse party, the records of the clerk of the court wherein the judgment or order appealed from was rendered must be relied upon for notice that an appeal has been taken. The notice of appeal in this instance was placed in the files of action No. D57350, a notation of its filing was made in the register of actions under the number of each of the cases with a cross-reference to action D57350. If a copy of the notice had been placed in the files of each case, it would, beyond a doubt, have been sufficient. Under the circumstances, where all the cases were consolidated, if only for the purpose of trial, and are bound to be considered together upon appeal, if only for the reason that the evidence taken applied to all, the entry in the register under the number of each case with a reference to the place where the notice itself was to be found in the files, can have resulted in no prejudice to the respondent and must be considered a substantial compliance with the requirement that the notice of appeal be filed in each case. Any other conclusion would be out of line with the rule of liberal construction of notices of appeal where the imperfections have not misled or prejudiced the respondent. Title Guarantee & Trust Co. v. Lester; In re Estate of Smead, both supra, and Purity Springs Water Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 P. 810.

There remain to be considered, in connection with the other ground of the respondent's motion to dismiss, the appeals from the final judgment of divorce in action D57350 and from the judgments in actions numbered D92871 and 306434. Determination of the motion upon this ground involves the same questions as a determination of the appeals upon the merits, hence it will not be considered separately.

The appellant urges as ground for reversal that it was error for the trial court to sustain the plea of former adjudication and also to find upon the merits of the other issues raised by the pleadings. The appellant contends, first, that the plea of res judicata was waived by the stipulation consolidating the cases for trial, and, second, that the action of the trial court in considering and sustaining the plea of res judicata deprived her of a fair trial on the merits in that it cannot be determined that in making its findings on the merits the court was uninfluenced by the former adjudication.

[6, 7] The proposition that the plea of res judicata was waived, and case No. D65544 reopened by the stipulation of consolidation is not borne out by the record. While the record is not free from ambiguity and confusion, the remarks of the trial judge in suggesting the consolidation, the argument and discussion by counsel at that time, the later introduction into evidence of the record in that case and the fact that no disposition of that case was attempted on March 26, 1931, when the order in case No. D57350 was made and the judgments in actions 306434 and D92871 were rendered, can only lead to the conclusion that case number D65544 was mistakenly included in the stipulation for consolidation and was before the court only for consideration on the plea of res judicata and in connection with the issue of the plaintiff's competence at the time of the rendition of the decree therein. Conceding that the statements of both court and counsel are ambiguous and capable of another interpretation, all presumptions must be in favor of the conclusion that the trial court took the proper course of asking for a consolidation of the three other cases in order that the issues of fact might be tried together, and without delay, while the plea of res judicata was taken under submission as to each of them.

The plea of former adjudication not having been waived, the trial court had before it for determination the question whether the issues raised in the three actions then at issue had been finally determined by the judgment in action No. 65544.

As to case No. D57350, the court found that all matters set up in the plaintiff's affidavit in support of her motion to resist the defendant's application for a final decree of divorce were res judicata by reason of the judgment in action No. 65544.

In action No. 306434 the findings made were to the effect that the plaintiff was not the owner of any interest in the describ-

ed property; that the defendant was the owner by reason of the conveyances and agreements between the parties, approved by the court in action No. D57350, and that, in action No. D65544, the plaintiff had raised the same issues, which were there fully determined by the court and final judgment rendered thereon which judgment had not been appealed within the statutory period.

[8] It is objected by the appellant that the judgment in D65544 cannot be res judicata as to the quiet title action for the reason that it was rendered in March, 1929, whereas the quiet title action was not commenced until July of 1930. This argument is without merit, since the plaintiff's only apparent claim to title is based upon her former interest in joint tenancy and the invalidity of the property settlement, the conveyances and the interlocutory decree in action No. D57350. She has proved no acquisition of title since the rendition of the decree in action No. D65544.

The court found, in action D92871, that, not at the instance and request of the defendant, but as her own voluntary and independent acts, the plaintiff instituted action D57350, seeking a divorce decree, employed a new attorney and caused the case to be reopened and the property settlement to be incorporated in the interlocutory decree and commenced a new action, numbered D65544, which was heard and determined in favor of the defendant; that the judgment rendered therein had never been appealed and had become final and binding; that during all this time the plaintiff was not unable to comprehend the nature of her acts due to physical and mental illness, but was fully conpetent to understand the matters involved in both actions; that, in action D65544, the court fully found upon her competency and mental condition and that all the allegations of the answer setting up the plea of res judicata and alleging that all the matters sought to be presented here were adjudicated in action D65544 were true.

[9] The complaint and findings in action D65544 have not been brought up. In this state of the record it must be presumed that the identical issues were determined therein, as found by the court in the three cases here under review. Nor, except as above noted with regard to action 306434, does the appellant contend that issues were here raised which were not passed upon in action D65544. The findings on the issue of res judicata, together with the additional finding, made in action No. D92871 in which it was sought to set aside the decree in action D65544, that the plaintiff was competent at the time of the rendition of that decree, are a complete support of the judgments here appealed from.

[10] The appellant complains the trial court improperly made additional findings on the facts as shown by the evidence. These findings were obviously made by the trial court out of an abundance of caution and in an effort to finally dispose of all issues in this confusing series of cases. While unnecessary and immaterial, it is impossible to see how the appellant can have been prejudiced thereby.

[11] The appellant moved for a new trial in each of the cases, asserting in her affidavits in support of the motion that the trial court improperly restricted her evidence as to reconciliation and incompetence to a time subsequent to the interlocutory decree, that the determination of the case upon the plea of res judicata rather than upon the merits constituted accident and surprise which could not have been guarded against, and that it was error to hold the decree in D65544 was res judicata as to the quiet title action. The appellant attempted to appeal separately from the order denying her motions for new trial. Such an order is not appealable, but is reviewable upon appeal from the judgment. From the conclusions reached above, it will be seen that the motions for new trial were properly denied.

The motion to withdraw and correct the record is denied. The motion to dismiss is granted as to the appeals from the judgment in D65544 and from the order denying the motions for new trial. It is denied as to the appeals from the judgments in cases numbered D57350, D92871, and 306434. The judgments in cases D57350, D92871, and 306434 are affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

14 Cal.App.2d 580

PEOPLE v. VALDEZ.

Cr. 193.

District Court of Appeal, Fourth District, California.

June 15, 1936.

1. Automobiles ⇐355(10)

Evidence that defendant accused of taking automobile without owner's consent was found at steering wheel of recently driven automobile which two minutes before had not been at place where it was discovered by police officers, and that automobile had been driven from its parking place a mile away without knowledge or consent of owner, *held* to support finding that automobile was taken and driven by defendant (St.1935, p. 174, § 503).

2. Automobiles ⇐355(10)

Evidence that defendant accused of taking automobile without owner's consent had had quite a bit to drink, but that he walked all right, *held* to support finding that defendant was not intoxicated (St.1935, p. 174, § 503).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Alfred Valdez was convicted of taking and driving an automobile without owner's consent and with intent to permanently or temporarily deprive owner of his title to or possession of the automobile, and he appeals.

Affirmed.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from a judgment pronounced upon Alfred Valdez after a jury had found him guilty of violating section 503 of the California Vehicle Code (St. 1935, p. 174, § 503) by taking and driving an automobile belonging to Albert Chicca without the consent of the owner and with the intent to permanently or temporarily deprive him of his title to or possession of the vehicle.

[1, 2] The sole question presented on this appeal is the sufficiency of the evidence to support the verdict and judgment. Defendant divides his argument into two phases: First, that as he was found sitting in the car and no one saw him take or drive it, the conviction cannot be sustained as mere possession is not sufficient to sustain the conviction; and, second, that he was too intoxicated to entertain any specific intent to deprive the owner of possession of or title to the car.

The evidence shows that Albert Chicca parked his automobile in front of the Tivoli Café in East Bakersfield at about 7:30 o'clock on the evening of January 11, 1936, and entered the café; that about fifteen minutes later he heard the engine start, went outside, and found the car gone; that about 12:50 o'clock the next morning two police officers found the car parked on a street in Bakersfield about one mile from the place from which it had been taken; that defendant was sitting behind the steering wheel; that the ignition was on but the engine was not running; that the radiator was warm; that defendant had "had quite a bit to drink" but "he walked all right"; that the officers had passed near the spot where defendant was found sitting in the car nine times before finding it and that on none of those times was it there; that the last time they passed before finding the car was not more than two minutes before discovering it.

The evidence and the reasonable inferences to be drawn from it are sufficient to support the judgment. The finding of defendant sitting at the steering wheel of the recently driven car, which two minutes before had not been at the place where it was discovered by the police officers, coupled with the fact that it had been driven from its parking place a mile away without the knowledge or consent of the owner, is sufficient to support the implied finding of the jury that it was taken and driven by defendant. People v. Roldan, 93 Cal.App. 677, 270 P. 253; People v. Zabriski, 135 Cal.App. 169, 26 P.(2d) 511. Under the evidence before us the implied finding of the jury on the degree of intoxication of defendant cannot be disturbed here.

Judgment affirmed.

We concur: BARNARD, P. J.; TURRENTINE, Justice pro tem.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

14 Cal.App.2d 392

PEOPLE v. DOWNING et al.

Cr. 1880.

District Court of Appeal, First District, Division 1, California.

June 2, 1936.

1. Criminal law ⇐1023(10, 13)

Appeal by defendant prosecuted for conspiracy to take property of another through false pretenses and representations *held* not dismissible because probation was granted, where appeal was taken from order denying motion for new trial as well as from judgment of conviction (Pen.Code, § 1237).

2. False pretenses ⇐7(5)

False pretenses and representations, to be indictable, must be of a past event or an existing fact, since no representation of future event, whether in form of promise or opinion, can be a criminal pretense.

3. Conspiracy ⇐47

Evidence *held* not to warrant conviction for conspiracy to take property of another through false pretenses and representations in connection with sale of interest in garage partnership.

False pretenses alleged were that garage was owned and operated by one of defendants and another as copartners; that it was earning $300 profit; that it was sold for $750 on terms requiring a $300 down payment and balance in monthly installments; that garage revenues from sale of gasoline and storage were sufficient to pay overhead expenses; that defendant partner kept complete set of books for garage, showing collections and disbursements. There was no evidence as to past earnings of business; statements as to amount of gasoline sales were true; no evidence was introduced as to amount received from storage or repairs or amount of overhead expenses; prosecuting witness testified that he had made purchase after full and independent and personal investigation and relied on such investigation in making purchase.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Virgil Downing and Wendell Palen were convicted of conspiracy to take property of another through false pretenses and representations, and they appeal.

Reversed.

Nathan C. Coghlan and Herman D. Gill, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellants, together with one F. H. McCann, were accused in an indictment of conspiracy to take property of another through false pretenses and representations. The codefendant, McCann, was not apprehended, and the case proceeded to trial against the two appellants upon their pleas of not guilty. When the evidence of the prosecution was closed a motion was made to advise the jury to acquit on the ground that the charge was not proven. The motion was denied. After a full trial defendants were convicted. Motion for new trial was made and denied. Motion for probation followed. The court granted this motion to each appellant, the probation of Palen being for five years upon condition that he serve a term of six months in the county jail and make restitution, the probation of Downing being for five years upon condition that he serve a term of one year in the county jail and make restitution. Notice of appeal was thereupon given, the appeal being taken from the final judgment and the order denying the motion for a new trial.

[1] It is the claim of respondent that in view of the trial court having granted probation, there has been no final judgment rendered against appellants, and therefore any attempted appeal from such purported judgment must be dismissed. While this is true with reference to the appeal from the judgment, appellants have appealed from the order denying their motion for a new trial in which they claimed, as in the appeal from the judgment, that the verdict is unsupported. They are, therefore, entitled to a hearing upon this motion under section 1237 of the Penal Code. This contention necessitates a review of the evidence. As heretofore indicated, appellants at all stages of the proceedings challenged the sufficiency of the evidence.

From the facts it appears that appellant Downing is a licensed broker engaged in the sale of business enterprises. In November, 1934, one Austin M. Huffman visited Downing's office with reference to the purchase of some character of business. Downing informed him appellant Palen and one McCann owned a certain

garage as copartners and that McCann was withdrawing from the copartnership for the reason that he desired to resume his business of mining engineer; that the business was clearing $300 a month and was selling 3,000 gallons of gas during such period; that the storage of automobiles and gasoline sales took care of the overhead, including the rent, leaving a net profit for all repairs made. Huffman, the prosecuting witness, went to see the garage and there met appellant Palen, who showed Huffman over the premises and repeated to him practically the same statements made by Downing. He represented that the place was selling about 3,000 gallons of gasoline a month and that the car storage and sale of gas paid the overhead, and one-half share of the profits for repairs should be from $150 to $200 a month. He also informed him that if he was not a mechanic or mechanically inclined he did not want him as a partner. Huffman, after inspecting the premises, expressed himself as being satisfied. A few days later the parties met in appellant Downing's office and a contract was prepared by which Huffman agreed to make the purchase of the one-half interest for the sum of $750, $300 to be paid in cash, the balance out of the profits of the business.

Appellant Downing then informed Huffman before he paid his money he wanted him to fully understand that he was making the purchase after investigating the proposition for himself, and that he should not rely upon any statements made to him by himself or any other person. Huffman admitted at the trial that this was so. An affidavit was drawn up and sworn to by Huffman to the effect that in making the purchase he was buying the same only after an independent and personal investigation, and not through any representations by anyone. The affidavit further recited that in buying the interest he was not relying on the past or present income, but was making the purchase because he had faith in the future of the business. Huffman then paid the $300 as part payment on his purchase price. After remaining in the garage for two weeks Huffman was informed by Palen that they had operated at a loss of 36 cents for the period. Huffman then left the premises and this prosecution followed.

The alleged false pretenses charged in the indictment are in substance as follows: that the Park-Presidio Garage was owned and operated by Palen and McCann as copartners; that it was earning $300 profit a month; that it was sold for $750 upon terms requiring a $300 down payment and the balance in monthly installments; that the garage revenues from the sale of gasoline and storage were sufficient to pay overhead expenses; that Palen kept a complete set of books for the garage, showing collections and disbursements.

[2, 3] Primarily it may be stated that in a prosecution of this character the representations to be indictable must be of a past event or an existing fact. No representation of a future event, whether in the form of a promise or an opinion, can be a criminal pretense. The mere expression of opinion or a representation of an act to be performed in the future does not constitute the offense. People v. Walker, 76 Cal.App. 192, 244 P. 94; People v. Moore, 82 Cal.App. 739, 256 P. 266. The only statements here made that come within the rule are those which refer to past profits, and those referring to the sale of gasoline and the storage of cars. With reference to the past earnings of the business, the record is silent, no attempt having been made to show what business had been done or what profits had been enjoyed. With reference to the amount of sales of gasoline, the prosecuting witness admitted that the statements were true. No evidence whatever was introduced as to the amount received from the storage or repair of cars, or what the overhead expenses amounted to at any time, except that certain repairs had been made to cars while the prosecuting witness was a partner, and the amount charged to the owners. It thus appears that there is no proof of obtaining money by false pretenses relating to a past or existing fact. The case was tried upon the theory that such pretenses had been made. Nor does the record disclose a conspiracy to obtain money by false pretenses. As heretofore stated, the prosecuting witness testified that he made the purchase after full and independent and personal investigation, and relied upon such investigation in making the purchase. Appellants further complain of the action of the trial court in refusing an instruction as to false pretenses, and also of certain remarks concerning the absence of defendant McCann. Considering the conclusion we

have reached these questions become unimportant.

The order denying defendants' motion for a new trial is reversed.

We concur: KNIGHT, J.; CASHIN, J.



14 Cal.App.2d 416

MOHR et al. v. RICCOMI et al.

Civ. 9876.

District Court of Appeal, First District, Division 1, California.

June 3, 1936.

1. Execution ⊂⊃73

Granting leave to issue execution upon deficiency judgment entered in pledge foreclosure proceeding 11½ years after entry of deficiency judgment *held* proper as within discretion of trial court, where, from showing made, trial court could conclude that an execution would have been futile if regularly issued (Code Civ.Proc. § 681, and § 685, as amended by St.1933, p. 2499).

2. Execution ⊂⊃73

Where statute allowed execution to be issued by leave of court, after lapse of 5 years from entry of judgment amendment requiring notice to be given to judgment debtor and providing that motion must be accompanied by affidavit stating reasons for failure to issue execution within 5 years after judgment *held* not to change character of court's discretion to be exercised in passing upon motion; a more formal presentation of motion only being required (Code Civ.Proc. § 681, and § 685, as amended by St.1933, p. 2499).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Proceeding by Albert Mohr and another against George L. Riccomi and another for foreclosure of a mortgage, wherein deficiency judgment was allowed. From an order for the enforcement of deficiency judgment and for issuance of execution, the named defendant appeals.

Affirmed.

Sylvester J. McAtee, of San Francisco, for appellant.

Hilary H. Crawford, of San Francisco, for respondents.

TYLER, Presiding Justice.

Appeal from an order for the enforcement of a deficiency judgment and for issuance of execution under the provisions of section 685 of the Code of Civil Procedure, amended by St.1933, p. 2499.

[1] The facts show that on January 6, 1923, the superior court of the city and county of San Francisco made a decree of foreclosure and an order of sale in an action where the appellant herein was a defendant; that thereafter certain pledged property was sold by a commissioner and return made by him showing a payment on account of the judgment in the amount of $2,487.25 arising out of the sale of the pledged property; that on July 25, 1923, a deficiency judgment was entered against the appellant George L. Riccomi and Fred J. Riccomi, his brother, for the amount of the deficiency shown by the return, namely, the sum of $1,985.60. During the five years following the entry of the deficiency judgment, no execution was taken out by the plaintiffs under the provisions of section 681 of the Code of Civil Procedure, no suit was instituted upon the judgment, and nothing whatever was done by the plaintiffs until the 28th day of November, 1934, eleven and one-half years after the entry of the judgment, at which time plaintiffs moved the trial court for an order that execution issue against appellant herein for the amount of the deficiency judgment in the sum of $1,985.60, together with interest from the 25th day of July, 1923. The motion was based upon affidavits. Thereafter, upon a hearing on February 19, 1935, the court made its order granting leave to enforce the deficiency judgment by execution, on condition that plaintiffs in writing waive claim for interest upon the amount of the judgment within ten days, otherwise the motion be denied; that thereafter, on February 25, 1935, plaintiffs filed their waiver of interest, and on February 28, 1935, the court signed and filed an enlarged order based upon the former minute order, wherein it decreed that the deficiency judgment of July 25, 1923, for $1,985.60 be enforced against the defendant George L. Riccomi for the said sum, with interest at 7 per cent. per annum from the date of

the order until paid, and directing the clerk of the court to issue an execution on the deficiency judgment against defendant George L. Riccomi. The affidavits upon which the order was based show that plaintiffs and respondents herein were a brother and sister of the former wife of appellant George L. Riccomi and had loaned the latter and his brother Fred J. Riccomi the sum of $5,000 on their promissory note, and the litigation is based on this transaction. It also appears therefrom that Fred J. Riccomi had gone through bankruptcy and had been released and discharged from liability on said claim and judgment. It also appeared that the other defendant, George L. Riccomi, prior to and at the expiration of the five-year period for renewal, was at the time engaged in litigation with his former wife over the payment of alimony in a divorce proceeding, and at said time was claiming he was without property of any kind and had no substantial income. In its decree enforcing the judgment and ordering issuance of execution for the principal of the judgment only, the court found from the evidence that sufficient reasons for plaintiffs' failure to proceed on their deficiency judgment in compliance with the provisions of section 681 of the Code of Civil Procedure fully appeared and that it was a proper case for its exercise of discretion in enforcing the judgment by carrying it into execution.

[2] Appellant has favored us with a history of section 685 of the Code of Civil Procedure, and he contends that under the amendment thereto in 1933 (St. 1933, p. 2499), requiring notice to be given to the judgment debtor and providing further that the motion must be accompanied by an affidavit setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of the same Code, the court can no longer accept any reason in its mere discretion as being sufficient to excuse the failure to proceed in compliance with section 681 of the Code of Civil Procedure. We see nothing in the amendment that in any manner changes the character of discretion to be exercised in passing upon such motions after the matter has been properly presented. Failure to give reasons for delay justifies the court in denying the motion, but where, as here, reasons are given for failure to have execution issued, which reasons are satisfactory to the court, the power of the exercise of discretion still exists as it did prior to the amendment; a more formal presentation of the motion only being required.

From the showing made, the court had a right to conclude that the issuance of an execution would have been futile if regularly issued. In our opinion the court exercised a sound discretion in ordering execution. This being so, the order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



14 Cal.App.2d 481

REYNOLDS v. REYNOLDS et al.

Civ. 1906.

District Court of Appeal, Fourth District, California.

June 5, 1936.

1. Assignments ⊂⊃32

"Fee" received by referee in a condemnation proceeding was "wages or salary," within statute prohibiting assignment of such by married person without written consent of spouse, and hence attempted assignment of such fee by married man without consent of wife was invalid (Civ.Code, § 955).

The "fee" of a lawyer or doctor is compensation; it is remuneration for services rendered in the line of their respective professions. A "fee" is a reward or compensation for services rendered or to be rendered; a payment in money for official or professional services, whether the amount be optional or fixed by custom or law.

[Ed. Note.—For other definitions of "Fee," "Salary," and "Wages," see Words & Phrases.]

2. Assignments ⊂⊃32

Intention of Legislature in enacting statute, that no assignment of "wages or salary" by married person shall be valid unless written consent of spouse is attached to assignment, was to prevent assignment of earnings, whether they be called wages, salary, fees, or compensation, without consent of other spouse, and "wages" and "salary," as there used, are comprehensive terms and must be interpreted in their broader sense

to mean compensation given for services rendered (Civ.Code, § 955).

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Action by Willetta Reynolds against J. J. Reynolds and Lottie V. Weathers. From the judgment, plaintiff appeals.

Reversed.

W. C. Dalzell, of Los Angeles, for appellant.

Oliver M. Hickey, of Los Angeles, for respondent.

MUNDO, Justice pro tem.

This is an appeal by the plaintiff wife in a divorce action, wherein the respondent was joined as claiming part of the community property.

James Reynolds, a married man, was appointed referee in a condemnation suit. His fee for such services was allowed in the sum of $1,560. Upon an action for divorce being filed by his wife, and before he had completed his work as referee, Reynolds assigned his fee to the respondent Lottie V. Weathers for $400 cash and the cancellation of a note for $100. His wife did not consent to the assignment. As between Reynolds and his wife the court awarded the community property to the wife; but as between the wife and the respondent Weathers it found that the fee of $1,560 was community personal property which might be transferred by Reynolds without the consent of his wife, and that it had been so transferred to Lottie V. Weathers for a valuable consideration.

Upon this appeal taken by Mrs. Reynolds it is contended that the assignment of the fee was invalid under section 955 of the Civil Code, and also for the reason that the unearned salary of a public officer cannot be assigned.

[1] The section referred to in part provides: "No assignment of * * * wages or salary made by a married person shall be valid unless the written consent of the husband or wife of the person making such assignment * * * is attached to such * * * assignment. No assignment of * * * wages or salary shall be valid unless at the time of the making thereof, such wages or salary have been earned."

The trial court proceeded upon the theory that the "fee" of a referee in a condemnation proceeding is not "wages" or "salary" within the meaning of this section of the Civil Code. Such a construction, we believe, would be repugnant to legislative intention. The fee of a lawyer or a doctor is compensation; it is remuneration for services rendered in the line of their respective professions. The fee awarded to Reynolds was compensation for his services as referee; it was money earned by him for services rendered. "A fee is a reward or compensation for services, rendered or to be rendered; a payment in money for official or professional services, whether the amount be optional or fixed by custom or law." 3 Words and Phrases, First Series, p. 2712; Crawford v. Bradford, 23 Fla. 404, 2 So. 782, 783; Cochran v. A. S. Baker Co., 30 Misc. 48, 61 N.Y.S. 724.

Fees are by some authorities distinguished from wages in being compensation paid to professional men, while wages is applied to the payment for manual labor or other labor of manual or mechanical kind. In re Stryker, 158 N.Y. 526, 53 N.E. 525, 70 Am.St.Rep. 489. Some lexicographers and some authorities, however, class salary and wages as synonymous. But be that as it may, a fee is compensation and compensation is salary. "The word 'salary' signifies the periodical compensation due to men in official and other situations. The word is derived from 'salarium,' which is from the word 'sal' (salt), that being an article in which the Roman soldiers were paid. * * * While the term 'salary' in its original and strict sense signifies a fixed compensation, it is frequently used in our constitution and laws as the equivalent of 'compensation.'" Martin v. Santa Barbara County, 105 Cal. 208, 38 P. 687, 688. Its synonyms, as Webster gives them, are "stipend," "hire," "wages," "pay," "allowance." In Board of Commissioners of San Juan County v. Oliver, 7 Colo.App. 515, 44 P. 362, 363, it was said: "The treasurer had no salary, in the technical signification of the term, and none could legally be paid to him, but he was entitled to the pay which the law allowed. * * * The evident purpose of the warrants, as expressed upon their face, was to pay Graf for his services as treasurer, and we must hold that by the word 'salary' merely legal compensation was meant, and that the warrants were for the amount of fees and commissions due him by law." And in Kirk-

wood v. Soto, 87 Cal. 394, 25 P. 488, 489, the court said: "The words 'compensation' and 'salary' were evidently used synonymously in the constitution, and in the county government act."

[2] The interpretation of the section under discussion does not so much depend upon the technical definition of the terms as upon the sense in which they were used by the Legislature. The real intention of that body was to prevent the assignment of earnings, whether they be called wages, salary, fees, or compensation, without the consent of the other spouse. The legislation is remedial in character and intended to be salutary and beneficial to wives whom it was designed to protect, and the judgment here appealed from denies Mrs. Reynolds the benefit of the act. Berg v. Standard Light Co., 89 Cal.App. 542, 265 P. 369. "Wages" and "salary," as here employed, are comprehensive terms and must be interpreted in their broader sense to mean compensation given for services rendered whether such compensation is limited to a fixed sum of money or is payable in fees. Martin v. Santa Barbara County, supra.

In view of our conclusion that the assignment is invalid under section 955 of the Civil Code, we deem it unnecessary to discuss the other point raised by appellant.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.



14 Cal.App.2d 507

KIDD v. HILLMAN et al.

Civ. 9936.

District Court of Appeal, First District, Division 1, California.

June 9, 1936.

1. Insurance ⇐606(1)

Release executed by plaintiff after recovery of judgment for damages to person and clothes in automobile accident *held* binding on plaintiff's collision insurer, precluding subsequent action for damages to automobile sustained in same accident, where defendant had no knowledge that insurer had compensated plaintiff when defendant accepted release.

2. Action ⇐53(2)

Neither insured nor collision insurer may split cause of action for property damage against one who runs into insured's automobile.

3. Action ⇐53(2)

Plaintiff who recovered judgment for damages to person and clothes in automobile accident *held* precluded from bringing subsequent action against same defendant for damages to automobile sustained in same accident, in view of rule against splitting causes of action.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Opal R. Kidd against Lloyd K. Hillman and others. Judgment for plaintiff, and named defendant appeals.

Reversed.

John J. Taheny, of San Francisco, for appellant.

Sandford, Burger & Barry, of San Francisco, for respondent.

TYLER, Presiding Justice.

Action to recover for damages to an automobile sustained in a collision. Plaintiff's complaint alleged in substance that on or about the 18th day of January, 1931, she was operating her automobile on the Bayshore highway in San Mateo county when another automobile carelessly and negligently operated by an agent of appellant forcibly collided with her machine and damaged it. She also alleged and prayed for damages for loss of its use. The action was filed April 14, 1933. Plaintiff had previously commenced an action against defendant Hillman and others growing out of the same collision, on January 16, 1932. In this prior action, as here, she alleged she had sustained certain injuries to her person and property. Plaintiff alleged appellant's driver was negligent, which was the cause of the collision, and that he was driving the appellant's automobile with his permission. In this prior complaint, she alleged, in addition to certain personal injuries, that she had sustained property damage to clothing worn by her in the sum of $100. This action re-

sulted in a verdict for plaintiff and against defendants for the sum of $1,000. Thereafter, on May 20, 1932, she executed and delivered to defendant Hillman a certain instrument in writing by the terms of which she released him for the sum of $950 from all liability, past and present, by reason of his imputed negligence. A few days later satisfaction of said judgment was entered. Thereafter, as above recited, she instituted the present action to recover for further damage to her property sustained in the selfsame collision, and alleged that she was at all times the owner of the automobile in which she was riding, and as a result of the collision it was damaged in the sum of $475.49. She also prayed for $150 additional damages for loss of the use of her car. The later claim was abandoned at the trial. Appellant set up the release, the execution of which is not disputed. He also pleaded that plaintiff was splitting a cause of action. He alleged the commencement of the prior action, the judgment, and the fact that both actions were predicated upon the same act of negligence. In passing it may be stated that it appeared in evidence that at the time the prior action was filed John Kidd, the husband of plaintiff, sued the same appellant and alleged in his complaint that the automobile which forms the basis of the present suit was broken and damaged by the collision, and he was deprived of its use to his damage in the sum of $300. Though not the owner of the automobile, he recovered judgment against appellant in the sum of $300, and later he also signed a release to Hillman. His and his wife's former actions were filed on the same day by the same attorneys and were tried together.

At the present trial, which was had before the court sitting without a jury, plaintiff introduced no evidence in support of the allegation that the driver of appellant's car was negligent, or that he was an employee of the appellant, or that he was driving with the consent of appellant. In order to establish these allegations there was introduced and received in evidence the record of the previous action between the parties. Appellant objected to this evidence on the ground that plaintiff was attempting to split a cause of action, by reason of the fact that in the prior action the same plaintiff sued the same appellant for property damage, and on the further ground that plaintiff had signed a release of any and all causes of action she had or might have against the appellant growing out of the collision. Plaintiff then offered in evidence a written assignment whereby an insurance company purported to sell and assign to plaintiff all claims which the company might have against any person or persons arising out of damage occurring to the plaintiff as a result of said collision. This document was admitted in evidence over stipulated objections, and also over the specific objection that the pleadings disclosed that plaintiff was not suing as an assignee but as the owner of the automobile. This assignment was executed on the 14th day of March, 1931, which was long prior to the date of the filing of the original action. Defendant Hillman then offered to prove that the driver of the car was not employed by him at the time of the accident, but that he had taken the car without defendant's permission. The proffered evidence was excluded on the ground that the question was previously adjudicated in the prior action. Judgment went in favor of plaintiff in the sum of $475.44 and costs. Defendant Hillman appeals.

[1-3] The theory of counsel for plaintiff is that an insurance company, not a party to the action, having indemnified plaintiff for damage to her automobile, became subrogated to her right of action, and at the time of signing the release she had no right, title, or interest in the damage to her car. There is no merit in the contention. Appellant herein had no knowledge, so far as the record shows, that the insurance carrier had compensated plaintiff for the damage she suffered. The release was therefore binding on the company (Bernhard v. Delluaitante, 5 Cal.App.(2d) 585, 43 P.(2d) 338), and this is especially true where payment by the tort-feasor was not voluntary, but at the end of a lawsuit wherein judgment had been pronounced against him Fidelity Insurance Company v. Atlantic Coast Line R. Co., 165 N.C. 136, 80 S.E. 1069. Again, an insured may not split his cause of action, and the insurer is in no better position than the insured. Plaintiff in her original action recovered for injuries to her person and property. She cannot now pursue appellant in another action for damage to her property arising out of the same accident. Respondent has cited us to the case of Hamilton Fire Ins. Co. v. Gregger, 246 N.Y. 162, 158 N.E. 60, 55 A.L.R. 921, as holding a contrary rule. The question of splitting causes of action was not there involved. The case is not in point.

Appellant has been subjected to two actions. He should not be harassed by a third. It was the duty of the insurer to protect its right of subrogation, assuming it had such right. Not having done so, it cannot now be heard to complain. Sun Insurance Office v. Hohenstein, 128 Misc. 870, 220 N.Y.S. 386; Packham v. German F. Ins. Co., 91 Md. 515, 46 A. 1066, 50 L. R.A. 828, 80 Am.St.Rep. 461. The action is barred both by the release and by the rule against the splitting of causes of action. This being so, the judgment should be, and it is hereby, reversed.

We concur: KNIGHT, J.; CASHIN, J.



14 Cal.App.2d 596

GLAZER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 10733.

District Court of Appeal, Second District, Division 1, California.

June 16, 1936.

Hearing Denied by Supreme Court Aug. 13, 1936.

Mandamus ⊂=26

Where record revealed that trial judge had assumed jurisdiction and disposed of all relevant and material issues raised by citation for contempt for refusing to comply with terms of interlocutory divorce decree and order to show cause why certain other relief should not be granted, defeated party was not entitled to mandamus, since such writ was not available to inquire into correctness of a decision.

Petition for a writ of mandate by Alice P. Glazer against the Superior Court of the State of California in and for the County of Los Angeles.

Alternative writ theretofore granted vacated and discharged, and petition denied.

Mitchell, Silberberg & Knupp and Ross R. Hastings, all of Los Angeles, for petitioner.

Neil S. McCarthy, Franklin W. Peck, Howard P. Hall, Everett W. Mattoon, Co. Counsel, and D. De Coster, Deputy Co. Counsel, all of Los Angeles, for respondent.

DORAN, Justice.

Petitioner seeks a writ of mandate to compel the respondent court to set for hearing an order to show cause and upon said hearing to hear and determine said matter upon the merits.

Petitioner, prior to November 26, 1930, was the wife of Benjamin Glazer. On that day an agreement was executed between them settling their property rights, with provision also for the maintenance and support of petitioner. Thereafter, petitioner filed suit for divorce, and, regarding the property settlement agreement, alleged as follows: "The parties hereto have heretofore effected a property settlement agreement, which agreement the plaintiff will offer the court for its confirmation and approval at the time of the hearing of this proceeding on its merits." The prayer of the complaint alleged as follows: "* * * that the court approve the property settlement agreement heretofore made between the parties hereto and incorporate the terms thereof in the Interlocutory Judgment of Divorce." Regarding the property settlement agreement the interlocutory decree provided as follows: "It is further adjudged and decreed that the property settlement heretofore effected between the parties dated November 26, 1930, offered in evidence and made a part of the file, is hereby approved and confirmed. Both plaintiff and defendant are hereby directed and ordered to comply with each and every term thereof." Thereafter, based on the affidavit of petitioner herein, said Benjamin Glazer was cited for contempt for refusing to comply with the terms of the interlocutory decree, and, in the same citation, was also required to show cause why certain other relief should not be granted.

At the hearing on the order to show cause, the trial judge denied the relief sought, and discharged said defendant Benjamin Glazer. Petitioner now contends that the trial court sustained the objection of defendant at the hearing upon the ground that the court was without jurisdiction, and that it was for that reason that the court refused to proceed with the hearing upon the order to show cause. Petitioner therefore seeks this writ to compel the lower court to try the issues on their

merits, asserting in that connection that the sole question is "the jurisdiction of the (trial) court to take the necessary steps and make the necessary order to enforce the interlocutory judgment of divorce."

The respondent herein, on the other hand, contends that mandamus is not available to petitioner and in that connection asserts that "the court below fully heard the matter, having before it at the time the entire file in the divorce case, which contained the complaint, the interlocutory and final decrees of divorce, the agreement, plaintiff's affidavit in support of her order to show cause in contempt, and defendant's answering affidavit"; furthermore, that "at the time of the hearing, counsel for both plaintiff and defendant stated to the court the matters presented to it for determination, plaintiff claiming that defendant was guilty of contempt for failing to comply with certain provisions of the interlocutory decree," and defendant contending to the contrary; that the matter was then and there fully argued by both sides to the controversy.

For consideration by this court the parties herein entered into a stipulation as to just what occurred at the hearing before the lower court; said stipulation contained the following: "Upon the conclusion of argument by respective counsel and an examination and discussion by court and counsel of the agreement, the decree and all the authorities cited, the court announced that it was ready to rule upon the matter. Thereupon the court held and determined that the only provision of the Interlocutory Judgment of Divorce which was enforceable upon the order to show cause was the provision ordering and directing defendant to pay to the plaintiff for her support and maintenance the sum of $1250.00 per month; that such payments were made an express term and provision of the decree; that counsel had stipulated that all such payments had been made, and it was not alleged in the affidavit of plaintiff that defendant had failed to make any of such monthly payments; that in this proceeding of a criminal nature the defendant could not be held guilty of contempt of court for failure to comply with an agreement not made part of the decree; that it should not be required that one examine exhibits or other papers in the record in aid of a decree." The same stipulation provided further as follows: "After about four hours of statements, arguments, examination of files and documents, and examination and discussion of authorities by counsel and court, counsel for plaintiff asked that the court clearly state for the record that the court declined to exercise jurisdiction, upon which the court stated that it had assumed and exercised jurisdiction and rendered decision, and also had explained why it had so decided."

Thus it will be seen that the matter was disposed of by the lower court upon its merits.

Mandamus is not available as a means of inquiring into the correctness of such decision. The record reveals that the trial judge assumed jurisdiction and disposed of all of the relevant and material issues raised by the citation and order to show cause.

The alternative writ hereinbefore granted by this court is vacated and discharged, and the petition for writ of mandate is denied.

We concur: HOUSER, P. J.; YORK, J.



14 Cal.App.2d 547

GRAYBIEL v. CONSOLIDATED ASS'N, Limited, et al.

Civ. 1806.

District Court of Appeal, Fourth District, California.

June 11, 1936.

Appeal and error ⇐800

Filing of appellant's opening brief before hearing of appellee's motion to dismiss appeal for appellant's failure to timely file points and authorities *held* sufficient compliance with court rules to justify denial of motion (Rules of Supreme Court and District Courts of Appeal, rules 1, 5).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by William N. Graybiel against the Consolidated Associations, Limited, and others. From a judgment in favor of nam-

ed defendant, plaintiff appeals. On motion to dismiss the appeal.

Motion denied.

Halbert & Stone, of Porterville, for appellant.

Samuel Schwartz, of Los Angeles, for respondent.

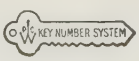
MARKS, Justice.

This is a motion by respondent to dismiss this appeal upon the ground that appellant failed to file his points and authorities within the time specified in rule 1 of the Rules of the Supreme Court and the District Courts of Appeal. The penalty for breach of this rule is found in rule 5.

The clerk's transcript on appeal was filed on April 11, 1936, the notice of motion to dismiss on May 14, 1936, and the appellant's opening brief on June 6, 1936. The motion to dismiss was calendared on June 9, 1936. The filing of the brief before the hearing of the motion has been held sufficient compliance with the rules to justify the denial of the motion. Toth v. Metropolitan Life Ins. Co., 113 Cal.App. 55, 297 P. 564.

The motion to dismiss is denied.

We concur: BARNARD, P. J.; JENNINGS, J.



14 Cal.App.2d 571

GEORGE v. SIMPSON.

Civ. 10494.

District Court of Appeal, Second District, Division 2, California.

June 15, 1936.

Hearing Denied by Supreme Court Aug. 13, 1936.

1. Cancellation of instruments ⇐37(1)

In suit to cancel assignment of plaintiff's interest in leasehold estate, amended complaint, alleging that plaintiff had intrusted his interest in estate to management of defendants and that defendants had managed it with plaintiff's full confidence and trust, *held* not demurrable on ground that there was no allegation that one of defendants handled any property or had any relationship with plaintiff.

2. Landlord and tenant ⇐78(1)

In suit to cancel assignment of plaintiff's interest in hotel lease on ground of false representations in inducing assignment, alleged false representation that plaintiff's interest in furniture had been lost and that lease had been canceled constituted misrepresentation of existing facts and not mere opinions of law.

3. Cancellation of instruments ⇐42

In suit to cancel assignment by plaintiff of his interest in hotel lease on ground of fraud in its execution, amended complaint, setting forth circumstances under which assignment was executed to lessor, *held* to sufficiently set forth facts showing confidential relationship between plaintiff and lessor for statement of cause of action against lessor.

4. Pleading ⇐225(1)

Ordinarily, plaintiff should be permitted to amend his complaint on sustaining of a demurrer if he desires to do so.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by M. F. George against Frank Simpson, Sr., and another. Judgment for named defendant, and plaintiff appeals.

Reversed.

Clyde C. Triplett, of Los Angeles, for appellant.

Frank M. Bering, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment against the plaintiff and in favor of the defendant Frank Simpson, Sr., after an order sustaining a demurrer to plaintiff's amended complaint without leave to amend and after an order denying permission to the plaintiff to file a second amended complaint. The appeal presents two questions: (1) Does the amended complaint state a cause of action against Frank Simpson, Sr.? (2) Did the trial court abuse its discretion in refusing to permit plaintiff to further amend?

[1] It is alleged in the amended complaint:

(a) That at all times therein mentioned the defendant Frank Simpson, Sr., was the owner of a certain hotel building in Los

Angeles known as the Hotel Savoy; that on June 23, 1924, the defendant Frank Simpson, Jr., purchased all the furniture located in said hotel building and entered into a lease with Frank Simpson, Sr., under the terms of which he took possession of the building for the purpose of operating a hotel business, and thereafter until September 19, 1934, continued to operate and conduct said business; that on the 23d of June, 1924, the plaintiff and Frank Simpson, Jr., entered into a contract in writing by which the plaintiff agreed to act as manager of said hotel and by which the said Simpson, Jr., agreed to pay to plaintiff for his services as such the sum of $350 per month as salary, and also by said instrument assigned to plaintiff an undivided one-tenth interest in the proceeds from the operation of said business and an undivided one-tenth interest in the furniture and in the lease, and that the plaintiff acted as manager of said hotel business until July 31, 1934, when such employment was terminated by Simpson, Jr.; that during all of said time the defendant Simpson, Jr., was in possession of said Hotel Savoy and that during all of said time the said Simpson, Jr., conducted a hotel business on said premises and in connection therewith constantly advised and collaborated with the defendant Simpson, Sr., and that defendant Simpson, Sr., during all of said time was and now is familiar with all matters and things connected with said business and the carrying on and conducting of the same; that during all of said time the defendant Simpson, Jr., with the consent and permission of plaintiff, has retained in his possession and under his management and control all of the said furniture, including the interest of the plaintiff therein.

(b) That during all of said time there has existed between the plaintiff and *defendants* a relationship of trust and confidence; all receipts and expenditures in connection with the operation of said hotel have been in the exclusive custody and control of defendants, and during all of said time plaintiff had no accounting for the same nor knowledge of the amount or disposition of same, and the plaintiff has not had access to the books of account thereof nor information as to the contents thereof; that even the possession of the lease has always been with the defendants, and plaintiff has never seen the same and is not familiar with the contents thereof; that plaintiff does not know and has never known the amount of the proceeds from the operation of said hotel, nor the nature and extent of the debts incurred in connection with the operation of the business, if any, but, on the contrary, *plaintiff has intrusted his interests in the leasehold estate and his interest in the proceeds to the sole care, custody, and management of the defendants* and has in connection therewith wholly relied upon the honesty and integrity of the defendants *and said defendants have managed and controlled the same without any control by the plaintiff* and with plaintiff's full confidence and trust.

(c) That there was due and unpaid on his salary at the end of July, 1934, the sum of $5,710.

(d) That on or about the 27th day of July, 1934, the defendants Frank Simpson, Sr., and Frank Simpson, Jr., conspired between themselves to obtain, by means of false representations of certain facts and by concealment and suppression of other facts as hereinafter alleged, a release and an assignment from the plaintiff whereby the plaintiff would transfer and convey without consideration all his interest in said furniture and would waive all sums which might be due him under the provisions of the said contract, and the said defendants further conspired to sell the furniture and business of said hotel to one Howard Scott without revealing such fact to plaintiff and to appropriate to themselves all of the proceeds of the said sale.

(e) That the defendant Frank Simpson, Jr., pursuant to such conspiracy, as a part thereof, and with the knowledge of *and as the agent of Frank Simpson, Sr.,* did on the 27th day of July, 1934, state and represent to the plaintiff that all the furniture in said hotel had been forfeited for the nonpayment of indebtedness and that all the interest of the defendant Frank Simpson, Jr., and this plaintiff had been forever lost and dissipated; that Frank Simpson, Sr., the lessor, had canceled the lease and was taking the hotel over and represented to the plaintiff that unless the plaintiff execute an assignment transferring all his interest to the said Frank Simpson, Sr., the plaintiff might be held liable for a large sum of money owing from Frank Simpson, Jr., to Frank Simpson, Sr., on account of rent for said hotel building and on account of alleged advances made by the said Frank Simpson, Sr., to the said Frank Simpson, Jr., for the purpose of operating said hotel, and that in such event the plaintiff would lose such other property as he personally owned.

(f) That all of such representations were then and there false and untrue and were known by the defendants to be false and untrue and were made with the intent on the part of Frank Simpson, Sr., and Frank Simpson, Jr., for the purpose of deceiving the plaintiff and inducing him to relinquish and assign all his rights and interests under the provisions of the said contract and all his interest in the furniture and business of said hotel, and with the intent on the part of said defendants of defrauding the plaintiff out of his interest therein; that plaintiff had no knowledge of the falsity of such statements and had no access to any information or source of information which would have enabled plaintiff to have discovered such falsity; that plaintiff trusted and relied upon the defendants in all matters concerning the management and control of said hotel and plaintiff believed such statements to be true and relied upon the same and because of the same consented to and did execute two certain agreements which were then personally prepared by the said Frank Simpson, Jr., and which agreements are attached and made a part of the amended complaint and designated Exhibits 1 and 2, respectively, whereby plaintiff assigned all his interest in the business and furniture to Frank Simpson, Sr., and whereby plaintiff released the said Frank Simpson, Jr., from all indebtedness which might be owing from Frank Simpson, Jr., to plaintiff.

(g) That in truth and in fact at the time of the making of said representations to the plaintiff defendants had already contracted to sell the furniture in said hotel and the business, and did actually sell the same to one Howard Scott for the sum of $40,000; that defendants did not nor did either of them reveal such fact to the plaintiff prior to his execution of said exhibits, but on the contrary purposely concealed such fact from the plaintiff and plaintiff did not learn of the same until after said exhibits had been executed and until after the said sale to Howard Scott had been completed; that had plaintiff had knowledge of such agreement to sell said property for $40,000, plaintiff would not have executed said exhibits, which fact defendants well knew, and knowledge of such sale was by defendants purposely suppressed and withheld from plaintiff to assist the carrying out of the purpose of said conspiracy, to wit, to obtain without consideration a transfer and assignment of all plaintiff's interest in said property and to obtain without consideration a waiver of all back salary due the plaintiff under the terms and provisions of said agreement of June 23, 1924. The prayer was for judgment canceling the Exhibits 1 and 2 and for an accounting and that the plaintiff be declared to be the owner of an undivided one-tenth interest as aforesaid and that his said interest be quieted against Frank Simpson, Sr., and for other relief.

We turn to the defendant's brief to find out in what respects the above allegations fail to state a cause of action and we find the following: "Nowhere in the amended complaint is any reference made or any allegation of fact that Frank Simpson, Sr., handled any property or had any relationship with plaintiff and appellant. * * * Nowhere in the complaint is there any allegation that any fiduciary relationship existed between appellant and respondent Frank Simpson, Sr." It is sufficient to say with regard to this alleged defect that there is no merit in defendant's contention. No elaboration is necessary. The amended complaint speaks for itself. See paragraph (b), above.

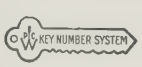
[2] The defendant next contends that the so-called "false representations" are nothing more than expressions of opinions of law. Among the alleged false representations are the following: (1) That the defendants stated to the plaintiff that all the furniture in the hotel had been forfeited for the nonpayment of indebtedness and that all the interest of Frank Simpson, Jr., and this plaintiff had forever been lost and dissipated; (2) that Frank Simpson, Sr., the lessor, had canceled the lease. See paragraph (e), above. Defendant says: "Respondent submits that those allegations are nothing more than expressions of opinions of law * * * and the courts have repeatedly held that an expression of opinion of law erroneously stated is not such a misrepresentation as to predicate a judgment of relief in fraud; particularly it is true where no fiduciary relationship existed." And he relies upon the case of McCarter v. Zeller, 35 Cal.App. 593, 170 P. 636. The answer is that these representations are representations of existing facts and past events and not mere opinions of law. But assuming momentarily that they are expressions of opinions of law, then there is a full and complete allegation of a confidential relationship existing between the plaintiff and the defendants.

[3] In this connection the defendant says: "Plaintiff tries to create a confidential relationship between appellant and respondent Frank Simpson, Sr., by alleging that he had the greatest confidence in him, yet the courts of this state have decided that facts alone establish a confidential relationship and that any statement that one existed without any justification therefor does not create such a relationship." And the defendant relies upon the following quotation from Robbins v. Law, 48 Cal.App. 555, at page 561, 192 P. 118, 120: "The mere statement in the complaint that the plaintiff had unlimited confidence in and relied upon the defendant is not a sufficient statement of the facts to show a confidential relation. The facts must be alleged, from which the court can see that a confidential relation does in fact exist." It is sufficient to say that the amended complaint herein does not confine itself to a mere statement of confidence in defendant but in addition thereto sets forth the facts which show a confidential relationship.

[4] Our decision on the first question makes it unnecessary to decide whether the trial court abused its discretion in denying plaintiff's application to amend. We might add, however, that the circumstances are few indeed where a plaintiff should not be permitted to amend his complaint upon the sustaining of a demurrer of he desires to do so, and this is the rule of the courts to the end that cases may be tried upon the merits.

Judgment reversed.

I concur: WOOD, J.



14 Cal.App.2d 635

MORRIS v. DUNCAN et al.

Civ. 10604.

District Court of Appeal, Second District, Division 1, California.

June 17, 1936.

Rehearing Denied July 17, 1936.

Hearing Denied by Supreme Court Aug. 13, 1936.

1. Automobiles ⇨301(3)

Complaint by automobile guest against host and county for injuries sustained when automobile at night dropped into stream where bridge had washed out, charging county with negligence as regards lighting and condition of warning signs and barricades, stated action against county, although charging host with willful misconduct in driving through barricade, where averring that plaintiff was in doubt as to whether she was entitled to redress from one defendant or the other, in view of statute authorizing joinder of defendants in cases of doubt (Code Civ.Proc. §§ 379a, 379c; St.1923, p. 675, § 2).

2. Pleading ⇨193(6)

General demurrer to complaint does not raise question whether causes of action alleged in complaint are properly joined.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Ava Marie Morris against A. D. Duncan and another. From a judgment entered in favor of defendant County of Los Angeles, upon its general demurrer to the complaint, plaintiff appeals.

Reversed.

George W. Manierre and G. M. Cuthbertson, both of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for respondent County of Los Angeles.

DESMOND, Justice pro tem.

Plaintiff appeals from a judgment entered in favor of defendant, county of Los Angeles, upon its general demurrer to plaintiff's complaint being sustained, without leave to amend. The complaint named two defendants, the county, and one Duncan, driver of an automobile, in which appellant was riding as his guest on the night of March 11, 1934.

Paragraph III of the complaint reads as follows: "That at the said time and place the plaintiff was riding as a guest in a certain automobile of the defendant Duncan, which was owned by and being driven by the said Duncan in a northerly direction on said Del Mar avenue in the vicinity of Norwood place and toward the said wash, and at the said time and place the said defendant Duncan drove, operated and maintained the said automobile at a dangerous and excessive speed, to-wit: be-

tween thirty-five and forty miles per hour, and, seeing the small sign in the center of the street and the red lantern hanging thereon, either read the said sign and realized the import thereof, or failed and omitted to notice the said wording and the said import, which he well knew gave notice of some danger to be apprehended on the said highway, and that the disregard of such warning was likely to result in injury to his passenger, and continued to drive his said automobile in a wanton fashion with the intent to cause injury to his said passenger or in utter disregard for her life and safety past the said sign at the same rate of speed, and either saw, or should have, at a sufficient distance to have stopped the said automobile, ascertained that the roadway was in a rough, bumpy and dangerous condition northerly from said sign, and traveling over the said highway at said speed was likely to result in injury to his passenger; and saw the red lanterns hanging from the barricade and that they were suspended above the roadway and gave warning of a danger, and that he should reduce his speed in order to ascertain the nature of the danger; that the said Duncan continued to drive his car at the same dangerous and excessive rate of speed with the intent to cause injury to his passenger or in reckless and wanton disregard for the life and safety of his passenger caused the same to collide with the said barricade, and that thereupon the said automobile continued through the barricade and dropped into the stream bed or wash with the plaintiff still riding as a passenger therein, and that the conduct of the said defendant Duncan at the said time and place constituted wilful misconduct."

The signs and lanterns referred to are more particularly described in paragraph II, as follows: "That on or about the 11th day of March, 1934, at or about the hour of 7:00 P. M., of said day, which was after dark, there was situated in the middle of Del Mar avenue and at a point approximately twenty (20) feet north of the northerly curb line of Norwood place as extended, a certain sign about two (2) feet square, standing perpendicularly and resting upon a small barrel and being partially illuminated by one (1) red lantern, bearing the words, 'Danger, Bridge Out'; some two hundred (200) feet northerly therefrom was located the precipitous southerly bank of the said wash and a stream bed some fifteen (15) or twenty (20) feet below the surface of the street, and some several feet south from the said bank of said wash there was located a barricade of unpainted boards resting upon wedged-shaped implements known as saw horses, and on the same barricade there was a sign reading, (Street Closed), which was being partially illuminated by one (1) or two (2) red lanterns."

In paragraph IV, it is alleged inter alia, and as a general ground for establishing the county's liability that "the signs and barricades which were maintained thereon, (Del Mar avenue) being partially obscured in that the painted letters thereon were in a dilapidated condition and covered with dirt and only partially illuminated in that the said lanterns were insufficient to clearly reveal the lettering thereon or the extent and nature of the said dangerous and defective conditions, and were insufficient to give reasonable notice to motorists using the said Del Mar Avenue at night time that the bridge was out and the highway impassable and that there was a sharp and precipitous drop from the end of the street to the stream bed below and that the said barricade was insufficient in strength or size to afford any protection to motorists. * * *"

[1] Respondent claims that trial court, having the entire complaint before it, could not ignore the allegations of paragraph III in determining whether the complaint states a cause of action against the county; appellant, on the other hand, calls attention to paragraph XII, which alleges that "plaintiff is in some doubt as to whether she is entitled to redress from the defendant Duncan or from the defendant County of Los Angeles, and both defendants have been joined herein with the intent that the question as to whether both of said defendants are, or one of them is, liable to the plaintiff and to what extent; and that the liability may be determined in this action; and that the court may award judgment to the plaintiff as against the defendants either jointly, severally, or in the alternative."

In 1927 (St.1927, pp. 477, 631) two new sections, identical with sections 211 and 213 of the New York Practice Act, were added to our Code of Civil Procedure. They are, respectively, section 379a and section 379c, Code of Civil Procedure.

Invoking these sections and relying upon the allegation of doubt set up in paragraph XII of her complaint, appellant con-

tends that, as to the county, paragraph III should be disregarded altogether, since it was drawn for the specific purpose of fixing liability upon the defendant Duncan, the allegations in paragraphs II and IV being relied upon to fix liability upon the county.

If this case had gone to trial upon the pleadings, a court or a jury conceivably might have found as a fact that the warnings and barricade posted and installed by the county were either or both so insufficient, as not to meet the requirement of the statute (St.1923, p. 675; Deering's Gen.Laws 1931, Act 5619, p. 3052, § 2), that the county "take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." It is conceivable, too, that the court or jury, notwithstanding the allegations of paragraph III, might have found defendant Duncan, as a member of the public exercising ordinary care under the existing conditions, guiltless of negligence. A judgment against the county might be predicated upon such findings.

Looking at the picture from the other angle, a jury or a court might conclude, if both defendants remain in the case, that the county had taken all reasonably necessary precautions to protect the public, in which event, in order to recover from defendant Duncan, it is apparent that his misconduct or negligence is charged appropriately in paragraph III.

Appellant and respondent both rely upon the recent case of Busset v. California Builders Co., 123 Cal.App. 657, 12 P.(2d) 36, as sustaining their respective positions. We note at page 666 of 123 Cal.App., page 40 of 12 P.(2d), the following language: "A mere doubt or suspicion is not enough to bring section 379c into play. There must be some nexus associating the defendants in an event or series of events productive of the injury complained of, under such circumstances that, while there is certainty as to the alleged wrong to be righted, there is uncertainty as to which of two or more individuals implicated is legally liable therefor." In the instant case the alleged wrong that is stated with certainty is the injury suffered by the plaintiff; the uncertainty as to which, if either, of the two defendants is responsible will be terminated when the judgment or verdict is rendered upon trial. We believe the alleged two possible causes of the wrong are so linked together as to justify bringing the suit in its present form, under the reasoning of Judge Johnson in the Busset Case, especially in view of his further statement at page 666 of 123 Cal.App., page 40 of 12 P.(2d): "Sections 379a, 379b, and 379c, which were added to the Code of Civil Procedure in 1927 (St.1927, pp. 477, 478, 631), are based upon like provisions adopted in New York and other states from the English rules of practice, and are designed to give greater freedom and flexibility in procedure, to the end that responsibility for the commission of a grievance or wrong may be fixed in certain classes of cases without circuity of action or multiplicity of suits. The sections should be liberally construed in furtherance of administrative efficiency, but should not be so loosely applied as to bring into court upon bare conjecture a distinct personality, who is pictured not in combination or collaboration with, or as a presumptive agent, of, some other party defendant, but as a wholly independent actor."

[2] The New York case cited by respondent, Ader v. Blau, 241 N.Y. 7, 148 N. E. 771, 772, 41 A.L.R. 1216, while having points of similarity to the instant case is not altogether in point. In that case a motion made by one of two defendants to strike the cause implicating him was granted, the question being, "Are the causes of action alleged in the complaint properly joined under the provisions of the Civil Practice Act?" While such a question may be raised under our system of procedure, it does not arise upon a general demurrer being interposed. We observe also the court's statement in the Ader Case: "It is not claimed that section 213 covers this action," while in the instant case, that is the exact claim, for, as we have noted, section 379c of the Code of Civil Procedure, above quoted, and invoked by plaintiff in paragraph XII of her complaint, is a duplicate of section 213 of the New York Civil Practice Act.

We find plaintiff's complaint does state a cause of action against respondent; therefore, the judgment entered under the general demurrer must be, and it is, reversed.

We concur: YORK, Acting P. J.; DORAN, J.

14 Cal.App.2d 577

IKENBERG v. CARLOCK.

Civ. 1752.

District Court of Appeal, Fourth District, California.

June 15, 1936.

Automobiles ⇨244(58)

Evidence *held* to support judgment awarding pedestrian damages for injuries received when struck by defendant's automobile at blind intersection controlled by traffic light, while pedestrian was crossing intersection in pedestrian zone, on ground that pedestrian was not guilty of contributory negligence proximately causing his injury by walking across intersection when traffic signals were closed against him.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by William Ikenberg against Harold Carlock. Judgment for plaintiff, and defendant appeals.

Affirmed.

Osborn & Burum, of Bakersfield, for appellant.

W. C. Dorris and H. E. Schmidt, both of Bakersfield, for respondent.

BARNARD, Presiding Justice.

The defendant has appealed from a judgment for $750 in favor of the plaintiff in an action for damages for personal injuries.

The accident occurred at the intersection of Chester avenue and Eighteenth street in Bakersfield. Chester avenue runs north and south and Eighteenth street east and west. There are pedestrian zones marked on each of the four sides of this intersection, and traffic is controlled by stop and go signals on the four corners. The signals on the southeast corner and northwest corner show the word "Go" for traffic to move north and south, and those on the northeast corner and southwest corner give a similar sign for traffic to go east and west. There is an interval of six seconds during which all of the signals display a stop sign to permit traffic one way to clear the intersection before traffic from the other way is admitted.

About 5:30 p.m. on November 21, 1933, the appellant, while driving an automobile north on Chester avenue, struck the respondent, who was crossing that street, going from east to west in the pedestrian zone, on the north side of that intersection. It appears without dispute that this is a blind intersection, and there is evidence that the appellant was traveling at a speed of 30 miles an hour or more, and that his car knocked the respondent up in the air some 6 or 7 feet from the ground.

The only point raised is that the respondent was guilty of contributory negligence as a matter of law, and that there is no evidence to support the findings in favor of the respondent on that issue. It is earnestly contended that all of the evidence shows that the north and south signals were open when the appellant passed through the intersection, and that the respondent attempted to cross the street when the east and west signals were closed against him.

While there was evidence to this effect, there was some evidence that all of the signals were closed to traffic at the moment the collision occurred, and there was also evidence, given by the respondent and one eyewitness, that the signals were open for east and west traffic at the time the respondent was crossing the street. While these witnesses showed some confusion as to the location of the signals on the respective corners of the intersection, they each testified that the signals were open for traffic east and west, and the possible conflicts in the testimony have been resolved by the trial court in favor of the respondent.

In addition, there was evidence that the appellant entered the intersection when the signals were closed to north and south traffic and the trial court was not compelled to hold that the respondent's negligence, if any, was a proximate cause of the accident. Another eyewitness testified that the appellant thus entered the intersection, and the appellant, when asked why he had not seen the respondent before hitting him, replied: "Instinctively, I was glancing left for oncoming traffic, and when I glanced back is when I saw Mr. Ikenberg." The traffic from his left was only to be expected when the signals were open for travel in that direction and while he was crossing the first half of the intersection, and the fact that he was looking for the same strongly suggests that when he entered the intersection the way was open for such traffic.

The evidence is conflicting, and it cannot be said, as a matter of law, that the respondent was guilty of contributory negli-

gence which proximately contributed to his injury.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



14 Cal.App.2d 604

GELGUD v. LOS ANGELES ROCK & GRAVEL CO. et al.

Civ. 10872.

District Court of Appeal, Second District, Division 2, California.

June 16, 1936.

Rehearing Denied July 8, 1936.

Hearing Denied by Supreme Court Aug. 13, 1936.

1. Contracts ⇐169

Contract providing that property conveyed to mechanic's lienor in satisfaction of lien could be repurchased for designated price on or before specified date, and that mechanic's lienor could sell to third persons for designated price and divide profit with owner, should be regarded in light of circumstances surrounding parties (Civ.Code, § 1647).

2. Trusts ⇐35(1)

Transaction whereunder property was put in name of mechanic's lienor to secure lien and enable owner to save property from loss by paying lienor designated sum, with understanding that, if buyer should be found for designated price, profit would be divided between mechanic's lienor and owner, *held* to create trust whereunder mechanic's lienor became obligated to hold property in conformity with terms of agreement, unless it should be sold in accordance with provisions thereof (Civ.Code, §§ 1641, 1647).

3. Contracts ⇐143, 147(3)

Contract must be construed in its entirety, and intention of parties must be gathered from whole instrument taking it by its four corners (Civ.Code, § 1641).

4. Damages ⇐120(6)

Under contract requiring mechanic's lienor to hold property conveyed to it until specified date, unless it should be sold in accordance with provisions of contract, mechanic's lienor *held* liable to owner for amount agreed on as owner's share of profit in event of sale, where property was sold for amount less than that fixed by contract prior to specified date, as against contention that measure of damages was fixed by statute relating to breach of contracts to convey (Civ. Code, §§ 1641, 1647, 3302, 3306).

5. Damages ⇐120(6)

Liability of mechanic's lienor for amount agreed to be paid to owner of property conveyed to mechanic's lienor to secure obligation in event of sale to third person after sale of property for price less than that designated in agreement *held* not affected by statute providing that part of contract fixing amount of damages for breach of obligation is void (Civ.Code, §§ 1670, 3302).

6. Damages ⇐120(6)

Under contract whereunder mechanic's lienor was to hold property as security for amount due, and, in event of sale for designated price, pay owner two-thirds of net amount of sale price after deducting amount "due" on all incumbrances and amount due lienor, amount of trust deed outstanding at time of sale which had not matured *held* properly deducted from amount of damages due owner for lienor's breach of contract by sale for less than amount designated; the word "due" being used to refer to existing obligation which may be payable at future time as well as money immediately payable.

Appeal from Superior Court, Los Angeles County; Atwell Westwick, Judge.

Action by K. L. Gelgud against the Los Angeles Rock & Gravel Company and another. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Monta W. Shirley and Barry Sullivan, both of Los Angeles, for appellant.

Everard L. McMurrin, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendants. It was stipulated that the Los Angeles Rock & Gravel Corporation acquired the assets and assumed the liabilities of the Los Angeles Rock & Gravel Company. For brevity the defendants will hereinafter be referred to as the

Company. No findings were made by the trial court; the case having been tried upon an agreed statement of facts. According to the stipulation, plaintiff was the owner of the real property described in the complaint, and on or about October 10, 1931, he employed the Company to do certain excavation work thereon for the agreed price of $2,425. The work was completed, and the Company, not having been paid, filed a mechanic's lien against the property for $2,425. On March 16, 1932, "in payment and satisfaction" of the lien, plaintiff caused the property to be conveyed to the Company, and as part of the same transaction plaintiff and the Company executed a written agreement dated March 16, 1932, by which it was agreed that the Company would sell and convey to plaintiff, and the plaintiff would buy, the property on or before November 19, 1932, for the sum of $2,950, subject to incumbrances of record. The agreement contained the following provision: "It is further understood and agreed that the seller herein mentioned, may at any time on or before November 19, 1932, unless the purchase price above provided for be sooner paid, sell said property to any other person or persons at a gross sales price of Twenty-three Thousand Five Hundred Dollars ($23,500.00) or more, and that this contract shall be canceled upon payment to the buyer herein mentioned of a sum equal to two-thirds of the net amount of said sale price after deducting the amounts then due on all incumbrances of record, together with the sum of Two Thousand Four Hundred Twenty-five Dollars ($2,425.00) due the Los Angeles Rock and Gravel Company, and a sales commission not exceeding five (5%) per cent of the selling price."

Payments on a trust deed upon the property were in default and the holder of the trust deed "threatened" foreclosure. On April 25, 1932, the Company conveyed the property to the holder of the trust deed for a consideration of $250. No part of this or any other sum was paid to plaintiff. At the time of the conveyance by the Company, there were two trust deeds upon the property upon one of which there was due the sum of $13,060, and interest in the sum of $438.75. The amount of the other trust deed, which had not matured, was $3,500, and there was due $61.25 for interest. Plaintiff demands payment of two-thirds of the net sum which would be computed upon a sale in the sum of $23,500, less the amounts of the first trust deed and interest, the amount of the mechanic's lien and the seller's commission.

[1, 2] The transaction should be regarded "in the light of the circumstances surrounding the parties." Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876, 878; Civ.Code, § 1647. It is apparent that the parties intended to put the property in the name of the Company for the purpose of securing the Company in its claim for work performed and to enable plaintiff to save his property from loss by paying the Company the sum of $2,950, before November 19, 1932, with the understanding that, if a buyer should be found by that time for the sum of $23,500 or more, the net profit would be divided two-thirds to plaintiff and one-third to the Company. Under such circumstances, a trust was created, and the Company became obligated to hold the property in conformity with the terms of the agreement, unless it should be sold in accordance with the provisions thereof. In Campbell v. Kennedy, 177 Cal. 430, 170 P. 1107, 1108, the plaintiffs were the owners of certain mining property which was about to be sold under an execution issued upon a judgment against them. Being without means, they applied to the defendant for assistance, with the result that the defendant advanced $1,200 to pay the judgment. The plaintiffs conveyed the property to the defendant, who gave them in return a writing whereby he agreed that, whenever he sold the property, he would, after deducting the amounts advanced by him, give one-half of the balance of the purchase price to the plaintiffs. The court said: "The conveyance was made to him in trust to sell the property and to divide the proceeds between the grantors and himself, after first deducting the amount of his advances."

[3-5] Defendants contend that plaintiff's remedy is a suit for breach of the contract to convey to him, and that his measure of damages is fixed by section 3306 of the Civil Code, and point out that the agreed statement of facts contains nothing to show the value of the property. In this contention defendants select only one feature of the agreement of the parties and disregard another important feature. A contract must be construed in its entirety and the intention of the parties must be gathered from the whole instrument, tak-

ing it by its four corners. The agreement must be construed in such a manner as will give effect to every part of it. Civ.Code, § 1641; 6 Cal.Jur. p. 268, and cases there cited. Bearing in mind these rules, we must conclude that the Company not only agreed to convey the property to plaintiff under certain circumstances, but also agreed to pay to plaintiff a certain definite sum if the property should not be held until November 19, 1932. The Company did not hold the property, but disposed of it in violation of the terms of its agreement. It therefore became liable to pay to plaintiff the amount agreed upon, based upon the provision in the contract which fixed the sum due plaintiff in the case of a sale. The contention of plaintiff is not defeated by section 1670 of the Civil Code, by which it is provided that a part of a contract which fixes the amount of damages for breach of an obligation is void. The obligation breached by defendants was to pay money only, and the detriment caused by the breach "is deemed to be the amount due by the terms of the obligation, with interest thereon." Civ.Code, § 3302; Brown v. Lamb, 83 Cal.App. 187, 256 P. 825; Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 242 P. 709.

[6] In calculating the amount due, plaintiff contends that the amount of the second trust deed for $3,500 should not be deducted, for the reason that it was not "due" at the time of the sale by the Company. The word "due" has a double meaning. It does not always mean that the money is then immediately payable. It is sometimes so used, but it is also used to refer to an existing obligation which may be payable at some future time. Ahlgren v. Walsh, 173 Cal. 27, 158 P. 748, Ann.Cas. 1918E, 751; Joy v. Rousseau, 72 Cal.App. 179, 236 P. 972. From a consideration of the transaction as a whole, we conclude that it was the intention of the parties that the amount of the second trust deed should be deducted in arriving at the sum due plaintiff.

The judgment is reversed, with directions to the superior court to enter judgment for plaintiff against both defendants in the sum of $1,893.33, with interest thereon at the rate of 7 per cent. per annum from April 25, 1932.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

14 Cal.App.2d 489

PEOPLE v. HARDEN et al.

Cr. 294.

District Court of Appeal, Fourth District, California.

June 8, 1936.

1. Conspiracy ⇐47
False pretenses ⇐49(1)

Evidence *held* sufficient to support conviction of grand theft and conspiracy to commit grand theft as against defendants' contention that transaction was a loan.

2. Conspiracy ⇐47
False pretenses ⇐49(4)

Evidence *held* to sustain conviction of grand theft and conspiracy to commit grand theft on ground that all material representations made to prosecuting witness by defendants were false and fraudulent and related to past or existing facts.

3. Criminal law ⇐97(½)

Where most of the acts leading up to defendants' fraudulent obtaining of money took place in California and defendants returned there with part of money soon after obtaining it, defendants were subject to punishment for grand theft and conspiracy to commit grand theft under California statute punishing persons who commit "in part, any crime within the state," though money was actually transferred in Mexico (Pen.Code, § 27, subd. 2, § 778a).

4. Criminal law ⇐517(1)

In prosecution for grand theft and conspiracy to commit grand theft, statements made to officers by defendants admitting they defrauded prosecutrix *held* voluntary and admissible.

5. Criminal law ⇐1168(1), 1171(1)

In prosecution for grand theft and conspiracy to commit grand theft, alleged misconduct of district attorney and errors in rulings by the court complained of by defendants *held* not to justify reversal in view of evidence (Const. art. 6, § 4½).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

William C. Harden and Martin J. Doud were convicted of grand theft and con-

spiracy to commit grand theft, and they appeal.

Affirmed.

Fred A. Steiner and O. A. Thorpe, both of San Diego, for appellants.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendants were jointly charged with the crime of grand theft, and, in a second count, with conspiracy to commit grand theft. Each defendant was also charged with a prior conviction, but this charge against Doud was dismissed during the trial. A jury found each defendant guilty on both counts, but found in favor of the defendant Harden on the charge of a prior conviction. Both defendants have appealed from the judgment and from an order denying their motion for a new trial.

The evidence is voluminous, and it would serve no useful purpose to give the details here. To shorten a long story, the appellant Harden met the prosecuting witness, a widow 60 years of age, at Long Beach in July, 1934. He made a number of misrepresentations to her, including the false statement that he was unmarried and giving her an assumed name. He paid her marked attentions, and by September she agreed to marry him. They arranged to start at 8 a. m. on September 25, 1934, for Yuma to be married, but he contrived to delay their start until 3 p. m. They started in her automobile and on reaching San Diego registered at a hotel. They spent the next few days partly in San Diego and partly in Tia Juana.

During this time Harden picked up Doud, who claimed never to have seen Harden before, although it was thoroughly established at the trial that they had known each other for eight years and had worked together at various race tracks throughout the country. Doud pretended to have inside information as to which horses were to win the various races then being run. He pretended to arrange with Harden to furnish the money with which Harden was to make certain bets and that Harden was to receive 25 per cent. of the winnings. One or two such bets were made, and when Harden returned with the winnings, apparently in phoney money, Doud handed 25 per cent. thereof to Harden in the presence of the prosecuting witness. Doud then persuaded Harden, in her presence, to make a large bet by putting up his (Harden's) check which he said he would arrange with the bookmaker to accept. They reported to the prosecuting witness that this was done and that Harden had won a large amount, but that the bookmaker would not turn over the money until Harden produced the amount of his check to convince them the check was good. The appellants then told the prosecuting witness that her fiancé would be sent to the penitentiary unless the amount of the check was raised. They went through an elaborate scheme, including telegrams supposed to have been sent and received, and finally convinced the prosecuting witness that they had raised all of the money needed with the exception of about $8,700. She told them she had this amount in her bank at Long Beach and they pursuaded her to get it and turn it over to them, saying it would be returned within an hour, and convinced her that this was necessary in order to keep her future husband from going to the penitentiary.

She went to Long Beach and drew that amount of money from her bank and turned the same over to them, although they had so arranged matters that the actual transfer of the money took place at Tia Juana. Another elaborate series of events was then staged through which they convinced the prosecuting witness that her future husband had made other bets and, through a misunderstanding of Doud's instructions, had lost not only Doud's money but all of his own and all of the money she had handed them. All three then came back to San Diego and they informed the prosecuting witness that it was necessary for Harden to go to Baltimore to procure funds for his own use and to pay back some he had borrowed in order to prove his ability to make the check good.

They then persuaded the prosecuting witness to go to Galveston, telling her that Harden would join her there on his return from Baltimore. While she was in Galveston they sent her several telegrams calculated to keep her waiting there. One of these, purporting to be from Doud and addressed to her supposed husband, was proved to have been written by Harden while he was with Doud, who dictated it. The prosecuting witness remained in Galveston for some three weeks

and then told her story to her son and later to the police. The two appellants were not apprehended until September, 1935.

[1-3] It is first contended that the evidence is not sufficient to sustain the conviction. While the appellants freely admitted on the stand that they received this money, they told a fantastic and unbelievable story to the effect that the money was merely loaned to them. They call attention to a small portion of the testimony given by the prosecuting witness in which she referred to the transaction as a loan. The rest of her testimony and the testimony given by the appellants themselves is amply sufficient to support the verdict of the jury and sufficiently disproves the contention that this transaction was an ordinary loan. It is also urged that the representations made to the prosecuting witness by the appellants were not proved to have been false and fraudulent. Many of them were definitely proven to have been false, some of these by the testimony of the appellants themselves, and the evidence, as a whole, is amply sufficient to show that each material representation was false. It is argued that these representations were as to future events and not of past or existing facts. With the exception of the representation that they would return her money within an hour every material representation was of a past or existing fact. It is further urged that since the money was actually transferred in Mexico no offense was committed in California. A sufficient answer to this contention is to be found in section 778a of the Penal Code and in subdivision 2 of section 27 of that Code, since the evidence conclusively shows that most of the acts leading up to the obtaining of this money from the prosecuting witness took place in San Diego and that each of the defendants, almost immediately after receiving the money, came back to San Diego with a part of the money in his possession.

[4] With respect to the claimed insufficiency of the evidence, it may be added that not only was there ample evidence to sustain the verdict, but both appellants, after their arrest, made statements to the officers, both at Long Beach and at San Diego, which confirms the other evidence. To the officers at Long Beach Harden said: "You knew we didn't want to beat that old woman. It was kind of forced upon us and we had just fell for a man and the move and expense was quite high and we just had to take her to kind of get even." To the same officers Doud said: "You know I have always made it a practice not to play for women and I didn't want to do it in this case but the circumstances kind of forced me to it and I am certainly sorry that I ever took hold of it." Some contention is made that the statements made at Long Beach were not admissible in evidence, as not having been voluntarily made. Not only is this contention without merit, but both appellants made similar statements to officers at San Diego after being taken there, and it is not even contended that the latter were not voluntarily made.

[5] The appellants next charge the district attorney with prejudicial misconduct in some half dozen instances and complain of some ten errors of the court in ruling upon the admission of evidence. All of these are trivial and most of them are so obviously without merit that we do not feel justified in discussing them in detail. We have carefully gone over the record, and any possible errors could not be held reversible in view of the evidence and the provisions of section 4½ of article 6 of the Constitution. Most of the claims of misconduct on the part of the district attorney are entirely without merit, and any possible misconduct in one or two instances was trivial in nature and adequately cured by instructions of the court. The court's rulings on the admission of evidence were entirely too favorable to the appellants, and the only real error we find therein is in one instance where the court erroneously sustained the appellants' objections to the admission of certain evidence which was plainly admissible.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

14 Cal.App.2d 599

In re LA FETRA'S ESTATE.

LANTERMAN et al. v. LA FETRA et al.

Civ. 11007.
District Court of Appeal, Second District, Division 1, California.
June 16, 1936.

Hearing Denied by Supreme Court Aug. 13, 1936.

1. Wills ⇐440

In determining testatrix' intention, court must stand by words of will and attribute no intention to testatrix which cannot reasonably be drawn from language of will itself.

2. Wills ⇐440

Will is to be examined with view to discovering decedent's testamentary scheme or general intention, and apparent meaning of particular words, phrases, and provisions is to be subordinated to testamentary scheme, plan, or dominant purpose.

3. Wills ⇐457

Technical import of testamentary words should not prevail over obvious intent of testator.

4. Courts ⇐89

Interpretation to be given particular will must turn on language peculiar thereto, so that decisions passing on instruments of varying terminology can be of little assistance other than to announce rules of construction.

5. Wills ⇐565(3)

Holographic will making several specific bequests, including bequest of stocks to consanguineous nieces and nephews, and bequeathing remainder for equal division among children of husband's brothers and sister and of testatrix' brother in provision containing interlined statement, "Personal property I give to (consanguineous nieces and nephews)—division to be made by (named persons) What no one wants give to charity—" *held* to bequeath remainder, both real and personal, with exception of testatrix' personal effects, to all nieces and nephews, since "personal property," within meaning of will, referred to personal effects only (Civ. Code, § 14, subd. 3; §§ 657, 663; Probate Code, § 106).

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding in the matter of the estate of Stella B. La Fetra, deceased, on the petition of Lloyd S. Lanterman and others for an order determining heirship, opposed by Everett E. La Fetra and others. From an order in favor of objectors, petitioners appeal.

Affirmed.

Oliver O. Clark, of Los Angeles, for appellants.

Ben F. Gray, of Los Angeles, for respondents.

WHITE, Justice pro tem.

Stella B. La Fetra died testate November 9, 1933. Through the medium of a holographic will the testatrix made several specific bequests, after which follows the following provision in the will: "Sixth—The remainder of my estate I wish equally divided among the living nieces and nephews —children of my husband's brothers and sister and my brother's children allowing C. W. La Fetra a nephew's portion *Personal property I give to Harriet Lulu Lloyd & Frank Lanterman—division to be made by F. D. & R. S. Lanterman What no one wants give to charity—"*

The trial court found that the italicized portion of the will above quoted was interlined by the testatrix.

The present controversy centers about the interpretation to be given to the italicized portion of the foregoing provision. Appellants herein, together with Harriet Lanterman, are the consanguineous nephews and nieces of testatrix. Two of them, Frank and Lloyd Lanterman, petitioned the superior court for an order determining heirship, wherein it should be decreed that all of the personal property be distributed to them except an amount sufficient to administer the estate; it being provided in the will that "a sufficient amount to administer my estate to be taken from stocks and bonds standing in my name." Sixteen nieces and nephews of the deceased husband of testatrix filed objections to said petition, contending that by the aforementioned words in controversy here it was the intention of the testatrix to give to the four consanguineous nephews and nieces *only her personal effects.* The trial court found in favor of the objectors, and decreed that it was the intention of the testatrix to give

only the *personal effects* to Harriet Lulu Lloyd and Frank Lanterman, and that after paying the specific bequests provided for in the will, the remainder of the estate, subject to the costs of administration, be distributed in equal shares among the appellants and the remaining sixteen nieces and nephews. From such order this appeal is prosecuted.

Appellants insist that the words "personal property" as used in the dispositive clause of the will in dispute, should be interpreted as they are defined in the Civil Code (sections 657, 663; subdivision 3 of section 14); while respondents urge that the words "personal property," as used in the disputed clause, should be limited to purely personal effects.

[1-4] In the interpretation of wills section 106 of our Probate Code enjoins upon courts the duty to view the testamentary words in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained; while technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention or discloses that the testator was unacquainted with such technical sense. In determining the intention of the testatrix here we must, as appellants insist, stand by the words of the will, and no intention should be attributed to the testatrix which cannot reasonably be drawn from the language of the document itself; but it is generally recognized that a testamentary instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention, and that the apparent meaning of particular words, phrases and provisions is to be subordinated to this scheme, plan or dominant purpose. In re Estate of Puett, 1 Cal.(2d) 131, 133, 33 P.(2d) 825. The technical import of words should not prevail over the obvious intent of the testator. In Re Estate of Koch, 8 Cal.App. 90, 96 P. 100, a bequest covering, in part, "all my belongings" was held not to include money, in view of the apparent intent of the testatrix to dispose of furniture, clothes, pictures, jewelry, and things which she ordinarily used for her personal comfort. In Andrews v. Schoppe, 84 Me. 170, 24 A. 805, 807, where the will disposed of certain enumerated household articles, furniture, beds, and "all other articles of personal property," it was held that the latter words must be read in connection with the words preceding them, and that when so read and construed, the words did not include promissory notes found among the effects of the decedent. It was held in Tallman v. Tallman, 3 Misc. 465, 23 N.Y.S. 734, that, in view of other bequests in a will, a bequest of "all my personal property" referred only to household effects. It must be borne in mind, of course, that the interpretation to be given a particular testamentary instrument must turn upon the language peculiar thereto, and that decisions passing upon instruments of varying terminology can be of little assistance other than to announce the rules of construction. The cases herein cited are of value to us in this case in that they indicate the propriety of applying to the phrase "personal property" a limited and restricted meaning and operation, consistent with the testatrix' evident intention.

[5] We are satisfied from a reading of the particular bequest here involved that it was the desire and intention of the testatrix, as evidenced by the language employed, after making specific requests, to give the remainder of her estate, both real and personal, to all "the living nieces and nephews—children of my husband's brothers and sisters and my brother's children allowing C. W. Le Fetra a nephew's portion"; and that when testatrix interlined her holographic will by inserting the words, "Personal property I give to Harriet Lulu Lloyd and Frank Lanterman—division to be made by F. D. & R. S. Lanterman What no one wants give to charity," she intended thereby to give, as the trial court found, her personal effects to appellants. To our minds, this is borne out by reference to the second paragraph of the will, in which she made a bequest of specified personal property, viz., stocks, to these appellants. We are of the opinion that it is not reasonable to assume that had the testatrix intended all of her personal property to go to appellants she would have referred to such property in two paragraphs of the will, and we feel that it is but logical to conclude that had she so intended she would have so provided in a single paragraph. We are impressed with the inference, based on the propensities of people, that the bequest of certain of her personal property to appellants in the second clause of the will, coupled with the express language in the sixth paragraph directing an equal division of the remainder of her property, leads logically and inevitably to the conclusion that when the testatrix added the words in dispute here she intended thereby to give

only her personal effects to appellants. Weight is also given this conclusion by the direction to her brothers to make the division of such property to appellants and the authority vested in them to give to charity such property as no one wanted. It does not seem to us reasonable to assume that the testatrix believed that any of the very valuable stocks and bonds embraced in her personal property would be rejected by appellants; while it is, in our opinion, reasonable to assume that she felt some of her personal effects or household goods might not be acceptable to the four nieces and nephews. This conclusion, in our opinion, is consistent with and does no violence to the expressed intention of the testatrix, because it harmonizes with decedent's apparent scheme or general intention. Frank D. Lanterman, executor under the will, a brother of decedent, and father of some of the appellants, testified that on March 18, 1933, the birthday of decedent, the latter stated to him that it was her desire that upon her death her household goods and personal effects be distributed in their entirety to appellants, save and except the furniture in the one room occupied by decedent's housekeeper, which latter effects were to go to the housekeeper.

The foregoing, we feel, is amply sufficient to support the lower court's finding that when the testatrix interlined her holographic will and inserted the disputed words, it was her intention to give to the four consanguineous relatives her personal effects, and if none of the parties named wanted any part of said personal effects, to distribute such unwanted property to charity.

For the foregoing reasons, the order appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



14 Cal.App.2d 589

PEOPLE v. CRITTENDEN.

Cr. 1889.

District Court of Appeal, First District, Division 2, California.

June 16, 1936.

Rehearing Denied July 16, 1936.

1. Criminal law ⇐878(4)

Conflict in wording of jury's verdict, finding defendant guilty of first degree robbery, but finding untrue charge of being armed in first count of information accusing him of robbery while armed with deadly weapon, *held* not prejudicial to him; record clearly showing legal conviction of second degree robbery (Pen.Code, § 211a; § 969c, as added by St.1935, p. 1705; § 1168, subd. 2).

2. Criminal law ⇐1159(5)

Where defendant's statement after his arrest on robbery charge, taken in connection with victim's description of robber, made sufficient case for jury as to identification of defendant as guilty party, appellate court cannot disturb jury's finding adverse to defendant on such question, though description was not very exact.

3. Criminal law ⇐941(2)

Newly discovered evidence that defendant did not wear mustache at time of alleged robbery, as victim testified that robber did, *held* not to warrant new trial after conviction, where such question was gone into during trial; such evidence being at most merely cumulative.

4. Criminal law ⇐1184

Error in judgment that defendant had been convicted of robbery in first degree, whereas effect of verdict was to find him guilty of second degree robbery, *held* not to require reversal; appellate court having power to modify judgment by substituting "second degree" for "first degree" (Penal Code §§ 211a, 1260).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Nathaniel Crittenden was convicted of robbery, and he appeals.

Judgment modified, and affirmed as modified.

M. B. Moore and Fred B. Mellmann, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant was convicted of the crime of robbery. He made a motion for a new trial and also made a motion to set aside the verdict. Both motions were denied. He has appealed from the judgment and the order denying said motions.

[1] The information filed against the defendant alleged that "Nathaniel Critten-

den is accused by the district attorney of the said county of Alameda, by this information of the crime of felony, to-wit, robbery, in that on or about the 27th day of October, A. D. 1933 at the said county of Alameda, state of California, he robbed Arthur Davis of $65, more or less, lawful money of the United States, and at the time of the commission of said offense defendant was armed with a deadly weapon, to-wit, a firearm capable of being concealed upon the person without having a license or a permit to carry such firearm." The jury returned a verdict which was as follows: "(1) We, the jury in the above entitled cause, find the defendant guilty of the crime of felony, to-wit: robbery in the first degree as charged in the information. (2) We find the charge of being armed contained in the first count not true." (Parenthesis ours.)

In his first point the defendant asserts that the verdict returned by the jury is inconsistent and amounts to a verdict of acquittal. In his presentation of this point he frankly concedes that before the year 1935 the first division of the verdict would have been valid as a verdict finding the defendant guilty of robbery in the first degree. It will be noted that the information was in general terms and would have supported a verdict convicting the defendant of either robbery in the first degree or in the second degree, depending on what the jury found the fact to be. It must also be conceded that robbery in the second degree falls within a charge of robbery in the first degree. For some years section 211a of the Penal Code has provided as follows: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree." In 1935 the Legislature enacted certain new provisions and certain amendments to the end that the records in penal offenses should contain more on the face thereof denoting with precision the exact nature of the offense, and that the state board of prison directors might be fully informed as to the facts. St.1935, c. 603, p. 1700. Section 969c is a new section that was added. Among other things, it is therein provided that: "Whenever a defendant is armed with a firearm or other weapon under such circumstances as to bring said defendant within the operation of subdivision 2 of section 1168 of the Penal Code," etc., "the fact that the defendant was so armed shall be charged in the indictment or information or complaint." That said section did not purport to add an element to the crime, but did purport to add collateral information, is shown by certain provisions of the section. Among other things it is provided: "If the defendant pleads not guilty of the offense charged in any count which alleges that the defendant was armed either at the time of this commission of the offense or at the time of his arrest, or both, the question whether or not he was armed as alleged must be tried by the court or jury which tries the issue upon the plea of not guilty. If the defendant pleads guilty of the offense charged the question whether or not he was armed as alleged must be determined by the court before pronouncing judgment." That language clearly indicates that in the contemplation of the Legislature the indictment or information must, as formerly, plead the offense, and, secondly, that it must plead the collateral matter whether the defendant was armed, etc. It also indicates that the plea of not guilty places in issue and the plea of guilty admits whether the defendant committed the offense. Whether the defendant pleads not guilty or pleads guilty in either event, the question as to whether he was armed or not armed had to be tried by the court or jury. There was no evidence that the alleged offense was perpetrated by torture. By its verdict the jury found against the defendant on every element constituting the crime of robbery, but, in his favor, it found that the defendant was not armed at the time of the commission of the offense. The last-mentioned finding did not go further than to point to the degree of the offense committed. Therefore we think the record under attack clearly showed a legal conviction of robbery in the second degree and that the conflict in the wording of the verdict was not prejudicial to the defendant.

[2] It is next claimed that the evidence was insufficient. Under that contention the defendant claims that the evidence did not connect him with the offense. He stresses the testimony given by Arthur Davis, who testified, giving a description of the person who robbed him. It will be conceded that such description was not very exact. However, after his arrest, the defendant did considerable talking. In doing so he made several statements which, taken in connection with the description given by Mr. Da-

vis, made a case sufficient to go to the jury on the question of identification, and this court is not at liberty to disturb the finding of the jury which was adverse to the defendant.

[3] The defendant also complains because the trial court overruled his motion for a new trial. He complains because he had set forth newly discovered evidence which would affirmatively sustain his contention on want of identification. We think the point has no merit. The evidence sought to be introduced was to the effect that at the time the offense was committed the defendant did not wear a mustache, although Mr. Davis testified that the man who robbed him did wear a mustache. Mustache or no mustache, large mustache or small mustache, was a subject gone into at the time of the trial. At most the newly discovered evidence was merely cumulative evidence. However, at the time of the trial the defendant testified he wore a small mustache, indicating its size, etc. The newly discovered evidence was to the effect that he did not wear a mustache at all. In the affidavit which the defendant's counsel executed in support of his motion for a new trial, it is alleged that the next day after the trial the defendant stated that during the preceding night he recalled at the time of the offense, October, 1933, he was not wearing any mustache, and that the testimony given by him at the trial was addressed to other times and places. Thereupon counsel for defendant made certain inquiries and obtained certain statements of certain individuals supporting the claim of the defendant. The showing made was such that the trial court did not err in denying defendant's motion for a new trial. 8 Cal.Jur. p. 442, and also page 427.

[4] The judgment of the trial court was that the defendant "had been convicted in this court of the crime of felony, to-wit: robbery in the first degree." As we have shown above, after examining the entire cause, including the evidence, the effect of the verdict was to find the defendant guilty of robbery in the second degree. But this conclusion does not require a reversal. This court has been granted the power to modify the judgments of the trial courts. Pen.Code, § 1260; People v. McIntyre, 213 Cal. 50, 1 P.(2d) 443. On these authorities the words "first degree," as they appear in the judgment, are modified to read "second degree," and, as so modified, the judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



14 Cal.App.2d 533

CARPENTER, Insurance Com'r, v. EUREKA CASUALTY CO. et al.
Civ. 10666.

District Court of Appeal, Second District, Division 1, California.
June 10, 1936.

1. Constitutional law ⇐70(1)

Courts are without authority to change manner in which right may be exercised, where manner is prescribed by statute.

2. Insurance ⇐51

Claim against casualty insurance corporation in process of liquidation, not having been presented to court, by way of order to show cause in liquidation proceeding, within 30 days after mailing of notice of rejection of claim as required by statute, *held* barred, since statute was mandatory (St.1933, p. 1422, § 8c).

3. Insurance ⇐51

Where statute prescribing limitation for filing of claims against insolvent insurance corporation in liquidation proceedings by Insurance Commissioner did not itself create exception, minority of claimant *held* not to create exception to application of statute (St.1933, pp. 1421, 1422, §§ 8a (1, 3), 8c).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, against the Eureka Casualty Company, an insolvent corporation, wherein David Thomas Price, a minor, by Thomas C. Price, his guardian ad litem, filed a claim. From an order rejecting the claim, the claimant appeals.

Affirmed.

J. Marion Wright, of Los Angeles, for appellant.

Frank L. Guerena, of San Francisco, and Eugene P. Fay and W. P. Wood, both of Los Angeles, for respondent Insurance Com'r of California.

ROTH, Justice pro tem.

On August 23, 1932, David Thomas Price, a minor, by Thomas C. Price, his guardian ad litem, recovered a judgment for damages based on negligence, against Perry A. McDonald and Mrs. Everett Mulconery, from which an appeal was taken and a stay bond posted on behalf of said defendants. Defendant McDonald was, at the time of the accident out of which the foregoing judgment arose, covered by a policy of public liability insurance issued by Eureka Casualty Company (hereinafter called "casualty company"). The bonding company which posted the bond on appeal subsequently became insolvent and the bond on appeal became insufficient. The judgment against defendants McDonald and Mulconery thereafter became final, and on October 20, 1934, an execution having been issued thereon, was returned wholly unsatisfied. In the meantime, the casualty company, on May 13, 1932, had been placed in the hands of the Insurance Commissioner of the State of California, as liquidator, who is respondent herein, and said casualty company was restrained from doing any further business. The liquidator caused a notice to creditors to be published, as prescribed by law, on the 16th, 23d, and 30th days of May, 1932, and on the 6th day of June, 1932, which notice provided that the time within which claims could be filed against the respondent corporation would expire on August 21, 1933. No other notice of any kind was given to creditors, and appellant received no notice and had no knowledge of the liquidation of the casualty company until shortly before December 12, 1934, on which date he filed his verified claim in the sum of $2,104.22 with the liquidator. This claim was subsequently rejected on December 14, 1934, by the liquidator, on behalf of the respondent casualty company, upon the sole ground that it was not filed within the time provided by law. Appellant thereafter, by his guardian ad litem, on January 23, 1935, filed a verified petition in the superior court as an intervener in the liquidation proceedings then pending, setting up the above facts, including the fact of the minority of appellant, which had continued down to the time of the filing of the petition, and the fact that appellant had no actual knowledge or notice of the insolvency and liquidation proceedings involving the casualty company until shortly before the time of filing his verified claim with the liquidator, and asking that said liquidator be required to show cause why his claim should not be allowed and approved and paid out of the assets of the insolvent corporation. Upon the hearing of this petition the superior court made its order refusing appellant the relief prayed for, on the sole ground that petitioner's claim was barred by operation of law because it was not filed within the time allowed by statute and because no objection was made to the rejection of petitioner's claim before January 13, 1934.

The law applicable is found in the Statutes of 1919, p. 265, as amended by Statutes of 1933, p. 1420 (Deering's Gen.Laws, Act No. 3739, as amended), hereinafter referred to as the "Liquidation Act," the pertinent portions of which are as follows: "Sec. 8a. (1) Upon the making of an order to liquidate the business of such corporation, the Insurance Commissioner shall cause to be published notice to its policyholders, creditors, stockholders, and all other persons interested in its assets, to file claims, with proper proofs thereof, against such corporation within six months after the date of first publication. Such notice must be published not less than once a week for four successive weeks. A copy of the notice, accompanied by an affidavit of due publication, and date of first publication, shall be filed with the clerk of said court within thirty days after the first publication. * * * (3) Unless such claim is filed in the manner and within the time herein provided it shall not be entitled to filing or allowance, and no action may be maintained thereon. * * * 8c. When a claim is rejected by the liquidator written notice of rejection shall be given by registered mail, addressed to the claimant at the address furnished on his claim, and within thirty days after the mailing of said notice the claimant may present his claim, by way of an order to show cause, to the court in which the liquidation proceeding is pending." St.1933, pp. 1421, 1422, §§ 8a (1, 3), 8c.

There is no contention that the liquidator of the casualty company did not give notice to creditors as required by the Liquidation Act, and it is admitted that appellant's claim was filed one year and approximately four months after the time, provided in the said notice for the filing of claims, had expired.

It is likewise conceded that notice of rejection of appellant's attempt to file his claim was given pursuant to the terms of the Liquidation Act; that said notice was received by appellant in due course and that appellant filed his petition for an order to show cause pursuant to section 8c of the Liquidation Act ten days beyond the time within which the said act permits the filing of such petition.

[1] It is established that when the Legislature has, by statute, prescribed the mode and manner in which a right may be exercised, the courts are without authority to make a change. Town of Mill Valley v. Massachusetts Bonding, etc., Co., 68 Cal. App. 372, 378, 229 P. 891; J. B. Orcutt Company v. Green, 204 U.S. 96, 27 S.Ct. 195, 51 L.Ed. 390; In re Harris Bros. (D. C.) 5 F.Supp. 191; People v. Osgood, 104 Cal.App. 133, 137, 285 P. 753; U. S. Gypsum Co. v. Karl W. Hart et al. (Cal.App.) 54 P.(2d) 517; Mello v. County of Tulare, 99 Cal.App. 268, 278 P. 465; Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.(2d) 185.

[2] Conceding that because of the peculiar facts of this case there may be a real question as to whether appellant filed his claim with the liquidator late because of the uncertainty as to when the claim against the casualty company actually accrued, there can be no doubt that appellant was ten days late in presenting his claim "by way of order to show cause, to the court in which the liquidation proceeding is pending," after he had personal notice of the rejection thereof by the liquidator. The requirement of the statute in this respect was not complied with and it is mandatory and absolute (authorities, supra).

[3] The only remaining question is, whether appellant's minority created an exception to the statute. Since the statute itself does not create such an exception, it is settled by authority that there would be none. Welsh v. Koch, 4 Cal.App. 571, 88 P. 604, 606; Phillips v. County of Los Angeles, 140 Cal.App. 78, 79, 35 P.(2d) 187.

In Welsh v. Koch, supra, 4 Cal.App. 571, at page 575, 88 P. 604, 606, the court says: "A minor has no further time than an adult * * * for the correction of errors in the proceeding or the judgment, for the statute has not made infancy an exception."

The order is affirmed.

We concur: HOUSER, P. J.; YORK, J.

14 Cal.App.2d 548

PEOPLE v. SMITH.

Cr. 2842.

District Court of Appeal, Second District, Division 1, California.

June 12, 1936.

Automobiles ⊜355(6)

Evidence *held* sufficient to sustain conviction for driving automobile while under influence of intoxicating liquor, and in an unlawful manner, causing bodily injury to a person (St.1935, p. 174, § 501).

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Gillis (Pat) Smith was convicted of driving an automobile while under the influence of intoxicating liquor, and in an unlawful manner, causing bodily injury to a person, and he appeals.

Affirmed.

Barry Sullivan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

YORK, Justice.

Defendant was charged in an information of violation of section 501 of the Vehicle Code (St.1935, p. 174), was tried before the court sitting without a jury, and was found guilty, as charged.

Appellant's opening brief raises nothing more than a request that this court weigh the evidence. We have made an examination of the evidence introduced and find it sufficient to justify the judgment of the trial court.

The judgment of conviction is affirmed.

I concur: DORAN, J.

HOUSER, Presiding Justice (dissenting).

I dissent. Defendant was accused of the commission by him "of the crime of violation of section 501, Vehicle Code," in that, on a specified date, he drove an automobile "while under the influence of intoxicating liquor, and in an unlawful manner, causing bodily injury to one Esther Lang, a human being."

⊜For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

As far as here is material, section 501 of the Vehicle Code provides as follows: "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony."

It thus may be noted that one of the elements necessary to a conviction of the offense of which defendant was accused is that a defendant who is charged therewith must have been "under the influence of intoxicating liquor" at the time when the alleged offense was committed. In substance, that much is alleged. But in order that a judgment of conviction of such an offense may be sustained, it is indispensable that the evidence establish that particular fact. Just what was meant by the phrase, "under the influence of intoxicating liquor," as used in section 112 of the California Vehicle Act (St.1923, p. 553, as amended by St. 1929, p. 537) as it existed prior to the date when the said act was amended by the Statutes of 1935 (St.1935, p. 93), was given careful consideration by the court in the case of People v. Ekstromer, 71 Cal.App. 239, 235 P. 69, 71. It was there held that "if intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."

In the case of People v. McKee, 80 Cal. App. 200, 251 P. 675, 677, it is said that "'under the influence of intoxicating liquors' means what common usage has ascribed to the word: to wit, Not that he should be intoxicated to the extent that his faculties are completely impaired, but only that degree of influence which looses the bonds of self-restraint and causes him to operate his car in a manner different from that in which it would be operated by an ordinarily cautious and prudent person. People v. Dingle, 56 Cal.App. 445, 205 P. 705."

To the same effect, see Tomlinson v. Kiramidjian, 133 Cal.App. 418, 422, 24 P.(2d) 559; People v. Fellows, 139 Cal.App. 337, 340, 34 P.(2d) 177; People v. Aguilar, 140 Cal.App. 87, 35 P.(2d) 137, 142; Tracy v. Brecht, 3 Cal.App.(2d) 105, 112, 39 P.(2d) 498; Lindemann v. San Joaquin C. O. Co. (Cal.Sup.) 55 P.(2d) 870.

A careful review of the evidence adduced on the trial of the action reveals nothing, either directly or indirectly, that would establish the required condition that at the time when the accident in question occurred, defendant was so far "under the influence of intoxicating liquor" that either his nervous system, brain, or muscles was or were impaired to the degree that he was either unable to or did not "operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care," would have operated his automobile in conditions similar to those which prevailed at the time and place in question; or that his condition was, or even approximated, that described or defined in either of the cited cases as necessary to establish the fact that defendant was "under the influence of intoxicating liquor." It is true that the prosecuting witness only testified that defendant "failed to stop at the boulevard stop"; and expressed his opinion that defendant was "under the influence of liquor." Specifically, he based that "opinion" on his statement that defendant "drove so recklessly, and he refused to aid me to take her (the injured person) to the hospital." However, he also testified that "there was a strong odor of liquor" on the breath of defendant; that he walked "pretty steady"; that defendant said "he was too much in a hurry; * * * you have my name and address"; that defendant was busy picking up storage batteries; but assisted in placing the injured person in another automobile.

Although the "opinion" of the witness that defendant was "under the influence of liquor" was based principally upon the asserted fact that defendant "drove so recklessly"—by the clearest sort of testimony given by the same witness, it appears that at no time prior to the happening of the accident did he see either defendant or the automobile that the latter had been driving. The following is a part of his testimony in that regard:

"Q. What do you base that opinion upon? A. He drove so recklessly and he refused to aid me to take her to the hospital.

"Q. Did you see him coming down McDonnell Street before he struck your car? A. He came down at a very rapid speed;

before I saw him, he hit me in the right rear end of my car. * * *

"Q. * * * His right front end hit your car? A. His course in the street was in a straight line.

"Q. Before it struck your car? A. I didn't see him before he struck me; it all happened so quick."

Still later, however, purely as a conclusion, and not from actual observation by him, the witness again stated that defendant was "coming at a terrific speed * * * thirty-five to forty miles an hour"; also, that although defendant's automobile struck the rear of the automobile that was being driven by the witness, thereafter each of such automobiles went forward for a distance of only 20 or 25 feet. No other witness for the prosecution gave any testimony either with reference to the failure of defendant to stop at "the boulevard stop," or regarding the rate of speed of the automobile that was driven by defendant. It thus becomes apparent that no substantial evidence was before the trial court that defendant was "under the influence of intoxicating liquor," as that phrase heretofore judicially has been construed by the courts of this state.

But even assuming against the evidence with relation thereto, and contrary to the rule announced in the authorities to which reference has been had, that defendant was "under the influence of intoxicating liquor," the evidence is entirely lacking in the legal requirement (section 501, Vehicle Code) that, being in such condition, defendant did either "any act forbidden by law" or that he neglected to perform "any duty imposed by law" while he was driving his automobile on the occasion in question.

It may be remembered that the information under which defendant was prosecuted charged him with the offense denounced by the provisions of section 501 of the Vehicle Code, in that he "did * * * unlawfully * * * drive a certain * * * automobile * * * while under the influence of intoxicating liquor, and in an unlawful manner," etc.

The only "unlawful manner" in the driving of his automobile by defendant that is even "squinted at" in the evidence is either that he failed to stop at a legally authorized boulevard stop, or, that he drove his automobile at a rate of speed inhibited by some statute or ordinance. But, indulging every inference that is possible from the testimony given by the witness to which reference hereinbefore has been had, and therefrom (violently) assuming that defendant failed to stop at a, or some, boulevard stop, or that immediately preceding the happening of the accident he had been driving at the rate of 35 to 40 miles per hour, still there is not a scrap of evidence by which it either directly appears, or from which it properly may be inferred, either that his failure to stop at some boulevard stop, or the driving of his automobile at the rate of 35 to 40 miles per hour, was "unlawful," as required or inhibited, respectively, by the provisions of the statute under which defendant was prosecuted. It was not shown whether the scene of the accident was within the boundaries of any city, or whether it was elsewhere than within unincorporated territory in the county of Los Angeles. More particularly, no evidence was introduced with reference to whether, by any ordinance of any city within the county of Los Angeles, or by any ordinance of the county of Los Angeles, a boulevard stop had been ordered or ordained at the intersection of the two streets where the accident occurred. For aught that appears, the boulevard stop sign, if there was any such sign at that point (which fact does not directly appear in evidence), was placed there by some person or persons wholly unauthorized to do so. But even assuming the existence of a legally authorized stop sign somewhere at the intersection, by no evidence does it appear that such stop sign affected the street on which defendant was driving. Possibly, the stop sign affected the other street, and it only. Nor was it attempted in any manner to show that a speed of 35 to 40 miles per hour was there inhibited by the provisions of any statute or ordinance. Consequently, a showing of the alleged "unlawful manner" of operating the automobile that was driven by defendant, which was, or may have been, an essential element in the commission of the offense of which defendant was accused, likewise was entirely lacking.

Reverting to the provisions of section 501 of the California Vehicle Code hereinbefore quoted, it may be noted that before that statute may furnish the basis for a valid judgment of conviction, it must appear in the evidence adduced on the trial of the action, not only that the defendant therein was driving an automobile "while under the influence of intoxicating liquor," that while in such condition he committed some act "for-

bidden by law," or that he neglected to perform some duty "imposed by law," but in addition thereto, that such act, or such neglect, "proximately" caused bodily injury to some person.

Again searching the record in the instant case, it nowhere appears therein that anything either done by defendant, or neglected to be done by him, proximately caused the accident to happen, as a result of which that any person sustained bodily injury. In that connection, the only pertinent evidence that was before the trial court, as hereinbefore has been outlined, consisted of the pure conclusion by the prosecuting witness that defendant failed to stop at the boulevard stop; that he was driving his automobile at the rate of 35 to 40 miles per hour; and that a collision occurred.

In an action to recover a judgment for damages that may result from personal injuries, it is a well-established principle of law that "the mere happening of the accident" does not establish negligence of the defendant therein. In effect, as tending to prove that any act on the part of defendant, or omission by him to act in response to some duty "imposed by law," was the proximate cause of the accident in question, the prosecution failed utterly. As far as the record discloses, the prosecuting witness may have been the only person that was guilty of any negligence in the premises. By his own testimony, he did not see either defendant or his automobile prior to the time when the collision of the two automobiles occurred. It may have been that either the rate of speed at which the automobile of the prosecuting witness was being driven in the intersection of the two streets, or his evident negligence in failing to see the automobile that was being driven by defendant, and to appreciate or to properly estimate its speed as it approached the intersection, was the sole and proximate cause of the accident. For aught that appears in the evidence, defendant may have been driving his automobile in a careful manner, but nevertheless, for the reason that the prosecuting witness was guilty of negligence in the operation of his automobile, defendant was unable to avoid the collision. To my mind, it is manifest that the evidence adduced on the trial of the action was insufficient to support the judgment.

14 Cal.App.2d 559

REYNOLDS v. JENSEN et al.

Civ. 10618.

District Court of Appeal, Second District, Division 1, California.

June 12, 1936.

Hearing Denied by Supreme Court Aug. 10, 1936.

1. Mortgages ⇐375

Statutes shortening period within which to bring action for deficiency remaining after foreclosure sale apply to all sales after effective dates of statutes, regardless of dates of trust deeds, since cause of action arises at time of sale (Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116; § 580a, as added by St.1933, p. 1672).

2. Constitutional law ⇐107
Mortgages ⇐375

Where more than a year and a half elapsed between effective dates of statutes shortening time to bring action for deficiency remaining after foreclosure sale and date of sale under trust deed executed before enactment of statutes, trustee was allowed more than "reasonable time" within which to sue and could not complain of shortening of period, since trustee had no vested interest in period for commencement of action (Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116; § 580a, as added by St.1933, p. 1672).

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Emma Reynolds against N. R. Jensen and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

George W. Lawrence, of Inglewood, for appellant.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for respondents N. R. Jensen and Katherine P. Jensen.

Laurence W. Beilenson and Walter L. Bruington, both of Los Angeles, for respondents Guy C. Earl, Jr., and Eleanor MacGowan Earl.

SHINN, Justice pro tem.

This action is one to recover a deficiency judgment after sale of real property under

a trust deed. Section 580a of the Code of Civil Procedure was enacted (St. 1933, p. 1672), and section 337, subd. 1, Code of Civil Procedure, was amended (St. 1933, p. 2116), after the trust deed was executed but before the sale of the property thereunder, and the action was commenced more than three months after the sale, and therefore after the expiration of the time as limited by said Code sections for the commencement of such actions.

[1] Appellant's first point is that the Code sections do not apply to trust deeds executed before the law was changed. In Bank of America Nat. Trust & Sav. Ass'n v. Dennison, 8 Cal.App.(2d) 173, 47 P.(2d) 296, it was held that the sections do not apply to suits following sales made before the effective date of the enactments, and it was said that they were intended to apply to cases where sales had taken place after the effective dates of the statutes. We are satisfied that such was the intention. These enactments were a part of a legislative plan to lighten the burdens of trust deed debtors as evidenced by numerous changes made in the laws at the same session of the Legislature. Much of the effectiveness of the limitation would have been lost had it been confined in its operation to trust deeds executed after the legislation was passed. There is nothing in the laws themselves requiring such construction, and the obvious reasons which prompted the changes would seem to forbid it. The law operated prospectively upon causes of action arising after its adoption. Plaintiff's cause of action arose at the time of the sale. To apply the law to plaintiff's case would not give it retroactive effect. Davis & McMillan v. Industrial Acc. Comm., 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095. Therefore, the limited time for bringing suit is applicable to all cases of sales after the effective dates of the acts, regardless of the dates of execution of the trust deeds under which the sales are made.

[2] The second point is that a limitation upon plaintiff's right to sue for a deficiency under the existing facts would deprive her of property without due process of law, in violation of constitutional principles. Plaintiff had no vested interest in the period of time for the commencement of the action and cannot complain of the shortening of the time to a period of three months if, after the effective date of the legislation, she was allowed a reasonable time in which to sue. Doehla v. Phillips, 151 Cal. 488, 91 P. 330. More than a year and a half elapsed between that date and the date of sale under the trust deed, which time, of course, was more than ample for plaintiff's purposes.

The judgment in favor of defendants Eleanor MacGowan Earl and Guy C. Earl, Jr., and the judgment in favor of N. R. Jensen and Katherine P. Jensen are affirmed.

We concur: HOUSER, P. J.; DORAN, J.



14 Cal.App.2d 454

PHILLIPS v. SOUTHERN PAC. CO.

Civ. 10846.

District Court of Appeal, Second District, Division 2, California.

June 5, 1936.

Rehearing Denied July 3, 1936.

Hearing Denied by Supreme Court Aug. 3, 1936.

1. Trial ⇐178

On motion for directed verdict, trial court may not weigh evidence, but may examine it only to determine whether there is substantial evidence which, if believed by jury, would sustain verdict.

2. Master and servant ⇐286(13, 33)

In switchman's action for injuries sustained in fall from freight car, whether railroad was negligent in supplying freight cars with faulty hand brakes and, through its other employees, in shunting cars with unusual force and without warning, *held* for jury (Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

3. Master and servant ⇐88(1)

Employee's concealment of vital facts from employer when procuring employment will not vitiate contract of employment and prevent recovery for injuries sustained in such employment unless there is a causal connection between injury and misstatements.

4. Master and servant ⇐88(1)

Switchman's concealment of his having been discharged from previous railroad em-

ployments and applying for employment under name of brother *held* not to preclude recovery for injuries sustained through fall from freight car occasioned by alleged negligence of railroad, in absence of showing of a causal connection between false representations and accident (Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Robert L. Phillips, sometimes known as William Marion Phillips, against the Southern Pacific Company, a corporation. From judgment on a directed verdict for defendant, plaintiff appeals.

Reversed and remanded for a new trial.

Erwin P. Werner, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff, employed by defendant corporation as switchman, brought this action for damages for injuries suffered when the impact of cars shunted by a switch engine precipitated him from the roof of a freight car to the ground below. Negligence of defendant in two particulars was alleged, viz., that the string of freight cars upon which plaintiff was working was equipped with faulty handbrakes, in violation of the Federal Safety Appliance Act (45 U.S.C.A. § 1 et seq.), and that unusual force and violence, without warning to plaintiff, were used by his fellow employees in shunting other cars against the one upon which he was working. A jury heard the evidence, but the court directed it to find for the defendant, and from the judgment on such directed verdict plaintiff appeals.

Respondent seeks to uphold the directed verdict upon two grounds: That the evidence is insufficient to justify submission of the case to the jury; and that appellant, because he procured his employment by fraud practiced upon respondent, vitiated his contract of employment and precluded himself from maintaining an action for damages arising out of his relation as respondent's employee.

There was evidence before the court that as to the car upon which appellant was riding "the brake chain wouldn't wind up properly, it wouldn't hold properly"; that the string of cars was shunted against the car upon which appellant was riding with unusual force and violence, throwing him to the ground and moving the cars forward an unusual distance; that no rider was upon the string of shunted cars; that no warning was given appellant; and that the movement of cars at the time of the accident was not in the normal and customary manner.

[1, 2] It is true that much evidence was offered by respondent, and elicited by cross-examination of appellant's own witnesses, to contradict appellant's showing, but it is not the province of the trial court upon motion for directed verdict to weigh the evidence. The court may examine it only to determine whether or not there is substantial evidence which, if believed by the jury, would sustain a verdict. Respondent argues that the federal rule as to a directed verdict rather than that of our state courts should control in such a case as this involving injuries under the Federal Safety Appliance Act and the Federal Employers' Liability Act (45 U.S.C.A. §§ 51–59). But even admitting respondent's contention and adopting the pronouncement of the federal court in Chicago, etc., Ry. Co. v. Coogan, 271 U.S. 472, 46 S.Ct. 564, 566, 70 L.Ed. 1041, relied upon by respondent, "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding," it is our opinion that the trial court improperly directed the verdict in the instant case. With the conflict of evidence the jury should have been allowed to determine whether there was a violation of the Federal Safety Appliance Act, and whether or not such violation, if found, was a proximate contributing cause of the injury; whether the movements of the cars were under usual and customary conditions, whether warning was given to appellant and whether the manner of shunting the cars in question proximately contributed to the happening of the accident. In other words, the case presents a situation calling for its submission to the jury. Qualls v. Atchison, etc., R. Co., 112 Cal.App. 7, 296 P. 645; Payne v. Connor (C.C.A.) 274 F. 497.

When appellant applied for work with respondent he had a record of having been discharged from several previous railroad-

ing employments. Concealing these facts, he made application under the name of his brother, whose record was without fault, was accepted as an employee under the assumed name and continued in respondent's employ for eleven years before the date of the injury which is the basis of this suit. It was appellant's testimony that shortly after the date of his employment, and many years prior to the date of the accident here in question, respondent had knowledge of his deception; that he was confronted with the facts and admitted the subterfuge, and was told that he would be given "a chance." That any such conversation took place was denied by respondent's witnesses.

[3, 4] Although cases such as Minneapolis, etc., Ry. Co. v. Rock, 279 U.S. 410, 49 S.Ct. 363, 73 L.Ed. 766, hold that an impostor by mere concealment of vital facts creates such a fraud upon his employer as to bar his right to recover for injuries suffered in the course of his employment, the better rule is that such concealment does not vitiate the contract of employment and prevent recovery unless there is shown to be a causal connection between the injury and the misstatements in the application for employment. As stated in Dawson v. Texas, etc., Ry. Co., 123 Tex. 191, 70 S.W.(2d) 392, 393: "It is clearly established as a fact, and is conclusively shown to be true, that at the time Dawson applied for employment to the Texas & Pacific Railway Company he was in every way physically fit to perform the duties of his employment, and had performed such duties for a period of twelve years in a satisfactory manner before his injury, and that there was no causal connection with his injury and the false statements in his application, and that his injury was in no way related to said false statements. The fact that he concealed his employment by the Texas Midland Railroad Company, and concealed that he had been injured while in its service and had filed a suit against it, if seasonably applied might have been a ground for canceling his contract of employment with defendant in error, but would be insufficient to render it void or to terminate the relation of master and servant. 39 Corpus Juris, p. 276, § 401. As such employee and while in the full discharge of his duties, he could not be deprived of the protection of the law or of his right to recover for unlawful or negligent injuries inflicted upon him." And in Galveston, etc., Ry. Co. v. Harris, 48 Tex.Civ.App. 434, 107 S.W. 108, 110, it is held that mere falsehood in an application for employment does not of itself destroy the contract of employment and exempt the employer from any liability for negligence to its employee. "It may have formed a just reason for the rescission of the contract of employment," says the Texas court, "but did not render his employment null and void."

In the present case there appears to be no causal connection between the false statements in appellant's application for employment and the injury which forms the basis of his claim for damages. If in fact respondent's negligence was the proximate cause of the accident, it should not be absolved from blame upon the claim that because of appellant's false statements in procuring employment he was in fact not an employee, where, as here, there was no showing that there was a causal connection between the false representations and the accident. At the most the question of causal connection was a question of fact for submission to the jury.

The judgment is reversed, and the cause remanded for a new trial.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 522

CITY OF LOS ANGELES v. MELINE et al.

Civ. 10125.

District Court of Appeal, Second District, Division 1, California.

June 9, 1936.

Municipal corporations ⇐347(1)

Where bond was given, conditioned upon construction of curbs and gutters which should be required by city within three-year period in real estate subdivision, subsequent bond guaranteeing completion of work and referring to prior bond relating that its purpose was to afford extension of time to complete work *held* required to be construed with prior bond so that in absence of demand by city for construction of curbs and gutters

there was no default in performance of bond so as to authorize action based thereon.

Appeal from Superior Court, Los Angeles County; Maurice T. Dooling, Jr., Judge.

Action by the City of Los Angeles against Frank L. Meline and others. From an adverse judgment, the plaintiff appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., Thatcher J. Kemp and Arthur Loveland, Deputy City Attys., all of Los Angeles, for appellant.

Walter H. Hewicker, of Los Angeles, for respondents.

WHITE, Justice pro tem.

The city of Los Angeles, a municipal corporation, appeals from a judgment against it and in favor of the defendants growing out of an action based upon a bond to plaintiff as obligee, executed by defendants Frank L. Meline, Leonore M. White, and Henry Lichtig, as joint trustees for the Franklin Park Company, a trust, as principals, and by defendant American Surety Company of New York as surety, guaranteeing the completion of certain street work to be performed by the principals.

The defendants Frank L. Meline and Leonore M. White, together with Leslie C. Speer, as joint trustees for the Franklin Park Company, owners of a certain tract of land within the city limits of plaintiff, submitted to plaintiff for filing and acceptance a subdivision map, designating the property as tract No. 7982, for the purpose of laying said tract out in certain streets and residential lots shown on the map.

The plaintiff exacted of the said defendants and said Speer as principals, and of defendant Frank L. Meline and one Violet Reed Urson, as sureties, a bond, which was executed by the principals and the sureties on June 14, 1924. Said bond provided in part as follows: "The Condition of the above obligation is such that said principal and sureties do jointly and severally agree to construct, install and to complete such construction and installation within a period of three (3) years from the date hereof, such curbs and gutters as may be required by the City of Los Angeles or the proper officers thereof in that certain tract of land known as the Franklin Park Tract, being Tract No. 7982, such construction work to be performed in accordance with the specifications for said type of construction on file in the office of the City Engineer of said City and under the supervision of said City Engineer, and subject to his approval, then the above obligation to be void, otherwise to remain in full force and virtue."

The work contemplated by said bond not having been fully performed by January 24, 1928, the plaintiff required a further bond, which was executed by defendants Frank L. Meline, Leonore M. White and Henry Litchtig as joint trustees of the Franklin Park Company, as principals, and by said American Surety Company of New York as surety, which bond was in part as follows:

"The condition of the foregoing obligation is such that

"Whereas, the said Principals, on June 14th, 1924, executed a Personal bond in the sum of ten thousand ($10,000.00) dollars, under which they bound themselves to grade, curb and pave certain streets in Tract No. 7982, known as Franklin Park, within a period of three years from that date, and

"Whereas, the largest portion of the street improvement work referred to in said bond has been completed and said Principals have asked for an extension of time in which to complete the unfinished portion; which consists in grading, curbing and surfacing with oil the streets that have not been completely improved; the work to be done in a manner satisfactory to the Board of Public Works of said City.

"Now Therefore, if the incompleted work herein referred to is finished in the manner described on or before December 1st, 1929, then the obligation of this bond shall be null and void, otherwise it shall remain in full force and effect."

The trial court found that the principals under the original bond had, up to January 24, 1928, constructed all curbs and gutters theretofore required by the city of Los Angeles or the proper officers thereof, but in that time had developed only portions of the tract in question for subdivision purposes; that the bond of January 24, 1928, which is the one here sued upon, was conditioned upon the faithful performance of all work, matters, and things required by the original bond of June 14, 1924, which consisted of the construction of such curbs

and gutters as should be required by the city of Los Angeles or the proper officers thereof, to adequately care for the drainage of all storm waters resulting from further construction in the improvement of said tract 7982.

It is the claim of appellant that the bond of January 24, 1928, bound respondents to complete, within the time allotted by the terms of the bond, all grading, curbing, and surfacing with oil of the streets that remained unimproved in said tract at the time of the execution of the bond last named; while respondents contend that both bonds must be considered together, and that the measure of respondents' obligations to construct and improve the streets in question was dependent upon requirements made therein by the city of Los Angeles, or the proper officers thereof.

The record fails to disclose any testimony showing that after the execution of the last bond and up to the time the action was commenced thereon, the city of Los Angeles or its officers requested or required respondents to do any street construction work in the tract named in the bonds.

We find ourselves in accord with the contentions advanced by respondents. Clearly, the original bond of June 14, 1924, bound the principal and sureties thereon to construct, install, and complete such construction of such curbs and gutters as might be required by the city of Los Angeles or the proper officers thereof; while the subsequent bond of January 24, 1928, recites the execution of the previous bond in 1924, refers to the conditions thereof, and then sets forth the fact that while the largest portion of the street improvement work referred to in the prior bond had been completed, the principals desired an extension of time in which to complete the unfinished portion. In the event the uncompleted work was not finished by December 1, 1929, then the principals and surety would become liable under their bond. To what uncompleted work, therefore, did the bond of 1928 refer? It referred to the uncompleted work mentioned in the original bond of 1924. Of what did this uncompleted work consist? It consisted, in our opinion, of the construction and installation of such curbs and gutters as may be required by the city of Los Angeles or the proper officers thereof. The record is barren of any evidence showing any requirements on the part of appellant city or its officers up to the time of the commencement of this action upon respondents to complete any curbs or gutters. The last-named bond, and the one upon which this action was predicated, discloses no intention to increase the obligations of either the principals or the surety, but merely to renew their obligation to do what they had originally agreed to do; that is, to construct such curbs and gutters as might be required from time to time by the City of Los Angeles or the proper officers thereof. The trial court, therefore, was correct in its conclusion that at the time of the commencement of this action there remained no construction work required by the terms of the bond uncompleted, because the city of Los Angeles had made no requirement upon either the principals or the surety to do any such construction work.

We find it unnecessary to pass upon other points raised upon this appeal.

The judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



14 Cal.App.2d 624

NEIMAN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10695.

District Court of Appeal, Second District, Division 1, California.

June 17, 1936.

Master and servant ⇐417(5)

Court of Appeal has no power to review Industrial Accident Commission's order, denying petition to reopen compensation claim on merits of controversy as to employer's fraud in suppressing evidence on hearing of order to show cause why petition should not be dismissed for lack of jurisdiction.

Proceeding by Lillian Neiman to reopen her claim for compensation under the Workmen's Compensation Act for the death of James Henry Neiman, employee, opposed by the Western Pipe & Steel Company, employer. The petition was denied by the

Industrial Accident Commission, and petitioner brings certiorari to review such order.

Order affirmed.

Dempster & Dempster, J. H. Creighton, and Arthur L. Green, all of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

HOUSER, Presiding Justice.

The pertinent facts necessary to a determination of the question here presented appear to be that in the month of July, 1929, one James Henry Neiman met his death at a time when he was an employee of Western Pipe & Steel Company; that thereafter, in pursuance of an application for adjustment of claim for compensation that had been presented by his widow (petitioner herein) to the respondent commission, findings of fact and an "award" were made by the latter, in substance, that, although immediately prior to his death the husband of the applicant had been an employee of Western Pipe & Steel Company, the evidence did not establish the fact that the death of the said employee was the proximate result of any injury that was sustained by him in the course of his said employment; as a consequence of which no award of compensation was made. Approximately two and a half years after such decision had been rendered, the widow presented a petition to the respondent commission to reopen the claim for compensation, which petition was by said commission denied. There the matter rested until April 13, 1935, which was nearly six years after the death of the husband had occurred, at which former time his widow caused a second petition to reopen the claim for compensation to be presented to the respondent commission, which petition was accompanied by several supporting affidavits, from which, although in the absence of any direct allegation of fraud on the part of the employer, it was inferable that, at the time when the hearing of the original petition for adjustment of the claim had occurred, the respondent commission had been imposed upon in that pertinent and material evidence relative to the establishment of the inducing circumstances under which the employee had met his death had been willfully suppressed by his said employer; whereas, had such evidence been introduced at said hearing, no proper decision would have been possible other than that an asserted injury that had been sustained by the employee and which had resulted in his death arose out of and was occasioned in the course of his said employment. Some time after said second petition had been filed, the respondent commission caused to be served upon the petitioner therein a notice by which she was required to show cause why said petition should not be dismissed, for the reason, as stated in said notice, that the said commission was without jurisdiction in the said matter. In response to the said order, following argument with reference to the asserted lack of jurisdiction of the respondent commission in the matter, instead of ruling upon the question of jurisdiction, the respondent commission proceeded to a hearing of said petition on its merits; and thereupon the several persons whose affidavits theretofore had been filed therein were sworn as witnesses and gave their testimony in detail regarding their knowledge of the circumstances that immediately had preceded the death of the employee. However, in no respect did it appear therefrom or otherwise that the employer either willfully or otherwise had prevented, or had attempted to prevent, either of such witnesses, or any other person, from giving his testimony, either on the original hearing of the claim for adjustment of compensation, or ever or at all; or that any officer of the employer ever had had any knowledge of the facts that were given in evidence by the witnesses who had testified thereto at the hearing on the said petition to reopen the said claim. Thereafter following the filing by respective counsel of briefs regarding the several assumed points at issue, the respondent commission made its order by which "the applicant's petition to reopen it (was) denied."

In due course, on the application by petitioner therefor, this court caused its writ of certiorari to issue herein; but in so doing this court acted upon the theory and assumption, as presented by the petitioner, to wit, that the respondent commission had denied its jurisdiction to consider the petition to reopen the cause, and therefore erroneously had declined to act in the premises. It now appears from the record herein that that much had been indicated as a possibility solely by the order to show cause why said petition should not be dismissed. But, as hereinbefore has been stated, it is now disclosed from the entire record herein that, on the hearing of the order to show cause why the petition to reopen should not be dismissed because of

lack of jurisdiction of the commission to act in the premises, the question then and there at issue was treated by all parties as though it was whether the cause should be reopened on account of the assumed fraud of the employer in the asserted suppression of evidence at the hearing of the original application for adjustment of the claim for compensation; and that instead of ordering the dismissal of the petition to reopen the claim because of lack of jurisdiction, the respondent commission had received evidence with reference to the right of the petitioner to have the claim reopened, and thereupon had denied the petition. Far from adjudicating that it had no jurisdiction in the matter at issue, the record shows conclusively, not only that the respondent commission assumed to act in the premises, but, as well, that it did act therein, and that in pursuance thereof it denied the said petition on the merits of the controversy.

It follows that this court has no power to review the order made by the respondent commission, and that such order made by the respondent commission should be affirmed. It is so ordered.

We concur: YORK, J.; DORAN, J.



14 Cal.App.2d 464

CALIFORNIA STATE AUTOMOBILE ASS'N INTER-INSURANCE BUREAU v. BRUNELLA et al.

Civ. 5483.

District Court of Appeal, Third District, California.

June 5, 1936.

1. Judgment ⇐585(2), 683

Automobile liability insurer, and employee to whom was assigned its interest under its claimed subrogation rights against defendant, were "privies," and "same parties," as defined by statute, and hence final judgment on merits in former action instituted by employee was conclusive as to subrogation rights asserted by insurer in instant action instituted by insurer, whether or not such judgment was erroneous (Code Civ.Proc. § 1910).

Term "privity" denotes mutual or successive relationship to same rights of property.

[Ed. Note.—For other definitions of "Privity; Privy" and "Same Parties," see Words & Phrases.]

2. Judgment ⇐713(2)

Former judgment concludes parties and their privies in all subsequent actions upon the same demand, not only as to matters actually adjudicated, but upon all questions which could have been presented for determination therein.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by the California State Automobile Association Inter-insurance Bureau, a reciprocal insurance exchange, against Peter Brunella, Jr., and others. From a judgment for Peter Brunella, Jr., the plaintiff appeals.

Affirmed.

Sandford, Burger & Barry, of San Francisco, for appellant.

Earl B. Myers, of San Francisco, for respondent.

STEEL, Justice pro tem., delivered the opinion of the court.

This appeal is taken from a judgment rendered against plaintiff and appellant in an action for damages to an automobile, the cost of repairs having been paid by appellant under a contract of insurance. The action is based upon the right of subrogation.

An automobile owned by one I. C. Kimball was involved in a collision with another car owned by respondent Peter Brunella, Jr., as the result of which Kimball was injured and his car damaged. Subsequently Kimball executed a general release to Brunella releasing him from liability for all damages, property and personal.

The record discloses that prior to the filing of the instant action, the appellant herein attempted to assign its interest under its claimed subrogation rights, to P.

L. Bernhard, an employee of appellant, for the purpose of bringing suit to recover the moneys expended in the repair of said car under such insurance policy or contract. That case was tried and judgment rendered in favor of the defendant Brunella, the court finding as true the allegations of ownership of the Kimball car, the collision resulting in damage to said car, and the negligence of the defendant and respondent Brunella. The court found against the allegations of insurance coverage, assignment by appellant of its claim to plaintiff Bernhard, and further found that Bernhard was not the real party in interest and that Kimball had released respondent Brunella from all liability.

Subsequently, the instant action was brought by appellant in its own name under its asserted right of subrogation. Upon trial the pleadings, findings, and judgment in the former action were admitted in evidence, disclosing that the issues herein were the same as in the previous case. The trial court again made findings substantially as in the former action, and in addition found that the judgment therein was res judicata as pleaded specially in defendant's answer.

[1] The question here for determination is whether the findings are supported by the evidence. While the parties plaintiff in the two actions are not the same, the evidence shows that in legal contemplation they are privies and are the same parties within the meaning of the statute. Section 1910, Code Civ.Proc. The term "privity" denotes mutual or successive relationship to the same rights or property. Freeman on Judgments (5th Ed.) § 162.

The judgment on the merits in the former case being final, the finding therein in favor of respondent as to the effect of the release is conclusive as to the subrogation rights of appellant here asserted. Such judgment, erroneous or not, is none the less a bar. Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am.St. Rep. 66.

[2] The rule is well established that a former judgment concludes the parties and their privies in all subsequent actions upon the same demand, not only as to matters actually adjudicated, but upon all questions which could have been presented for determination therein. Nielsen v. Emerson, 119 Cal.App. 214, 6 P.(2d) 281; 15 Cal.Jur., Judgments, p. 135.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



14 Cal.App.2d 544

VENABLE et al. v. NORTON et al.

Civ. 10868.

District Court of Appeal, Second District, Division 2, California.

June 10, 1936.

1. Appeal and error ⇐931(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of findings of trial court and all legitimate and reasonable inferences indulged to uphold its judgment.

2. Appeal and error ⇐989

When findings are attacked as being unsupported, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusions of trial judge.

3. Appeal and error ⇐996

Where two or more inferences can be reasonably deduced from facts, District Court of Appeal is without power to substitute its deductions for those of trial court.

4. Appeal and error ⇐1010(1)

Finding that assignor of landlord suing to recover arrearage of rent due under lease did not modify terms of lease would not be disturbed by District Court of Appeal where there was substantial evidence to sustain such finding.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by J. G. Venable and another against William Norton, Eva Norton, and others. From a judgment for the plaintiff and against the named defendants, the named defendants appeal.

Affirmed.

A. P. Michael Narlian, of Los Angeles (William E. Prather, of Los Angeles, of counsel), for appellants.

Harry Sutton, of Los Angeles, for respondents.

Charles H. Rowlands and Carey C. Allen—C. B. Hubbard, of West Los Angeles, for Allen-Rowlands Co.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff and against defendants William Norton and Eva Norton in an action to recover an arrearage of rent due under the terms of a written lease.

The facts are:

Defendants William Norton and Eva Norton were the lessees by a written lease of certain premises located in Los Angeles county. Plaintiffs through mesne conveyances became the successors in interest of the lessors and filed action against the defendant lessees to recover $4,742, representing an unpaid balance of rent due under the terms of the written lease. Defendant lessees as a defense alleged that plaintiffs' assignor, the Allen-Rowlands Company, orally agreed to a modification of the rental terms of the lease, and that this oral agreement had been fully executed.

The trial court found: "* * * that it is not true that the said plaintiffs' assignor, the said defendant, the Allen-Rowlands Company, had, on or about the 15th day of January, 1932, or at any time, or at all, entered into any agreement, oral or written, with said defendants William Norton and Eva Norton, wherein and whereby said The Allen-Rowlands Company agreed to change or modify the rental terms of said lease, or in any wise or in any amount reduce any sum, or any of the sums, required and stipulated to be paid by said defendants William Norton and Eva Norton as rental under the terms of said lease; and the court further finds that it is not true that said plaintiffs and their said assignors, The Allen-Rowlands Company, or either of them, has waived any and all, or any or all, right which they or either of them may or might have had under the said lease or the aforesaid assignments to any sum or sums or amounts of rent remaining unpaid by said defendants William Norton and Eva Norton as required by and provided in the terms of said lease; and the court further finds that the allegations contained in paragraph III of the First Answer and Defense of the Answer of the defendants William Norton and Eva Norton to the Amended Complaint to the effect that payments were made under the terms of an alleged oral agreement, as in said paragraph set forth, are untrue; that it is not true that the said defendant The Allen-Rowlands Company accepted any payments as and for rent under the terms of said alleged, or any, oral agreement; and that it is not true that said defendant The Allen-Rowlands Company, for a period of time from the 22nd day of August, 1932, to and including the 7th day of August, 1932, or at any time, or at all, accepted from said defendants William Norton and Eva Norton $100.00 per week, or any other sum or sums in said period of time, as rental for the premises demised in said lease on terms other than as payments on account of, and subject to, the rental terms specified in said lease."

This is the sole question necessary for us to determine:

Is there substantial evidence to support the findings of fact set forth above?

[1-4] In reviewing the evidence on appeal, all conflicts must be resolved in favor of the findings of the trial court and all legitimate and reasonable inferences indulged to uphold its judgment. It is an elementary principle of law that, when findings are attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions of the trial judge. When, as in the instant case, two or more inferences can be reasonably deduced from the facts, this court is without power to substitute its deductions for those of the trial court. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain all the findings of fact hereinbefore set forth. Further discussion of the evidence is unnecessary. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Thatch v. Livingston (Cal.App.) 56 P.(2d) 549.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

14 Cal.App.2d 582

PEOPLE v. HALL.

Cr. 297.

District Court of Appeal, Fourth District, California.
June 15, 1936.

1. Homicide ⇐253(1)

Evidence *held* to sustain first-degree murder conviction as against claim of self-defense and contention that evidence failed to show premeditation, where evidence showed that defendant attacked deceased without provocation 15 or 20 minutes after end of first altercation between them.

2. Homicide ⇐22(3)

No appreciable space of time need intervene between intention to kill and act of killing, as regards premeditation necessary to support conviction for first-degree murder.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

James Hall was convicted of murder in the first degree, and he appeals.

Affirmed.

W. W. B. Seymour and Eugene R. Dukette, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was convicted of murder in the first degree, with a recommendation of life imprisonment, and has appealed from the judgment and from an order denying his motion for a new trial or for a reduction of the degree of the crime.

About 1 o'clock a. m. on the morning of January 17, 1936, the appellant killed one James Washington by stabbing him with a long-bladed knife in front of a café and dance hall in the city of San Diego. Both were negroes, and this café was frequented almost exclusively by negroes. The appellant and his fiancée came to this café about 12:30 that night, where they occupied a booth and danced a time or two. The deceased, whom the appellant had never seen before, came up and asked the girl to dance with him. The appellant apparently objected, and some argument or altercation ensued. While no blows were struck, the appellant was seen to pass an open knife from one pocket to another. An officer employed by the café intervened and ordered the parties off the dance floor. They separated, and the appellant and his girl went to a booth and sat down. Some five or ten minutes later they left the café. As they went out of the door, they saw a man named Turner, whom they knew, standing near a telephone pole at the curb, slightly to their right as they passed out. They went over and talked with him there for about five minutes and then started to walk along the sidewalk past the café door on their way home, with Turner following just behind them. The girl was walking on the inside with the appellant nearer the curb. As they reached a point opposite the door, they saw the deceased with his overcoat on standing just to the left of the door as one comes out of the building. The appellant pushed the girl back with his left hand and approached the deceased. Some sort of scuffle or fight then took place.

Almost immediately the appellant knocked the deceased through the plate glass window of the café, breaking the glass. Shortly after the deceased got out of the window, he was down on the sidewalk with the appellant striking him. When the window was broken, a number of people, including a brother of the deceased, rushed out of the café. There is evidence that, while the appellant was striking the deceased, he had a knife in his hand. Some of the witnesses testified that they did not see a knife, saying the blows were struck too fast. At some point while this was going on the deceased's brother went to his assistance, and the appellant chased him into the street, inflicting two cuts on his hands, the scars of which were shown to the jury. While the appellant was chasing the brother, the deceased staggered into the street, where he collapsed and died. An autopsy on the body of the deceased showed a 3-inch laceration in the mid-area of the left biceps muscle; a stab wound 1¼ inches wide and 4 inches deep on the left shoulder; a 1¼-inch stab wound 5 inches deep in the region of the collarbone on the left shoulder; a 2½-inch stab wound 5 inches deep at the left of the second rib on the right; and 2½-inch stab wound 5 inches deep through the back, approximately opposite the upper mid-region of the chest. A physician testified that any one of the last three of these wounds "would allow for almost certain death unless surgical intervention was very fortunate."

[1, 2] The only point raised is that the evidence is not sufficient to support the verdict, it being urged that it conclusively appears that the appellant acted in self-defense, and, if not, that the evidence is insufficient to show the premeditation necessary to support a verdict of murder in the first degree.

The appellant bases his claim of self-defense upon a portion of his testimony to the effect that the deceased approached him as they passed the door and said: "I'm not through with you," that he pushed the girl to one side and started backing away; that the deceased kept coming and struck him with his left hand while keeping his right hand in his overcoat pocket; that he did not use his knife until after the deceased got out of the window, at which time the deceased's brother entered the fray; that although the deceased was on the sidewalk, he had hold of the appellant's pants leg; and that he kept trying to pull himself loose in order to escape and at the same time tried to ward off the attack of the brother.

The appellant's evidence, standing alone, presents a doubtful case of self-defense, and, when all of the evidence is considered, it cannot be said that such a situation conclusively appears. After reading the entire record, we are unable to see how the jury could reasonably have accepted that theory. There is ample evidence that the appellant produced and used a knife before the brother appeared on the scene and that he was never in danger at any time. As one witness expressed it, there was no fight because the deceased never had a chance. The appellant himself testified that the deceased struck only with his left hand and had his right hand in his overcoat pocket at all times. One witness testified as to the attack on the deceased with a knife in a manner which indicates that the same was actually brutal. While an attempt is made to disparage the testimony of this witness, the jury could well have believed him. The nature of the wounds on the body of the deceased are not without a bearing upon the theory of self-defense. Not only are they out of all proportion to the attack which the appellant says was made upon him, but several of them were apparently made from above and one of them was in the middle of the deceased's back. The evidence, as a whole, strongly indicates that the wounds were inflicted before the brother of the deceased appeared on the scene and that while the appellant chased the brother into the street he was not fighting both of them at the same time. Some of the evidence, even from the appellant's own witnesses, indicates that the appellant was the aggressor and that the deceased did nothing to provoke the attack. Turner testified that, when they started on after talking at the telephone pole for about five minutes, the deceased was standing just outside the door, that he did not hear either of the men say anything, and that the deceased did not have hold of the appellant at any time. This witness was within a few feet of the parties at the time the affair started, and the girl, who was between the appellant and the deceased, testified that, prior to the time the appellant knocked the deceased through the window, she did not hear the deceased say anything to the appellant, did not see the deceased make any motion toward him, and did not see the deceased make any move to strike at him. She further testified that she saw the appellant striking at the deceased, that he got the deceased down on the sidewalk and was on top of him striking at him, and that the brother did not interfere in the matter until after the deceased was down on the sidewalk and the appellant was striking at him. The most that can be said of the matters relied upon by the appellant is that they create a conflict in the evidence.

What has already been said is a sufficient answer to the contention that there was no showing of premeditation, deliberation, or lying in wait. Whether or not the appellant waited outside with the intention of attacking the deceased, there is ample evidence that he did attack him without provocation some fifteen or twenty minutes after their first altercation had ended, and the nature of the wounds inflicted is most suggestive as to his intention. It is well settled that there need be no appreciable space of time between the intention to kill and the act of killing. The matter of the degree of the crime was submitted to the jury under appropriate instructions, and the verdict is sufficiently supported by the evidence.

The judgment and the order denying the motion for a new trial or for a reduction in the degree of the offense are affirmed.

We concur: MARKS, J.; TURRENTINE, Justice pro tem.

14 Cal.App.2d 565

McLEOD v. McMAHON.

Civ. 10742.

District Court of Appeal, Second District, Division 1, California.

June 13, 1936.

1. New trial ⊂=163(2)

If memorandum stating that new trial would be granted was "the order" rather than minute order granting new trial entered later, order made memorandum ambiguous, and appellant had duty to take appropriate proceedings for amendment or correction of one or both orders, so that order speaking the truth could be entered, and from such corrected order appeal could be taken (Code Civ.Proc. § 657).

2. New trial ⊂=163(2)

Where trial court filed memorandum stating that new trial would be granted and later entered minute order granting new trial, whether memorandum was order or mere announcement of order court contemplated making depended upon court's intention (Code Civ.Proc. § 657).

3. Appeal and error ⊂=110

Minute order granting new trial *held* the "order" from which appeal had to be taken rather than memorandum filed day before, stating that new trial would be granted, where minute order recited that memorandum had been filed, and court instructed clerk to enter minute order (Code Civ.Proc. § 657).

[Ed. Note.—For other definitions of "Order," see Words & Phrases.]

4. New trial ⊂=163(2)

Opinion filed with order granting motion for new trial is not part of order, and order entered in minutes of court is the only "order."

5. Appeal and error ⊂=533(1)

Trial court's opinion is not part of record on appeal.

6. New trial ⊂=71

Granting new trial in automobile accident case *held* not abuse of discretion where record showed conflict in evidence, and memorandum stating that new trial would be granted showed that court specifically had state of evidence in mind (Code Civ.Proc. § 657).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Clara E. McLeod against J. F. McMahon. From an order granting plaintiff's motion for a new trial, defendant appeals.

Order affirmed.

Francis J. Gabel, of Los Angeles (John K. Ford, of Los Angeles, of counsel), for appellant.

John Elliott Cook, of San Francisco, and Stanley N. Barnes, of Los Angeles, for respondent.

ROTH, Justice pro tem.

On June 26, 1935, pursuant to a motion therefor, made on all grounds set up in the statute, section 657 of the Code of Civil Procedure, the trial court filed a "Memorandum in re Motion for New Trial" (hereinafter called "first order") which, after calling attention to a certain instruction which the court stated it was persuaded had "misdirected" the jury, and wherein there was a discussion of certain phases of the evidence, concluded as follows: "For this reason a new trial will be granted."

On the next day the trial court instructed the clerk to enter and there was entered a minute order (hereinafter called "second order"), as follows: "Motion by plaintiff for new trial heretofore submitted on June 14, 1935, is now by the Court granted upon the ground of the insufficiency of the evidence to justify the verdict and upon errors in law occurring at the trial and excepted to by the plaintiff. Memo in re motion filed."

Appellant appeals solely from the second order and his first contention on appeal is that the second order is void because the first order is the complete order of the court on the motion for a new trial, and that the second order is surplusage. The immediate, and it seems to us conclusive, response to this contention is that if appellant's assertion is sound, then his appeal is waste motion, because even were we persuaded to reverse the second order appealed from, the first order would stand as the order since no appeal has been taken from the first order and the time within which one might have been taken has long since expired.

[1, 2] If appellant is correct in his contention that the first order is the order,

then it would have been essential to have taken an appeal from the first order as well as from the second order. Robbins v. Jenkins (Cal.App.) 50 P.(2d) 826; Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co., 67 Cal.App. 420, 227 P. 938, and Id., 67 Cal.App. 424, 227 P. 940; Livesay v. Deibert, 3 Cal.App.(2d) 140, 39 P.(2d) 466. Assuming, further, that appellant is correct in his contention that the first order is the order, then an ambiguity was created in the first order by the second order, and it was appellant's duty to take appropriate proceedings in the trial court for an amendment or correction of the that an order could have been entered to speak the truth. From such a corrected order an appeal might have been taken which would have attacked the entire situation. Wutchumna Water Co. v. Superior Court, 215 Cal. 734, 739, 12 P.(2d) 1033. On the merits, however, it is clear to us that the first order was never intended by the trial court to be the order, and in a situation such as that which exists in the case at bar, the intention of the trial court is decisive of the character of the first order. In the Wutchumna Case, supra, 215 Cal. 734, at page 738, 12 P.(2d) 1033, 1034, the court says: "Whether remarks made at the conclusion of a hearing are a rendition of the court's decision on the matter before it, or a mere announcement or memorandum of the decision which the court contemplates making by signed order, depends on the intention of the court. 14 Cal.Jur. 856; 1 Freeman on Judgments, p. 81."

[3-5] The record on appeal shows that the trial court instructed the clerk to enter the second order. This, in itself, is conclusive evidence that the trial judge did not consider the first order to be the court's order. In addition, the second order on its face recites that a memo is filed, showing that the trial judge did not regard the memo as an order, but merely a memo advising counsel of the factual reasons which prompted the order. The trial judge knew what he intended to do, and his intention as manifested in the second order is conclusive. Livesay v. Deibert, supra, 3 Cal.App.(2d) 140, at page 147, 39 P.(2d) 466. It has been consistently held in this state that an opinion filed with an order granting a motion for a new trial is not part of the order and that the order entered in the minutes of the court is the only order. Classen v. Thomas, 164 Cal. 196, 128 P. 329; Weisser v. Southern Pacific Ry. Co., 148 Cal. 426, 83 P. 439, 7 Ann.Cas. 636; Bouchard v. Abrahamsen, 4 Cal.App. 430, 88 P. 383; Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 P. 110; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 621, 75 P. 332; Harnett v. Central Pac. R. Co., 78 Cal. 31, 33, 20 P. 154. It is also an accepted proposition that a trial court's opinion is not part of the record on appeal. Manufacturers' Finance Corporation v. Pacific Wholesale Radio, 130 Cal.App. 239, 19 P.(2d) 1013. Because of these well-settled rules, appellant moved the court "for a diminution of the record in order that the memorandum, so-called, dated June 26, 1935, might be included within the judgment roll." It is clear, therefore, from an analysis of the first order and the second order, in the light of the circumstances under which and the manner in which they were made, that the trial judge intended the second order to be the only order.

[6] The record shows a substantial conflict in the evidence which we find unnecessary to review, particularly in view of the fact that the first order affirmatively shows, in spite of its concluding language, that the trial judge specifically had in mind the state of the evidence. Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co., supra, 67 Cal.App. 420, at page 423, 227 P. 938. Said first order reads in part as follows: "Furthermore, the defendant himself testified that for half a mile he saw the wagon load of hay and the plaintiff's Ford car. He knew that she was approaching the wagon and he knew that the wagon was going at such a slow pace that a reasonable person could not expect the plaintiff to remain behind the wagon. Also, when he was within seventy-five feet of plaintiff's car and he saw that she was pulling into the left-hand side of the road, he must have been driving at a speed that was unreasonable for the width of the highway, the traffic, and the surface. If she pulled to the left when he was seventy-five feet from her and if he was going at a speed at which he could 'bring his car to a stop if necessary', then it was his negligence in not stopping that brought on the collision. Whatever appraisal may be put upon the fact of her turning into the left lane of travel, that act did not contribute to cause the collision. For this reason a new trial will be granted."

The record affirmatively shows that there was not an abuse of discretion.

The order appealed from is therefore affirmed.

We concur: HOUSER, P. J.; YORK, J.



14 Cal.App.2d 609

PERRY v. WASHINGTON NAT. INS. CO. et al.*

Civ. 9730.

District Court of Appeal, First District, Division 1, California.

June 17, 1936.

Rehearing Denied July 17, 1936.

1. Assault and battery ⊂=35

Evidence *held* to support finding that insurance company employees committed assault and battery on insured who had been requested to come to insurance company's offices to adjust claims on accident policies.

2. Assault and battery ⊂=40

$5,300 damages for assault and battery *held* not excessive where testimony was conflicting and pleadings permitted allowance of both general and exemplary damages.

3. Insurance ⊂=93

Insurance company *held* liable for assault and battery committed in company's offices by its employees in their efforts to regain from plaintiff possession of company's check which they had handed to plaintiff pursuant to directions from company to bring about final settlement of plaintiff's claims on accident policies.

4. False imprisonment ⊂=8

In suit for false imprisonment, unlawful detention of plaintiff's person must be shown.

5. False imprisonment ⊂=31

Evidence that insurance company's employees instantly and forcibly ejected insured from insurance company's offices as soon as argument over check in settlement of insured's claims under accident policies arose *held* insufficient to show that insured was falsely imprisoned.

6. Malicious prosecution ⊂=56

Plaintiff suing for malicious prosecution must show that defendant acted without probable cause and that he was actuated by malicious motives.

7. Malicious prosecution ⊂=20

"Probable cause" as used in law of malicious prosecution means suspicion founded on circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

8. Malicious prosecution ⊂=24(2)

Existence of probable cause for malicious prosecution is not negatived by acquittal of defendant at trial of criminal charge, and such acquittal does not create conflict on issue of probable cause.

9. Malicious prosecution ⊂=20, 30

Person who procures arrest on facts which do not charge crime is not liable for malicious prosecution if facts are such as to induce in mind of reasonable person the honest belief that offense has been committed and that person procuring arrest is not actuated by improper or sinister motives.

10. Malicious prosecution ⊂=22

If prosecuting witness acts in good faith and fairly discloses to prosecuting attorney all facts within his knowledge regarding offense and is advised that probable cause for arrest exists, witness is exonerated from liability for malicious prosecution even though attorney's advice was erroneous.

11. Malicious prosecution ⊂=64(2)

Evidence *held* insufficient to show that defendants acted maliciously and without probable cause in swearing to complaint charging that plaintiff committed battery upon them, precluding recovery of damages in malicious prosecution action.

12. Malicious prosecution ⊂=21(1)

Defendants who brought an action under advice of counsel in filing battery charges against plaintiff *held* to have complete defense to malicious action based on such charges.

13. Malicious prosecution ⊂=42

Insurance company employees sued for malicious prosecution in swearing to complaint charging that plaintiff with whom they had had altercation concerning claim

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For dissenting opinion, see 59 P.(2d) 158.

against company had committed battery upon them *held* not responsible for statements made by insurance company's local manager that company would put plaintiff in jail if he did not settle his claims against company, where employees were not present when statement was made and did not acquiesce in or authorize statement.

14. Malicious prosecution ⊂⊃64(2)

Evidence that defendants, sued for malicious prosecution for swearing to complaint charging that plaintiff committed battery on them, accompanied police officers to plaintiff's home when warrants were served and went back with officers and plaintiff to hall of justice did not establish want of probable cause or malice, since want of probable cause and malice must be determined from facts as they existed at time charge was preferred.

15. Malicious prosecution ⊂⊃22

Defense that defendant sued for malicious prosecution acted on advice of counsel in bringing charge is not available to defendant who has failed to reveal to prosecuting officer material facts known to defendant, or of which he has means of ascertaining which would tend to exonerate plaintiff.

16. Malicious prosecution ⊂⊃22

Failure of defendants charging plaintiff with committing battery on them to relate plaintiff's version of altercation to prosecuting officer did not destroy defense that defendants acted on advice of counsel, where defendants did not know plaintiff's version.

17. Malicious prosecution ⊂⊃24(2)

Person who has reasonable ground for belief that other person committed crime, and in good faith charges commission of such crime, cannot be held liable in malicious prosecution action, notwithstanding that such other person proves at trial of criminal action that he is innocent, or that no crime was in fact committed.

CASHIN, J., dissenting in part.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Joe Perry against the Washington National Insurance Company, G. L. Smith, Russell George, and another. From the judgment, the named defendants appeal.

Affirmed in part, and reversed in part, with directions.

J. F. Riley, of San Francisco, for appellants.

Elmer P. Delany and Paul F. Fratessa, both of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff sued for damages on a complaint containing four counts. The first was for assault and battery, the second for false imprisonment, and the third and fourth for malicious prosecution. The litigation grew out of an altercation which took place in the San Francisco offices of the defendant insurance company between plaintiff and three of the company's employees, named Russell George, G. L. and J. A. Smith, over the possession of a check which had been handed to plaintiff by George in settlement of accident insurance, and which plaintiff attempted to take away with him, so defendants claim, without first signing the requisite receipt therefor which was attached to the check and handed to plaintiff at the same time. The malicious prosecution counts were based on two criminal complaints sworn to by G. L. and J. A. Smith, respectively, charging that plaintiff had committed battery upon them after they had regained the check. Plaintiff made the insurance company and all three employees parties defendant to the action, but the summons was not served on J. A. Smith, and at the close of plaintiff's case he dismissed the action as to J. A. Smith. The jury before which the action was tried returned separate verdicts in plaintiff's favor and against all three remaining defendants on each count, the awards being as follows: $5,300 for assault and battery, $3,000 for false imprisonment, and $2,000 on each of the malicious prosecution counts. Judgment was entered accordingly against said defendants for the total sum of $12,300. Motions for new trial were made and denied, and the defendants appeal, urging as grounds for reversal that the evidence is insufficient to sustain any of said verdicts especially as against the insurance company; that the amounts of the verdicts are grossly excessive and were rendered under the influence of passion and prejudice; and that the court erred in its rulings during the course of the trial, and in its charge to the jury.

The circumstances leading up to the altercation were as follows: Plaintiff, while employed as a laborer on a building in San Francisco, fell and injured his left thigh.

He held two accident policies issued by defendant company, which provided for disability benefits. The company, an Illinois corporation having its principal offices in that state, made three payments to plaintiff under said policies through its San Francisco office, and thereupon, believing plaintiff was malingering, notified its local office to effect a final settlement with him if possible; otherwise to make a careful investigation as to the extent of his disability. In pursuance of such instructions defendant George called on plaintiff and offered him a check for $32.50 in full settlement of his claim, which plaintiff refused to accept, whereupon George requested plaintiff to call at the company's office to adjust the matter. He did so, and upon entering the office took a seat on a bench in the reception room. The defendant George came in, and handing plaintiff a check for $32.50 attached to a separate paper in the form of a printed receipt, explained the proposition to plaintiff and requested him to sign the receipt. Plaintiff is a native of the Cape Verde islands, having arrived in this country in 1926, and he was not well versed in the English language. However, he took the documents in his hands, examined the check, and noting the amount thereof stated he would not sign the receipt. George proceeded to explain that acting under instructions from his company he could not pay him more than the check called for; whereupon plaintiff detached the receipt and retaining the check stated, according to his testimony, that he wanted to take the check to show to his lawyer and to the insurance commissioner. The testimony as to what actually happened thereafter is conflicting. Plaintiff testified that immediately upon telling George he wanted to take the check away with him George grabbed for the check and it fell from plaintiff's hands to the floor; that George then said, "Get out of here, you nigger," and started to assault him; that the two Smiths then entered the room and all three started striking and choking him, and twisting his arm, and finally threw him through the open doorway to the floor of the corridor; that after lying there for a few minutes he got up and left the premises. The testimony given by the three employees as to what happened was entirely different. They testified that plaintiff stated he would not accept the amount of the check nor sign the receipt; that while George was explaining the matter to him plaintiff detached the receipt, laid it on the bench beside him, and crumpling the check in his hand said he was going to take it to his lawyer and to the insurance commissioner; that he was told he would not be allowed to take the check unless he signed the receipt, but that he insisted on doing so, and still clutching the check in his hand started to get up from the bench to leave the office; that thereupon George and G. L. Smith, who was present during the conversation, attempted to restrain him and regain possession of the check, but that plaintiff resisted by kicking at them; whereupon J. A. Smith, who had been listening to and watching the altercation from an adjoining room, entered the reception room, grasped plaintiff by the shoulder and held plaintiff's knees between his while George and G. L. Smith pried open plaintiff's hand and the check dropped to the floor; that plaintiff was then released and he instantly arose from his seat, looked straight at J. A. Smith, explained "That's the man I want," and rushed toward Smith, striking at Smith's head several times with a cane which plaintiff carried; that Smith tried to ward off the blows with his forearm and backed into another room, whereupon George and G. L. Smith took hold of plaintiff's arms and forced him out of the room into the corridor; that they then released him and started back toward the reception room door but as they re-entered the doorway plaintiff rushed toward the open door and succeeded in striking G. L. Smith on the hand several times with his cane before Smith succeeded in closing the door. Said witnesses further testified that after the door was closed plaintiff hammered on the outside of the door with his cane and tried to open it; that a few minutes later, believing that plaintiff had gone away, J. A. Smith started to leave the office through another door, but was immediately confronted by plaintiff, who rushed at him again and struck him several times with his cane before he could retreat into the office. Meanwhile George summoned the police, but plaintiff disappeared before the officer arrived.

The officer inquired about the trouble and after it was explained to him he advised the Smiths to go to the bond and warrant clerk of the district attorney's office and swear to criminal complaints charging plaintiff with battery. Acting upon such advice, the Smiths, accompanied by George, went at once to said office and laid before the bond and warrant clerk, who is a practicing attorney, all of the facts; they also exhibited to him the bruises inflicted upon them as a

result of the blows from plaintiff's cane; whereupon the bond and warrant clerk issued a so-called citation, requesting plaintiff to appear at said office within a certain time and give any reason he might have why warrants should not issue for his arrest on charges of battery. The citation was served by a police officer, but plaintiff ignored it, and at the end of the limitation of time fixed therein, to wit, on the fourth day after it was served, G. L. and J. A. Smith returned to the office of the bond and warrant clerk, as instructed by him, and two complaints were prepared by said officer charging plaintiff with battery; and acting under his advice the Smiths took the complaints before a municipal judge and swore to them. Warrants of arrest were issued and served on plaintiff, and he was confined in jail for approximately an hour before being released on a $50 bond. Subsequently his trial took place in the municipal court before a jury on the J. A. Smith charge and he was acquitted; whereupon the G. L. Smith charge was dismissed.

[1, 2] With respect to the first cause of action, it is evident that the testimony given by plaintiff as to the circumstances under which the alleged assault occurred, although contradicted by the other three participants in the quarrel, is legally sufficient to sustain the jury's conclusion that plaintiff was entitled to reasonable damages under the first count charging assault and battery. There is a conflict of evidence also as to the nature and extent of plaintiff's injuries, and in that state of the record and particularly in view of the testimony given by plaintiff's physician it cannot be successfully maintained that the amount of damages awarded under the first count was the product of passion and prejudice, especially since under the pleadings the jury was entitled to allow both general and exemplary damages.

[3] Furthermore, there is sufficient evidence to charge the defendant company with liability for the acts of its employees for the reason that it appears without conflict that the alleged assault was committed in the company's office by its employees in their efforts to regain from plaintiff possession of the company's check which they had handed to plaintiff pursuant to directions from the company to bring about a final settlement of plaintiff's disputed claim for insurance. The other points relating to the first cause of action are without merit.

[4, 5] We are of the opinion, however, that as defendants contend, the evidence wholly fails to establish a case of either false imprisonment or malicious prosecution against any of said defendants. With respect to the former, it is admittedly essential to show some unlawful detention of plaintiff's person, and here, according to plaintiff's own story, he was in no way detained by any of the defendants. On the contrary, he insisted at the trial and he contends on this appeal, that as soon as the argument started over the check he was instantly and forcibly ejected from the room. Therefore, taking plaintiff's own version of the quarrel, defendants were entitled to an instructed verdict on the second count.

[6-9] And with regard to the causes of action for malicious prosecution, it is well established, as pointed out in Haydel v. Morton, 8 Cal.App.(2d) 730, 48 P.(2d) 709, and Richter v. Neilson (Cal.App.) 54 P.(2d) 54, that the burden is always upon the plaintiff to establish the concurrence of two indispensable elements, first, that the defendant acted without probable cause, and, secondly, that he was actuated by a malicious motive. Griswold v. Griswold, 143 Cal. 617, 77 P. 672; Moore v. Durrer, 127 Cal.App. 759, 16 P.(2d) 676; Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, 57 P. 764, 59 P. 698; Carpenter v. Ashley, 15 Cal.App. 461, 115 P. 268. As shown also in the Haydel and Richter Cases, supra, the term "probable cause" as used and applied in the law of malicious prosecution has been defined to be a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true (Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611; Lee v. Levison, 173 Cal. 166, 159 P. 438; Selvester v. Kennedy, 137 Cal.App. 250, 30 P.(2d) 63, and cases cited therein); and in this connection it has been repeatedly held that the existence of probable cause is not negatived merely by a showing that the accused has been able at the trial of the criminal charge to obtain an acquittal; that such favorable determination does not even create a conflict on the issue of probable cause (Haydel v. Morton, supra; Dunlap v. New Zealand F. & M. I. Co., 109 Cal. 365, 42 P. 29; Moore v. Durrer, supra; McKenna v. Heinlen, 128 Cal. 97, 60 P. 668). Furthermore, as indicated, even though a want of probable cause is shown, malice also must be affirmatively established (16 Cal.Jur. 735; 18 R.C.L. 28); and it is held, therefore,

that though it be found that the facts upon which the person bases the charge do not in point of law constitute a crime, if they are of such character as to induce in the mind of a reasonable person the honest belief that an offense has been committed and the accuser is not actuated by improper or sinister motives, he shall not be held liable in damages afterwards for having caused the arrest (Dunlap v. New Zealand F. & M. I. Co., supra; 16 Cal.Jur. 741; Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am.St. Rep. 174).

[10] Moreover, as stated in the Richter Case, supra, it has long since been the law that if in addition to his own belief a defendant proves that before commencing the prosecution of the action alleged to be malicious he sought the legal advice of an officer selected by the people to prosecute offenders against laws, and in good faith fully and fairly disclosed to that officer all the information he possessed, and he advises that a crime has been committed and the prosecution is instituted upon a complaint prepared by that officer, the defendant has made out a complete defense to the action (Dunlap v. New Zealand F. & M. I. Co., supra; 16 Cal.Jur. 741, and cases cited under note 12; Ball v. Rawles, supra; Hahn v. Schmidt, 64 Cal. 284, 30 P. 818), however erroneous such advice may have been (Potter v. Seale, 8 Cal. 217, 218, 226; 18 R.C.L. 45).

[11, 12] In view of the foregoing legal principles, it is our conclusion that plaintiff failed to meet the burden of establishing either want of probable cause for the arrest or that in swearing to the criminal charges the Smiths were actuated by motives imputing bad faith and want of honest belief in the truth of said charges. Furthermore, it would appear beyond question that under the decisions cited the undisputed fact that the Smiths first sought and then acted under the advice of counsel in filing said charges constituted a complete defense to any action for malicious prosecution based on said charges.

[13, 14] In support of his contention that the Smiths were actuated by malice in causing his arrest, plaintiff makes two points. The first is based on his own testimony to the effect that on the day following the altercation the local manager of defendant company, J. A. Shelnutt, called on him at his home and stated that if he "did not settle the case the company was going to put him in jail." The second is that after the warrants were issued George and G. L. Smith went along with the police officers to plaintiff's home when the warrants were served and accompanied them back to the Hall of Justice. As to the first point, Shelnutt denied not only having made such statement, but also having visited plaintiff at all subsequent to the altercation in the office. But resolving the conflict in plaintiff's favor and assuming that Shelnutt did make such statement, it is evident that neither of the Smiths can be held responsible therefor because admittedly neither was present at the time the alleged statement was made nor is there any testimony whatever to show that either of them ever knew anything about Shelnutt's activities or that they directly or indirectly acquiesced in or authorized him to make any statement in their behalf. And as to the second point, the circumstance referred to happened, as will be noted, after the issuance of the warrants, and consequently cannot be considered as evidence establishing want of probable cause for the arrest or of malice on the part of either of the Smiths in swearing to the complaints for the reason that under the authorities such elements must be determined from the facts as they existed at the time the charge was preferred. Richter v. Neilson, supra; Harkrader v. Moore, 44 Cal. 144; Griswold v. Griswold, supra.

[15, 16] Nor is there any merit in plaintiff's contention that in obtaining said warrants of arrest the Smiths did not fully and fairly disclose to the prosecuting officer all of the facts of the case. Obviously, it was impossible for them to relate, as plaintiff seems to contend that should have been done, his version of the altercation as afterwards disclosed by him at the trial of the criminal action for the reason that at no time prior to said trial did the Smiths have any intimation that he would deny the truth of their statement as to how it happened; and much less did they know, prior to the issuance of the warrants, that if he did make such denial what his version of the altercation would be. The very purpose of the citation was to ascertain from him if possible, before filing the formal criminal charges, what his side of the controversy was, and to afford him full opportunity to refute any statements the Smiths had made in applying for said warrants. But as stated, plaintiff ignored the citation and within the four days allowed therefor did not avail himself of the opportunity to explain. Consequently, at the end of that time the criminal complaints

were prepared and sworn to and the warrants of arrest were issued. It is true, of course, as plaintiff contends, the defense of advice of counsel is not available to an accuser who has failed to reveal to a prosecuting officer material facts known to the accuser or of which he has the means of ascertaining, which would tend to exonerate the accused. The case of Shaffer v. Arnaelsteen, 54 Cal.App. 719, 202 P. 946, affords a good illustration of the proper application of such doctrine. There the defendant caused the arrest of the plaintiff, Mrs. Shaffer, on a charge of embezzling $2.50; and in applying the above doctrine to the facts of that case the decision points out that the defendant in seeking the warrant of arrest failed to reveal to the prosecuting officer numerous material facts, particularly that the sum involved had been appropriated by plaintiff openly and avowedly under the claim of title preferred in good faith, which, of course, was sufficient to destroy the essential element constituting embezzlement, and if known to the prosecutor would have resulted in a refusal to sanction the arrest. Here, however, the Smiths charged plaintiff with having committed acts of violence upon them, and so far as our attention has been called, there was no evidence introduced which justifies the reasonable conclusion that at the time they consulted the prosecuting attorney they withheld or suppressed any material facts within their knowledge or which upon inquiry they might have ascertained, tending to exonerate plaintiff, or that at that time or thereafter they did not believe in the absolute truth of the statements they made to said officer; nor were there any circumstances which would tend to prove that in making said charge they did not act honestly and in good faith. For the reasons stated, plaintiff failed to bring his case within the scope of the legal doctrine applied in the Shaffer Case.

[17] And finally it may be said here, as in the Haydel and Richter Cases, that the courts of this state have often declared that for reasons of public policy actions for malicious prosecution have never been looked upon with favor; and while they have been readily upheld when the proper elements thereof have been established, they are sustained only when it is shown that the prosecution was in fact actuated by malice and the party instigating the same had no reasonable ground for causing the prosecution. The main reason given for so declaring is that it is for the best interests of society that any person who has good reason to believe the law has been violated shall have the right to cause the arrest of the offender; and that consequently for his protection in so doing it is the established rule that if, as here, he has reasonable ground for his belief, and acts thereon in good faith, he shall not be mulcted in damages merely because the accused is able at the trial of the criminal action to establish that no crime was committed or that he is innocent. Ball v. Rawles, supra; Lacey v. Porter, 103 Cal. 597, 37 P. 635; Haydel v. Morton, supra, and cases cited therein; Dunlap v. New Zealand F. & M. I. Co., supra.

In conformity with the foregoing conclusions it is ordered that the judgment be affirmed as to the first cause of action and reversed as to the second, third, and fourth causes of action; that a revised judgment for $5,300 be entered in plaintiff's favor in accordance with the verdict rendered in said first count, and that the costs of appeal be equally divided between plaintiff and the defendants

I concur: TYLER, P. J.

CASHIN, J., dissenting in part. For dissenting opinion see 59 P.(2d) 158.

KEY NUMBER SYSTEM

STANISLAUS COUNTY DAIRYMEN'S PROTECTIVE ASS'N et al. v. STANISLAUS COUNTY et al. *

Civ. 5513.

District Court of Appeal, Third District, California.

June 4, 1936.

Rehearing Denied July 3, 1936.

Hearing Granted by Supreme Court Aug. 3, 1936.

1. Pleading ⇐8(1)

Allegations of conclusions in complaint with respect to purpose or result of county ordinance are not binding on court in construction thereof.

2. Counties ⇐55

Municipal corporations ⇐597

Powers of counties and chartered cities to enact police ordinances for sanitation or health are as broad as same powers of Legislature, except ordinances of counties and chartered cities must not conflict with Constitution or general laws, and must be con-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 65 P.2d 1305.

fined in their application to city or county adopting them.

3. Counties ⊜55

In determining whether county ordinance is unreasonable, discriminatory, or oppressive, intent and object of legislation should be ascertained, if possible, from act itself.

4. Counties ⊜55

Purpose and spirit of county ordinance should be considered by court in determining whether ordinance is unreasonable, discriminatory, or oppressive.

5. Counties ⊜55

County ordinance relating to control of tubercular cattle providing new and additional regulations beyond those of Agricultural Code would be valid so long as its provisions did not conflict with provisions of Code (Gen.Laws Supp.1933, Act 144).

6. Counties ⊜55

Ordinance making county, not included in tuberculosis control area established by agricultural department, a voluntary tuberculosis control area, *held* not in conflict with provisions of Agricultural Code relating to control of tuberculosis as affecting cattle, since such provisions are applicable only to areas established as tuberculosis control areas by department (Gen.Laws Supp.1933, Act 144, §§ 234, 234.25, 234–239).

7. Counties ⊜55

Under provision of Agricultural Code that, in any county where agricultural department had not established a tuberculosis control area, county could declare "any portion" of county a voluntary tuberculosis control area, county could include all portions or entire county in voluntary control area (Gen.Laws Supp.1933, Act 144, § 234.25).

[Ed. Note.—For other definitions of "Any Portion," see Words & Phrases.]

8. Animals ⊜29

Agricultural Code *held* not discriminatory or void because it provided for organization of separate districts within state for purpose of regulating and eradicating tuberculosis from dairy cattle (Gen.Laws Supp. 1933, Act 144).

9. Counties ⊜55

County ordinance making county voluntary tuberculosis control area *held* not to conflict with provisions of Agricultural Code relating to control of tuberculosis as affecting cattle because ordinance failed to provide for compensation of owners of condemned cattle while Code did, and even if other provision of ordinance were couched in same language as Code (Gen.Laws Supp.1933, Act 144, § 234.25).

10. Counties ⊜55

Ordinance making county voluntary tuberculosis control area *held* not void for delegating discretionary authority in testing, segregating, or slaughtering infected cattle to county livestock inspector or county veterinarians (Gen.Laws Supp.1933, Act 144, § 234.-25; Const. art. 11, § 11).

11. Counties ⊜55

That county ordinance making county voluntary tuberculosis control area exempted beef cattle from requirements applicable to dairy cows found to be infected with tuberculosis did not render ordinance discriminatory (Gen.Laws Supp.1933, Act 144, § 234.-25; Const. art. 1, § 11).

12. Constitutional law ⊜293

Ordinance making county voluntary tuberculosis control area and providing for slaughter of infected cattle without providing for compensation of owners *held* not violative of due process, since ordinance was within police power of county and its execution was in hands of skilled agents (Const. U.S. Amend. 14; Const.Cal. art. 11, § 11).

13. Constitutional law ⊜293

County ordinance making county voluntary tuberculosis control area and providing for cleaning and disinfecting premises from which diseased cattle were removed *held* not violative of due process because it made no provision for compensation of owners, being within police power of county (Const.U.S. Amend. 14; Const.Cal. art. 11, § 11).

14. Constitutional law ⊜293

That county ordinance provided for slaughter of tubercular cattle under supervision of federal, state, or state approved municipal meat inspector, did not render ordinance violative of due process, since owners of such stock were not thereby deprived of vested rights, and, even if clause were invalid, saving clause would preclude its affecting balance of ordinance (Const.U.S. Amend. 14).

Appeal from Superior Court, Stanislaus County; L. J. Maddux and Roy B. Maxey, Judges.

Action by the Stanislaus County Dairymen's Protective Association, a voluntary unincorporated association, and another, against the County of Stanislaus, a political subdivision, and others. Judgment for defendants upon an order sustaining a demurrer to complaint without leave to amend, and plaintiffs appeal.

Affirmed.

Hawkins & Hawkins, of Modesto, and Whitehurst & Logan, of Patterson, for appellants.

Leslie A. Cleary, Dist. Atty., and Frank B. Collier, Deputy Dist. Atty., both of Modesto, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment which was rendered against them upon an order sustaining a demurrer to a complaint without leave to amend the pleading. The action was brought to enjoin the officers of the Stanislaus County Voluntary Tuberculosis Control Area from enforcing an ordinance of that district authorizing the inspecting, condemning or slaughtering of dairy cattle infected with tuberculosis. It is contended the ordinance is unconstitutional and void for the reason that it is in conflict with the Agricultural Code of California (Gen.Laws Supp.1933, Act 144), which purports to legislate for the entire state upon the same subject, and because the ordinance is discriminatory, unreasonable, and oppressive. The demurrer was sustained on the ground that the complaint fails to state facts sufficient to constitute a cause of action authorizing the injunctive relief which is sought.

It is contended the demurrer was improperly sustained for the reason that the facts which are alleged show that the county ordinance is unreasonable, discriminatory, and void, and that evidence may be adduced to prove that an act which may appear on its face to be valid is, nevertheless, void. It is stated in 2 McQuillin on Municipal Corporations, p. 732, § 766, in that regard: "It is well settled that in case of an act of the legislature, or of a municipal ordinance which has been expressly ratified by the legislature, evidence may not, as a general rule, be introduced for the purpose of showing that the statute or ordinance is unreasonable, and therefore unconstitutional, while in the case of an ordinance or municipal regulation adopted under authority of the legislature, but *not specially ratified* after adoption, it may be attacked on the ground that it is unreasonable, and to support this claim evidence may be introduced."

[1] Conceding that a different rule prevails in that regard in determining whether a county ordinance is unreasonable and void from that which applies with relation to the ordinance of a city which is enacted under an express delegation of authority contained in a charter which has been approved by the Legislature, still we are of the opinion the present county ordinance does not appear to be unreasonable or discriminatory. The mere allegations of conclusions with respect to the purpose or result of an ordinance are not binding on a court in the construction thereof. The ordinance itself is clear with respect to its purpose and procedure.

[2] The county of Stanislaus was granted authority to adopt local, police, sanitary, or other regulations not in conflict with general laws. Article 11, § 11, Const. of Calif. The only questions to be determined are whether the challenged ordinance constitutes a violation of that constitutional delegation of authority, or whether it is in conflict with the Agricultural Code of California. The authority to enact police ordinances for sanitation or health on the part of counties as well as chartered cities is just as broad, sweeping, and inclusive as the powers with relation thereto which are vested in the Legislature itself, except that they must not conflict with the Constitution or with general laws, and must be confined in their application only to the city or county adopting them. People v. Velarde, 45 Cal.App. 520, 188 P. 59; In re Maas, 219 Cal. 422, 27 P.(2d) 373.

[3] In determining whether the ordinance is unreasonable, discriminatory, or oppressive, and therefore void, the intent and object of the legislation should be ascertained, if possible, from the act itself. In 59 Corpus Juris, p. 961, § 571, it is said in that regard: "In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid."

[4] But the purpose and spirit of the act should also be considered. In 59 Corpus Juris, p. 964, § 573, it is said: "In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute. Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or injustice, or would lead to contradictions, or would defeat the plain purpose of the act. * * * When the law is free and clear of ambiguity, the letter of it is not to be disregarded on the pretext of pursuing its spirit."

[5] It is asserted sections 234 to 239 of the Agricultural Code of California (Deering's Supp. to Gen.Laws of Calif., 1933, Act 144, p. 841 et seq.) includes all of the provisions with relation to the control of tuberculosis as affecting cattle within the state, which are found in the Stanislaus ordinance, which latter measure is a mere attempt to regulate the same subject covered by the state law, and that the ordinance is therefore ineffectual and void. In re Sic, 73 Cal. 142, 14 P. 405; In re Mingo, 190 Cal. 769, 214 P. 850; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334. The application of this rule depends upon whether the Agricultural Code does in fact cover regulations in the same district regarding tubercular cattle which are sought to be enforced by the Stanislaus ordinance. If the ordinance does enact new and additional regulations beyond those which are covered by the state law, then those measures may be upheld as valid so long as they do not conflict with the provisions of the state law. It is said in Re Iverson, 199 Cal. 582, 250 P. 681, 682, in that regard: "Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable. Mann v. Scott, 180 Cal. 550, 556, 182 P. 281. * * * Whether the Legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate."

[6] After comparison of the Stanislaus county ordinance with the Agricultural Code we are satisfied these measures are not in conflict. The tuberculosis control feature of the Agricultural Code is not effective in Stanislaus county. The complaint does not allege facts indicating that the code is effective in Stanislaus county. In truth, just the opposite situation appears. It is recited that the county of Stanislaus adopted an ordinance pursuant to section 234.25 of the Agricultural Code declaring that county to be an independent "voluntary tuberculosis area." This procedure is authorized by the Code. The theory of the Agricultural Code is that the state will assume authority to enforce the provisions thereof with respect to tubercular animals only in districts consisting of one or more counties *after such areas have been segregated and established by the agricultural department.* Section 234 of the Code provides in that regard: "The department may establish and maintain tuberculosis control areas within this State, wherein said department shall examine and tuberculin test all dairy cattle, and, with the consent of the owner, such beef cattle as he may specify, as often as may be deemed necessary, in order to determine which animals are affected with tuberculosis. Any tuberculosis control area shall consist of one or more entire counties."

This provision is followed by section 234.25, which authorizes any county which is not included in a district organized by the department to create by ordinance its own area "until the department shall establish such county as a tuberculosis control area," within which county or any portion thereof the board of supervisors may provide for the regulation and testing of all cattle for the purpose of eradicating tuberculosis. That is exactly what was done in the present case. The last-mentioned section provides:

"In any county which has not been established by the department as a tuberculosis control area as provided in the pre-

ceding section, the board of supervisors of such county may, by ordinance, declare any portion of said county a voluntary tuberculosis control area, for the purpose of eradicating bovine tuberculosis therein; the same to continue, as such, only until the department shall establish such county as a tuberculosis control area.

"The county live stock inspector shall, subject to the supervision of the director, examine and tuberculin test all dairy cattle within such voluntary tuberculosis control area, as often as may be deemed necessary, in order to determine which animals are affected with tuberculosis.

"The board of supervisors of such county shall provide by ordinance for the formation, regulation, and operation of all such voluntary tuberculosis control areas, as may be so established within such county, necessary to accomplish the object of this section. The provisions in this code for payment of indemnity shall not apply to any voluntary tuberculosis control area established by authority of this section."

[7] It is alleged the board of supervisors of Stanislaus county enacted Ordinance No. 170 pursuant to the provisions of section 234.25 of the Agricultural Code on January 19, 1935, creating a voluntary tuberculosis control area of the entire county for the purpose of eradicating tuberculosis from cattle. That ordinance is referred to as "Exhibit A" and is made a part of the complaint. It is claimed that since the last-mentioned section only authorizes a board of supervisors to declare *"any portion* of said county a voluntary tuberculosis control area," the effort to include the entire county in such district is unwarranted and void. We think there is no merit in this contention. We are of the opinion the authority to embrace within the area "any portion of the county" necessarily confers the right to include all portions or the whole thereof. Coelho v. Truckell, 9 Cal. App.(2d) 47, 48 P.(2d) 697.

The complaint then alleges that the board of supervisors of Stanislaus county enacted Ordinance No. 171, on February 25, 1935, which ordinance is also referred to as "Exhibit B" and made a part of the pleading. This ordinance appears to conform to the requirements of section 234.25 of the Agricultural Code, and provides in detail for the regulation and control of the testing, branding, and disposition of tubercular animals within that county.

The first ordinance created the district. The second one provided the authority and procedure for eradicating tuberculosis from dairy cattle within that area.

[8, 9] Since it does not appear that Stanislaus county was included by the agricultural department in any tubercular control district within the state, it is clear that county had a right to organize such a district within its own borders and enact an ordinance under the police powers conferred by article 11, § 11, of the Constitution of California for the purpose of controlling the dairy business and eradicating tuberculosis from cattle within that area. This is exactly what the county of Stanislaus proceeded to do. Since the Agricultural Code does not affect the territory within the county of Stanislaus with respect to tubercular cattle, it may not be said the county ordinance is in conflict therewith. It is therefore unnecessary to examine the various provisions of these two measures to determine whether they are the same in language and purpose. If the Agricultural Code does not apply to Stanislaus county, it is immaterial that the county ordinance may also be couched in the same language or that it may be intended to serve the same purpose. Statutes may be identical in language and purpose, but if they apply to distinctly separate districts, they are not conflicting. The Legislature had a right to authorize the organization of separate districts within the state for the purpose of regulating and eradicating tuberculosis from dairy cattle. This districting of the state has been done with respect to fishing and hunting and in various other regulatory enactments. The Agricultural Code is not discriminatory or void on that account.

The appellants suggest that the Stanislaus ordinance conflicts with the Agricultural Code in many particulars, among which is the fact that section 238 of the Code provides that animals shall not be tested for tuberculosis or slaughtered unless there are funds available from federal and state sources to compensate the owner of the stock for the loss thereof, while the ordinance provides for no compensation under such circumstances. But, as we have said, there is no conflict between these measures since the Code does not apply except in districts which have been established by the agricultural department, and Stanislaus county was not

included in such an area. Section 234.25 of the Agricultural Code specifically declares that: "The provisions in this code for payment of indemnity shall not apply to any voluntary tuberculosis control area established by authority of this section."

In view of our conclusion that the Agricultural Code has no application to the county of Stanislaus, we are not concerned with the problems as to whether it is unconstitutional for the alleged reasons that it is unreasonable, discriminatory, or oppressive, or that it constitutes an unlawful delegation of judicial authority, or otherwise. The agents of the Stanislaus district are not pretending to regulate tuberculosis among dairy cattle pursuant to the Agricultural Code.

[10] We are of the opinion the ordinance is not void because it purports to delegate certain discretionary authority in testing, segregating, or slaughtering cattle which are infected with tuberculosis. The ordinance is evidently intended as a police and sanitary measure adopted under the provisions of article 11, § 11, of the Constitution of California, chiefly to eradicate tuberculosis from dairy cattle in Stanislaus county for the protection of the consumers of milk against that prevalent disease. This discretion is conferred by the ordinance on the county livestock inspector or upon the county veterinarians, subject to the rules therein provided for the purpose of regulating the dairy business and eradicating tuberculosis. Sections III to VI of the ordinance are quoted in part and provide:

"III. All bovine animals within the voluntary tuberculosis control area herein created, shall be tuberculin tested by the county livestock inspector or veterinarians as often, in the opinion of said livestock inspector or veterinarians, as may be deemed necessary to accomplish the purpose of this ordinance. * * *

"IV. Each reactor shall * * * be marked * * * under the supervision of the county livestock inspector or a [county] veterinarian. * * *

"V. Any bovine animal in Stanislaus County reacting positively to a tuberculin test conducted by a [county] veterinarian or the county livestock inspector * * * shall immediately be segregated * * * and shall be slaughtered within 30 days * * * under supervision of a federal, state, or state approved municipal meat inspector.

"VI. After removal of reactors the premises occupied and used by the reactors must be cleaned and disinfected by the owners thereof at their expense, to the satisfaction of a veterinarian or the county livestock inspector."

For the purpose of enforcing this ordinance the county livestock inspector or county veterinarians are constituted the agents or officers of that district.

Regarding the right of the Legislature to delegate to administrative boards or officers the authority to adopt reasonable rules or methods of supervising or regulating a business or enterprise within the general purpose for which the statute is enacted, the language used in the case of Fillmore Union High School District of Ventura County v. Cobb (Cal.Sup.) 53 P.(2d) 349, 352, appears to answer the appellants' objections to the ordinance which is involved in this case. That opinion says in that regard:

"It is a well-established rule of law that authority may be delegated by the Legislature to administrative boards or officers to adopt reasonable rules and terms to carry out the general purpose for which a statute is enacted, even though the delegated power confers a discretion or the necessity of determining terms, qualifications, or facts upon the board or officer within the scope of the legislative act. 6 R.C.L., p. 179, § 179; 5 Cal.Jur., p. 683, § 97; 1 Cooley's Const. Lim., p. 228; School District No. 7 v. Hunnicutt (D.C. Okl.) 51 F.(2d) 528; People v. Kuder, 93 Cal.App. 42, 269 P. 198, 630; In re Halck, 215 Cal. 500, 11 P.(2d) 389; Ex parte McManus, 151 Cal. 331, 335, 90 P. 702; In re Weisberg, 215 Cal. 624, 12 P.(2d) 446, 450. In 1 Cooley's Const. Lim., (8th Ed.) p. 231, it is said in that regard: 'Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of

a statute and various governmental powers for the more efficient administration of the laws.'

"In the case of In re Weisberg, supra, in upholding a statute authorizing the state fire marshal to license certain establishments for sponging and pressing garments, the Supreme Court said with respect to these delegated powers: 'We find no merit in petitioner's claim that the act confers arbitrary and uncontrolled power upon the state fire marshal to determine the persons entitled to pursue and the conditions upon which they may conduct the regulated businesses. This contention is sufficiently answered by Carter v. Stevens, supra, 211 Cal. 281, 289–293, 295 P. 28, and Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349. As stated in the latter case, "it has become increasingly imperative that many quasi-legislative and quasi-judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can long be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. United States, 204 U.S. 364, 367, 27 S.Ct. 367, 51 L.Ed. 523."'"

There is nothing in the able opinion of Mr. Chief Justice Hughes in the case of Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, commonly called the "hot oil" case, upon which the appellants rely, in conflict with the authorities from which we have previously quoted. Moreover, the appellants are assailing section 234.25 of the Agricultural Code in that regard, and not the provisions of the county ordinance.

[11] The ordinance does not unlawfully discriminate between the owners of beef cattle and dairy cows in violation of article 1, § 11, of the Constitution of California, nor does it deprive any owner of property without due process of law, contrary to the inhibition of the Fourteenth Amendment of the Federal Constitution.

The ordinance does exempt beef cattle from the necessity of inspection, testing or slaughter in the manner which is applicable to dairy cows which are found to be infected with tuberculosis. We are of the opinion this is a reasonable and valid classification. It is apparent the act is primarily intended to regulate the control of milk cows for sanitary and police purposes so as to protect the dairy business for the well-known reason that milk, which is susceptible to infection from tubercular germs, is peculiarly dangerous for human consumption. Stanislaus County is a famous dairy county. There is good reason why that industry should be strictly regulated and protected in that district. It may be true that beef cattle may also be dangerously infected with tuberculosis. The general laws of inspecting, classifying and marketing beef may adequately provide for safety against tubercularly infected meat, independently of the Stanislaus ordinance. At least the reasonableness of the classification of dairy cows from beef cattle is a question resting very largely in the discretion of the legislative authority. It is said in the case of Martin v. Superior Court, 194 Cal. 93, 227 P. 762, 765: "The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason."

To the same effect are the cases of Dooley v. Johnson, 133 Cal.App. 459, 24 P. (2d) 540, and Jochimsen v. City of Los Angeles, 54 Cal.App. 715, 202 P. 902, 903. In the case last cited it is said: "The state may distinguish, select, and classify objects of legislation, and necessarily the

power must have a wide range of discretion. 'Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary.'"

[12] It is contended the ordinance violates the provisions of the Fourteenth Amendment to the Federal Constitution by depriving the owners of cattle of their property without due process of law, and that it is unreasonable and oppressive and therefore unconstitutional and void.

It is true that the ordinance does provide for the inspection and slaughter of cattle found to be infected with tuberculosis, without providing for compensation therefor. This condemning and slaughter of cattle without providing for compensation therefor, and at the discretion of the county livestock inspector or veterinarian, raises a close and serious constitutional question. Most statutes and ordinances enacted for the summary destruction of diseased animals which are dangerous to health provide for reasonable methods of ascertaining and compensating the owners for their value. This is the safe and just method of disposing of diseased livestock. But it appears that under the police powers, in emergencies arising from the prevalence of diseased animals which are dangerous to the health of individuals, such as stock which is infected with the virulent "hoof-and-mouth disease" or other contagious or infectious diseases, statutes have been held to be valid which provide for the summary destruction of the animals even though they do not provide for compensation for the value of the animals. These statutes are upheld on the theory that under the police power the agencies of the government are authorized to abate a public nuisance dangerous to the health of individuals. New Orleans v. Charouleau, 121 La. 890, 46 So. 911, 18 L.R.A.(N.S.) 368, 126 Am.St.Rep. 332, 15 Ann.Cas. 46; Newark & S. O. Horse Car Co. v. Hunt, 50 N.J.Law, 308, 12 A. 697; Torruella v. Fernandez, 14 Porto Rico R. 591; 3 C.J. p. 54, § 151; 1 R.C.L. p. 1158, § 102; 67 A.L.R. 208, note. We are of the opinion the ordinance which is involved in this case falls within that rule for the reason that it is enacted under the police power specifically delegated to the county by the provision of the state Constitution, and is intended to eradicate tuberculosis from dairy cattle and to regulate the producing and distribution of pure milk free from infected germs which are dangerous to health. We are pointed to no case which has held such statutes or ordinances to be unconstitutional or void on account of a failure to provide for compensating the owners of such diseased cattle for their summary destruction. The ordinance provides for the segregation of such diseased cattle for a period of thirty days, during which time they shall be slaughtered. This seems to afford reasonable assurance that they are actually dangerously diseased before their destruction is authorized. The delegation of enforcing this provision of the ordinance to a county livestock inspector or veterinarian is not unreasonable, arbitrary, or oppressive. These officers are deemed to be the skilled agents of the county for the purpose of inspecting, segregating, and destroying diseased dairy cattle for the preservation of the health of the consumers of milk so commonly used by the public.

[13] The same reason prompts the sustaining of section VI of the ordinance which provides for the cleaning and disinfecting of the premises from which such diseased cattle have been removed, under the supervision and to the satisfaction of the same county livestock inspector or veterinarian.

[14] The mere fact that the ordinance provides that diseased cattle shall be slaughtered "under supervision of Federal, State or State approved municipal meat inspector" is harmless. The mere supervision of the actual destruction of diseased animals on the part of federal or state approved officers deprives the owners of such stock of no vested property rights. Moreover, if that clause be deemed to be invalid, it does not affect the balance of the ordinance, which specifically provides that the invalidity of any section, paragraph, or phrase thereof "shall not affect the validity of the remaining portion of the ordinance."

Nearly every issue which is involved in this appeal was determined adversely to these appellants in the recent case of Coelho v. Truckell, 9 Cal.App.(2d) 47, 48 P.(2d) 697, in which a hearing was denied by the Supreme Court. In that case Kings county organized a tuberculosis control area under the provisions of section 234.25 of the Agricultural Code of Cali-

fornia, including the entire county in that district, just as Stanislaus county did in the present case. Kings county then adopted an ordinance under the police power conferred upon it by the Constitution of California providing for the testing, branding, segregation and slaughter of cattle within the district which were found to be infected with tuberculosis. The slaughter of such diseased cattle was authorized without compensation to the owners thereof. The enforcement of the ordinance was delegated to the livestock inspector of the county, or to qualified veterinarians employed by the bureau of animal industry of the United States. There is no substantial difference between the Kings county ordinance and the Stanislaus county measure, with the exception that in the present case the testing, condemning, and slaughtering of diseased animals is not left to the discretion of federal officers, but is intrusted only to officers of Stanislaus county. In that case it was definitely held not to be an unlawful delegation of authority to vest the county livestock inspector or the other qualified veterinarians or federal officers with a discretion to determine when and how often cattle may be inspected for tuberculosis or to direct the slaughtering of such diseased animals. In fact, every essential issue of this suit was determined in the Coelho Case in accordance with our preceding opinion. That case is determinative of this appeal.

The judgment is affirmed.

We concur: PULLEN, P. J.; STEEL, Justice pro tem.



14 Cal.App.2d 422

WACHNER et al. v. RICHARDSON, Building and Loan Com'r, et al.

Civ. 10939.

District Court of Appeal, Second District, Division 2, California.

June 3, 1936.

Hearing Denied by Supreme Court July 31, 1936.

1. Mortgages ⇐74

Possession of trust deed by trustee *held* to constitute prima facie evidence of its delivery (Civ.Code, § 1055).

2. Evidence ⇐87

Presumptions are evidence and may be basis for findings of fact (Code Civ.Proc. § 1957).

3. Mortgages ⇐67

Fact that trust deed was returned to grantor by trustee *held* not to negative previous delivery or to operate as surrender of title which had been acquired (Civ.Code, § 1055).

4. Appeal and error ⇐1008(1)

Intention of parties as to time of delivery of trust deed which was presented to trustee for its approval and acceptance and then returned to grantor *held* question of fact for trial court (Civ.Code, § 1055).

5. Appeal and error ⇐1010(1)

Finding of trial court based upon substantial evidence *held* binding upon reviewing court.

6. Mortgages ⇐168

Officers of beneficiary under trust deed who at time of receipt of deed were fully informed as to transactions surrounding prior execution of another trust deed on same property could not assert priority for their trust deed based upon prior record title, since not innocent third parties.

7. Mortgages ⇐186(4)

In suit involving priority of two trust deeds, rejection of offer of proof that notes sold to public secured by one of trust deeds were not printed until after recordation of the other *held* not erroneous, where lien of notes attached as of date of trust deed securing them.

8. Liens ⇐1

Rules covering transactions between two individual lien claimants are given strict application, but have been given broader application in matter of issuance of securities for sale to public.

9. Mortgages ⇐151(3)

Lien of notes sold to public and secured by trust deed took effect as of date of trust deed, notwithstanding that they may not have been printed until after date of recordation of another trust deed on same property.

10. Appeal and error ⇐1056(1)

In suit by purchasers of notes sold to public and secured by trust deed to establish priority of trust deed, refusal to admit

permit from corporation commissioner to issue such notes to show that some of notes were not sold as therein authorized *held* not prejudicial error, since purchasers were not in pari delicto with issuer of notes.

11. Licenses ⊂=39

In suit by purchasers of notes sold to public and secured by trust deed to establish priority of such trust deed, beneficiary under another trust deed on same property claiming priority could not raise question of compliance with terms of permit from corporation commissioner to issue such notes.

12. Building and loan associations ⊂=42(7)

Liquidating receiver of building and loan association had no more rights than association would have had in proceeding involving priority of trust deeds under one of which association was beneficiary.

13. Receivers ⊂=69

Receiver takes assets of corporation subject to all equities and is in no better position than corporation itself, subject to certain exceptions, such as cases in which fraudulent dealings were conducted directly between third parties and insolvent corporation.

14. Mortgages ⊂=151(2)

Where reconveyance of old trust deed was made by beneficiary at time of execution of new trust deed to it, with knowledge of its officers of previous execution of another trust deed on same property to another, beneficiary *held* not entitled to priority against such intervening trust deed to extent of amount of lien of old trust deed to it.

15. Costs ⊂=12

Where issue was well defined between plaintiffs and one defendant in suit wherein other defendants were brought in as necessary parties, court *held* not to have abused discretion in ordering such defendant to pay all costs on rendition of judgment for plaintiffs (Code Civ.Proc. § 1032 (c), as added by St.1933, p. 1901).

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Edwin M. Wachner and others, on behalf of themselves and on behalf of all gold note holders similarly situated, of an issue of gold notes secured by trust deed on the Hacienda Park Apartments, against Friend W. Richardson, as Building and Loan Commissioner in Liquidation of the American Loan Society, and others. From an adverse judgment, named defendant appeals.

Affirmed.

E. S. Williams, of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, Walter K. Tuller, Pierce Works, Marshall Taylor, and William Crandall, all of Los Angeles, and E. M. Wachner, of Hollywood, for respondents.

WOOD, Justice.

In the year 1929 the American Mortgage Company, which will hereinafter be referred to as the mortgage company, was a going concern with many financial transactions and at the same time the American Loan Society, which will hereinafter be referred to as the loan society, was a building and loan association. At the time of the inception of this litigation both were insolvent, the assets of the mortgage company being under the control of a receiver and the assets of the loan society being under the control of the building and loan commissioner of California. The corporations were managed by the same directors with Frank Fish president and general manager and Giles Major title officer of both institutions. Most of the stock of the loan society was owned by the mortgage company, and the balance was owned by officers and directors of the mortgage company.

The mortgage company became the owner through foreclosure proceedings of the Hacienda Park Apartments. The mortgage company had loaned to one Gollos the sum of $200,000 on this property and Gollos had defaulted in his payments. In July, 1929, the loan society loaned to the mortgage company the sum of $125,000 and received a trust deed upon the property as security. The grantor in this trust deed was Palmer Morris, an employee of the mortgage company. At the time of the execution of this trust deed Morris also executed a second trust deed upon the same property in the sum of $75,000 in which the beneficiary was the mortgage company. It was stipulated that the mortgage company was the real party in interest, the real owner of the property, and the real maker of the different instruments which were executed concerning the property, and that the grant-

or Morris, and the grantors, Withers, hereinafter referred to, were employees of the mortgage company, were acting for the mortgage company and had no personal interest in the transactions.

The title officer, Giles Major, acting on instructions from the president, Frank Fish, on November 1, 1929, prepared various instruments for the purpose of issuing a series of notes to be sold to the public, the notes to be secured by a trust deed upon the Hacienda Park Apartments in the names of James H. Withers and his wife. The instruments prepared by Major were: A deed from Morris to Withers and wife, a deed from James H. Withers and Dorothy F. Withers as grantors to the American Mortgage Company as grantee; a deed of trust in which James H. Withers and Dorothy F. Withers appeared as trustors, the Title Guarantee & Trust Company appeared as trustee, and the American Mortgage Company appeared as beneficiary, purporting to secure an issue of notes of the aggregate principal sum of $200,000 made in the names of James H. Withers and Dorothy F. Withers to the American Mortgage Company as payee; a request for the reconveyance of the $125,000 trust deed of July, 1929. Morris and Mr. and Mrs. Withers signed the deed in which they were named as grantors or trustors and these instruments were notarized by Major on November 2, 1929. The deed from Morris to Withers was retained in the office of the mortgage company until it was recorded on January 29, 1930. The Withers trust deed was held in the office of the mortgage company until November 5th or 6th, when it was sent to the office of Title Guarantee & Trust Company. The request for the reconveyance of the $125,000 trust deed of July, 1929, was signed later. The officers of the Title Guarantee & Trust Company, trustee in the Withers trust deed, having possession of the indenture of trust, signed the instrument and acknowledged their signatures before a notary on November 6, 1929. That part of the instrument by which the trustee accepted the trust provided that the trustee "hereby accepts the trust in this indenture declared and provided and agrees to perform the terms and conditions" set forth. The indenture of trust also provided that the trustee should not be responsible for its recordation and that the trustors "will cause the same to be duly and properly filed for record." After the indenture of trust was signed by the officers of the Title Guarantee & Trust Company it was returned to the mortgage company and retained by the mortgage company until it was recorded on January 29, 1930. On December 3, 1929, the mortgage company applied to the commissioner of corporations for a permit to issue notes upon the strength of the Withers trust deed and stated that the proceeds of the issue were to be used "only in the repayment of present encumbrances against the above described property." The permit was granted. Plaintiffs are the holders of notes issued upon the security of the Withers trust deed. The court found that plaintiffs were "bona fide purchasers thereof in good faith and for valuable consideration, prior to maturity, and without notice of any defect in said indenture of trust or the notes secured thereby."

Between November 6 and November 16, 1929, a transaction was arranged between the mortgage company and the loan society whereby a new trust deed was executed in the name of Palmer Morris as trustor, he still being the record owner of the property. Title Guarantee & Trust Company was made the trustee and the loan society the beneficiary. The trust deed was issued upon the Hacienda Park Apartments in the sum of $200,000, was dated November 16, 1929, and was recorded by the Title Guarantee & Trust Company on November 18, 1929. Between November 16 and November 19, 1929, the request for reconveyance under the July trust deed for the sum of $125,000 was made by the loan society and the trustee's reconveyance pursuant to this request was made on November 18, 1929, and recorded the following day. At the same time there was recorded a reconveyance under the $75,000 deed of trust made in July, 1929, in the name of Morris to the mortgage company. These two reconveyances were necessary to have the new deeds of trust to the loan society appear as a first encumbrance, in accordance with the legal requirement for a loan by the loan society. The trial court found: "That the $200,000.00 loan of November 16, 1929, constituted a new loan and that it was not a renewal or merger of the $125,000.00 loan of July 16, 1929, or of the debt evidenced thereby." The contest before the court is between the building and loan commissioner, who claims priority for the trust deed in favor of the loan society dated November 16, 1929, and the plaintiff note holders who claim priority under the Withers trust deed dated November 2, 1929.

[1-5] In holding that plaintiffs' lien was prior to that of the loan society the trial

court found that the Withers deed was delivered to the trustee therein named concurrently with the execution of the deed from Morris to Withers. The court further found that: "At a time not later than November 6, 1929, said Indenture of Trust was presented to the Title Guarantee and Trust Company, as trustee, as aforesaid, for its acceptance and approval, and that thereupon and on November 6, 1929, said trustee approved and accepted said Indenture of Trust and the duties imposed by the terms thereof." These findings are attacked by appellant. The trust deed was placed in the possession of the trustee, to whom it was sent "for their acceptance of the trust." The covenants of the trust deed were unconditional, and when at a later time the trustor called upon the trustee to discharge its duties, the trustee did in fact discharge the duties of the trust. A reasonable inference may be drawn from the evidence that the mortgage company forwarded the trust deed to the trustee for the purpose of making delivery and to induce its acceptance by the trustee, an inference more readily drawn when we consider that the evidence disclosed that numerous similar transactions had been carried out by and between the mortgage company and the same trust company. It having been found that the trust deed was in the possession of the trustee, plaintiffs may invoke the rule that possession of a deed by the grantee named therein is prima facie evidence of its delivery. Ward v. Dougherty, 75 Cal. 240, 17 P. 193, 7 Am. St.Rep. 151. It is provided in section 1055 of the Civil Code: "A grant duly executed is presumed to have been delivered at its date." Presumptions are evidence and may be the basis for findings of fact. Code Civ. Proc. § 1957; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919. The fact that the deed was returned to the grantor does not negative the previous delivery or operate as a surrender of title which had been acquired. Good v. Williams, 81 Kan. 388, 105 P. 433, 135 Am.St.Rep. 392. Provision was made in the instrument that it should be recorded by the grantor. It was the duty of the trial court to determine, as a question of fact, the intention of the parties in the matter of the delivery of the trust deed. Follmer v. Rohrer, 158 Cal. 755, 112 P. 544. This question has been determined by the court in the plaintiffs' favor upon substantial evidence and the finding is binding upon us now.

[6] The officers of the loan society, upon receiving the trust deed of November 16, 1929, were not in the position of innocent third parties relying upon the record title, for they were fully informed concerning all the transactions surrounding the execution of the Withers trust deed. They may not now successfully assert priority for the loan society's trust deed.

[7-9] Appellant offered to prove at the trial that the Withers notes were actually printed after the date of the recordation of the loan society's trust deed, but the offer was rejected by the court. It is now argued that no debt was incurred until the notes were actually sold and that the rejected proof would have established that the lien of the loan society's trust deed should be given priority because of the issuance of the notes after the execution of this trust deed. The ruling of the court was not erroneous. The rules covering transactions between two individual lien claimants are given strict application. Western Loan & Building Company v. Scheib, 218 Cal. 386, 23 P.(2d) 745. But in the matter of the issuance of securities for sale to the public the rules have been given a broader application. The authorities are reviewed in Lanz v. First Mortgage Corporation, 121 Cal.App. 587, 9 P.(2d) 316, 322, where it is stated: "The authorities cited establish the proposition that the trust deed or mortgage securing a future bond issue attaches for the full amount as of the date thereof, and each subsequent bond relates back automatically and completely to the instrument creating the indebtedness." The lien of plaintiffs' notes took effect as of the date of the Withers trust deed.

[10-13] The permit issued by the corporation commissioner was offered in evidence by appellant, and the objection to its admission was sustained. Appellant was not prejudiced by this ruling. It was sought to show that by the terms of the permit the notes were to be sold for cash only and that some of them were in fact not sold for cash. In this no blame can be placed upon the noteholders since the court held that they purchased the notes without notice of any defect. The purchasers of the notes were not in pari delicto with the issuer of the notes. The terms of the permit imposed by the corporation commissioner upon the issuer for the protection of the public were violated by the issuer. Kehrlein v. Builders' Mortgage Company, 131 Cal.App. 714, 22 P.(2d) 242; Security-First National Bank v. Ruddle Properties, Inc., 218 Cal. 435, 23 P.(2d) 1016; Eberhard v. Pacific South-

west Loan & Mortgage Corp., 215 Cal. 226, 9 P.(2d) 302. Moreover, the loan society, being in the position of a third party having no direct interest as between the issuer and the buyers, is not in a position to raise the question of compliance with the terms of the permit. The fact that appellant was liquidating receiver of the loan society does not give him additional rights in the present situation. As a general rule the receiver takes the assets of a corporation subject to all equities and is in no better position than the corporation itself, subject, however, to certain exceptions, such as cases in which fraudulent dealings were conducted directly between third parties and the insolvent corporation. Verder v. American Loan Society, 1 Cal. (2d) 17, 32 P.(2d) 1081. The present case does not come within any of the exceptions.

[14] Notwithstanding the trial court found that the $200,000 loan for which the trust deed of November 16 was executed was in fact a new loan and was not a renewal or merger of the previous $125,000 loan, appellant presents the contention that the court should revive the old lien and allow priority to the loan society in the amount of $125,000. It is not necessary to discuss the question whether or not the evidence sustains the court's findings. The officers of the loan society had notice and knowledge of all of the facts surrounding the transactions involved. They knew of the execution of the Withers trust deed and of the pending note issue. They did not act because of any mistake of fact. After the reconveyance was brought about by the loan society the rights of innocent third parties intervened. Under these circumstances equity will not order the reinstatement of a lien which has been voluntarily surrendered. Jones on Mortgages, § 738; Atkinson v. Plum, 50 W.Va. 104, 40 S.E. 587, 58 L.R.A. 788.

[15] An appeal has been taken from the order taxing costs. Complaint is made that the loan society should not be compelled to pay all the costs, but that they should be apportioned between the parties. The issue was well defined between plaintiffs on the one side and the loan society on the other. A number of defendants were brought in as necessary and proper parties to completely determine all issues involved and to enable the court to render a final and binding judgment. Under section 1032(c), Code of Civil Procedure, as added by St.1933, p. 1901, the trial court is given discretion in the matter of apportioning costs in such cases. We find no abuse of discretion.

The judgment and order appealed from are affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



14 Cal.App.2d 180

PEOPLE v. FITZGERALD et al.

Cr. 1463.

District Court of Appeal, Third District, California.

May 19, 1936.

Hearing Denied by Supreme Court June 18, 1936.

1. Criminal law ⇐1023(8)

No appeal lies from order denying motion in arrest of judgment.

2. Constitutional law ⇐250, 266
Criminal law ⇐307

State laws making proof of certain facts prima facie evidence of other facts do not constitute denial of due process, equal protection, or accused's right to presumption of innocence, where there is natural and rational evidentiary relation between facts proved and facts presumed (Const.U.S. Amend. 14; Const.Cal. art. 1, §§ 13, 21).

3. Constitutional law ⇐266

State law creating arbitrary presumption or operating to deny fair opportunity to repel presumption violates due process clause (Const.U.S. Amend. 14).

4. Criminal law ⇐324, 741(1)

Disputable presumption has no weight against proved or admitted fact, but it is for jury to say whether undertaking to prove fact against presumption has been successful.

5. Constitutional law ⇐250, 266
Criminal law ⇐307
Explosives ⇐2

State statute declaring that persons not regularly engaged in manufacture, sale, transportation, or legitimate use of high ex-

plosives who are discovered in possession thereof shall be presumed guilty of reckless and malicious possession, *held* not unconstitutional as denying due process, equal protection, or accused's right to presumption of innocence, in view of rational connection between fact of possession and presumption based thereon (Gen.Laws 1931, Act 2433, §§ 5, 6; Pen.Code, § 375a; Const.U.S. Amend. 14; Const.Cal. art. 1, §§ 13, 21).

6. Explosives ⇐5

Accused charged with reckless or malicious possession of dynamite is favored by usual presumption of innocence, but, on production of evidence that accused was in possession of dynamite and was not engaged in occupation calling for its possession, burden shifts to accused of going forward and producing evidence to meet statutory presumption that possession was reckless and malicious (Gen.Laws 1931, Act 2433, §§ 5, 6).

7. Explosives ⇐5

Evidence authorized finding that accused's possession of explosives was reckless and malicious without aid of statutory presumption (Gen.Laws 1931, Act 2433, § 6).

8. Statutes ⇐118(1)

Title of act entitled "An act to protect life and property against careless and malicious use or handling of dynamite and other explosives" *held* to embrace provision of act declaring that certain persons shall be presumed guilty of reckless and malicious possession of high explosives found in their possession (Gen.Laws 1931, Act 2433, § 6).

9. Statutes ⇐158

Repeal of statutes by implication is not favored.

10. Statutes ⇐161(1)

Where later statute does not cover entire field of earlier statute and fails to embrace a material part of earlier statute, later statute will not repeal so much of earlier statute as is not included within its scope.

11. Statutes ⇐166

Re-enactment of five of eleven sections of statute on subject of explosives *held* not to repeal statute by implication, where no attempt was made to revise entire subject-matter of earlier statute and title of subsequent statute indicated no such intention (St.1887, p. 110; St.1905, pp. 687, 768; Pen.Code, §§ 375a, 601; Gen.Laws 1931, Act 2433).

12. Criminal law ⇐507½

In prosecution for malicious and reckless possession of dynamite, evidence authorized finding that state witnesses were feigned accomplices, so as to require no corroboration for their testimony (Gen.Laws 1931, Act 2433, §§ 5, 6).

13. Explosives ⇐5

In prosecution for malicious and reckless possession of dynamite, evidence as to occupations of accused authorized application of statutory presumption that their possession of dynamite was malicious and reckless (Gen.Laws 1931, Act 2133, § 6).

14. Criminal law ⇐423(8)

In prosecution of eight defendants for malicious and reckless possession of dynamite, admitting evidence that one defendant stole dynamite over objection that evidence involved acts committed before formation of conspiracy to possess dynamite maliciously or recklessly *held* not error, in absence of request for instruction limiting effects of evidence, since evidence was admissible without limitation against defendant who stole dynamite.

15. Criminal law ⇐423(8)

Acts committed by conspirator prior to formation of conspiracy are inadmissible against his subsequent coconspirator.

16. Conspiracy ⇐47

Conspiracy may be shown by proof of facts and circumstances sufficient to satisfy jury of existence of conspiracy, without proving that parties met and actually agreed to undertake performance of unlawful act.

17. Criminal law ⇐427(5)

Evidence authorized finding that conspiracy of union members to dynamite hotel housing strike breakers was formed before dynamite was stolen by one of conspirators, so as to authorize admission of evidence of stealing as against all conspirators.

18. Criminal law ⇐369(2)

In prosecution for malicious and reckless possession of dynamite, evidence that defendant stole dynamite was admissible against him under rule that evidence of another crime is competent where necessary or pertinent to proof of crime charged.

19. Criminal law ⇐423(1)

In prosecution for malicious and reckless possession of dynamite, knowledge of two of conspirators before commission of of-

fense that dynamite was stolen by coconspirator would constitute ratification of stealing by coconspirator, authorizing admission of evidence of stealing as against conspirators.

20. Criminal law ⇐423(8)

One who joins and actively participates in conspiracy after its formation adopts previous acts and declarations of his coconspirators, so that such acts and declarations are admissible against him.

21. Criminal law ⇐433

In prosecution of union members for malicious and reckless possession of dynamite which was allegedly to be used to blow up hotel where strike breakers were housed, evidence that member of striking union received letter from his wife stating that strike breakers were housed in hotel in question *held* competent.

22. Criminal law ⇐1169(5)

In prosecution for malicious and reckless possession of dynamite, admission of testimony of feigned accomplice as to facts relative to his experiences *held* not prejudicial error, where testimony was stricken at conclusion of trial and court instructed jury to disregard testimony.

23. Criminal law ⇐1169(1)

Admitting minutes of court to show that defendant not on trial was represented by same counsel who appeared for defendants on trial *held* not prejudicial, although evidence was not material.

24. Jury ⇐131(6)

In prosecution of union members for malicious and reckless possession of dynamite, inquiry by district attorney of prospective jurors as to whether they had any connection with Communist Party *held* proper.

25. Criminal law ⇐304(2)

It is common knowledge that Communist Party believes in "direct action" in settlement of controversies, and not in judicial determinations.

26. Jury ⇐131(6)

In prosecution of union members for malicious and reckless possession of dynamite, inquiry by district attorney of prospective jurors as to whether they knew named labor leader *held* not prejudicial.

27. Criminal law ⇐1169(5)

In prosecution of union members for malicious and reckless possession of dynamite, admission of testimony of feigned accomplice as to conversation wherein witness had stated that he had asked defendant if it could be arranged so that other participant in conversation could ship out when he wanted to leave town *held* not prejudicial, where court instructed jury to disregard testimony.

28. Criminal law ⇐721½

District attorney's comments on failure of defense to call codefendant not on trial as a witness *held* not error, where it was conceded at trial that witness was unable to attend court on account of illness and this fact was before jury.

29. Criminal law ⇐721½

District attorney's comment that defense could have called expert witness to meet testimony of state's expert *held* not error.

30. Criminal law ⇐713

Remarks of district attorney are not cause for reversal, unless remarks are willful, unsupported by record, contain statement of something as fact, either by direct statement or innuendo, and are objected to or court's attention is called to them.

31. Criminal law ⇐589(2)

Denying accused's motion for continuance for illness *held* entirely within trial court's discretion.

32. Criminal law ⇐778(5)

In prosecution for malicious and reckless possession of dynamite, instruction that if defendants committed certain acts they are "presumed" to be guilty *held* not prejudicial error because of omission of words "prima facie" after word "presumed," although statute reads "presumed (prima facie)" (Gen. Laws 1931, Act 2433, § 6; Code Civ.Proc. § 1961).

The words "prima facie" added nothing to the effect of General Laws 1931, Act 2433, § 6, providing that persons other than those engaged in occupations calling for use of dynamite shall be "presumed (prima facie)" to be guilty of reckless and malicious possession thereof, if any of named explosives is found upon him, since "prima facie" evidence is presumptive in character, and, in view of Code Civil Procedure, § 1961, declaring that a presumption not declared by law to be conclusive may be controverted by

other evidence, when jury was instructed that guilt was presumed jury must have understood presumption to be disputable. There is no difference in law between the quantum and character of evidence necessary to overcome a "prima facie" presumption and that necessary to overcome an inconclusive presumption.

[Ed. Note.—For other definitions of "Presume" and "Prima Facie," see Words & Phrases.]

33. Criminal law ⇨777

In prosecution for malicious and reckless possession of dynamite, instruction that testimony showing motive, reason, or purpose is always admissible *held* not erroneous, even though understood as referring to evidence of theft of dynamite by one of defendants, where evidence of theft was admissible.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Robert J. Fitzgerald, Reuel Stanfield, Victor H. Johnson, Patsy Ciambrelli, John Sousa, John Rodger, Henry Silva, and John Burrows were convicted of malicious and reckless possession of dynamite, and they appeal.

Affirmed.

Faulkner & O'Connor, of San Francisco, Fowler & Fowler, of Modesto, Leo Collins, of San Francisco, and Griffin & Boone, of Modesto, for appellants.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., Leslie A. Cleary, Dist. Atty., of Modesto, and Glenn M. DeVore, of Fresno, for the People.

TUTTLE, Justice pro tem., delivered the opinion of the court.

Appellants were found guilty by a jury of malicious and reckless possession of dynamite as that crime is defined in section 6, Act 2433, General Laws of California 1931. They now appeal from the judgment, order denying motion for new trial, and order denying motion in arrest of judgment.

[1] No appeal lies from an order denying a motion in arrest of judgment, and such appeal will therefore be dismissed. People v. Bundy, 168 Cal. 777, 145 P. 537.

The facts, as disclosed by the evidence produced by the prosecution and also certain undisputed facts, are stated in the following paragraphs:

During the months of March and April, 1935, there existed on the Pacific Coast a strike which involved various oil companies operating oil tankers and their maritime employees, members of certain maritime unions. This strike was commonly referred to as the "Tankers Strike." The various maritime unions, consisting of the Sailors' Union of the Pacific, the Pacific Coast Marine Firemen, Oilers, Wipers & Water-Tenders, the Marine Cooks and Stewards Association, the Marine Engineers Benevolent Association, and the Pacific Coast District Masters, Mates and Pilots, formed what was known as the "Joint Tankers Strike Committee and Negotiations Committee." These various unions appointed members of the joint tankers strike committee and to a negotiations committee, the purpose of which latter committee was to meet with the mediation board appointed by the President of the United States for the purpose of adjusting the differences between the employers and the employees.

While the strike was in progress, and as early as about the 1st of April, 1935, the Standard Oil Company was recruiting and concentrating strike breakers to be used on its oil tankers at Patterson and at the town of Westley, both in the county of Stanislaus, state of California. Said strike breakers were housed in the town of Patterson in a hotel known as the Del Puerta Hotel.

During this period, although other oil companies were involved in the strike, the Standard Oil Company was the company most particularly affected in this, that the unions had declared a boycott on all Standard Oil products.

On April 3, 1935, Donald W. Cobble, a member of the Marine Engineers Benevolent Association, one of the unions on strike, received a letter from his wife, who was a waitress in the Del Puerta Hotel at Patterson, Cal., stating that strike breakers were housed in the said hotel. This letter Cobble took to union headquarters and delivered to a Mr. Merriweather, an officer of the union. On the night of April 10, 1935, two of the defendants, Buyle and Rodger, met one George Brazelton and his wife, Helen Brazelton, at the Mohawk restaurant, situate at No. 40 Commercial street, in the city of San Francisco. They ar-

ranged to take Helen Brazelton with them on a trip to Marin county. On this trip they went to the Daniels quarry, a few miles from San Rafael, and there they entered a powder magazine and a locked box and stole a quantity of dynamite, fuses, and caps, and two cans of black powder. They returned to San Francisco and to the apartment of George and Helen Brazelton, and asked George Brazelton if they could store the "soup" there. During all of the times mentioned, Cobble and defendants Rodger and Buyle were members of unions conducting the strike mentioned.

James Scrudder, at the time employed as a longshoreman, and also previously employed as a special police officer by the San Francisco police department, met the defendant Buyle on the street on the morning of April 11th, and was told by Buyle that he and Rodger had gotten sufficient "stuff" the night before to blow up the town. On the 11th day of April, Scrudder communicated with the crime prevention bureau of the San Francisco police department, commanded by Capt. George Healty, and was instructed to look out for the dynamite. Between the 10th and 20th of April, Scrudder contracted all of the appellants in this case at various times, with the exception of the appellants Silva, Burrows, and Sousa. He told the appellant Rodger that he had a car which could be used if it became necessary at any time.

On the 20th of April, 1935, in the morning, Scrudder met Stanfield and Ciambrelli, two of the appellants herein, who were looking for Rodger and Buyle, stating that they had a party on for that night and that the party involved a letter which had been written by some engineer's wife, relative to the place in the country where they were housing nonunion sailors, and that they were going "to dump the finks." Later, at the Mohawk café, Scrudder was present when Stanfield, Ciambrelli, Rodger, and Buyle discussed the party that was to take place that night. On this same day defendant Stanfield called at the union headquarters and secured from Merriweather, a union official, funds to defray the expenses of the trip to Patterson.

Some time before 7 o'clock that evening the defendant Rodger called Scrudder on the phone and asked him if his car was all right, so that it would not stall on the highway, and directed him to be at the Mohawk café not later than 7 o'clock. When Scrudder got to the Mohawk café on the night of April 20th, all of the appellants, together with Hal Marchant, were there waiting for Rodger. When Scrudder asked where Rodger was, he was told that Rodger had gone to get the "groceries," the "soup," the dynamite. Shortly afterwards Rodger returned to the Mohawk and had with him a package of twelve sticks of dynamite, some fuses, and fulminate caps, which he proposed to put in Scrudder's car. Scrudder declined to take the package in his car, and insisted that it be divided, and the dynamite was divided on the running board of the Chrysler car in the presence of all of the appellants herein, and Marchant and Scrudder, and six sticks were put in the Chrysler car belonging to Rodger, and six were taken into the Nash car by the appellant Fitzgerald, he sitting in the rear seat of that car. The party then started for Patterson, traveling south to San Mateo and over the San Mateo bridge, stopping for gas, and arriving at Tracy, where the cars became separated.

Before leaving San Francisco Scrudder reached a telephone and telephoned to Officer Harry Majors, of the San Francisco police department, crime prevention bureau. Meanwhile, at the Del Puerta Hotel at Patterson, John M. Sayers, a special agent of the Standard Oil Company, in charge of the guards, had received a telephone call giving an automobile license number which was that of Scrudder's car. He communicated with the sheriff of Stanislaus county, who, with the undersheriff, proceeded to Patterson. There he remained until the episode of the arrests as hereinafter related.

The appellant Rodger, driving his Chrysler car, in which were also riding the appellants Silva and Ciambrelli in the front seat, and Stanfield and Johnson in the rumble seat, drove into Patterson, passed around the circle in front of the Del Puerta Hotel, and identified it, passed through other streets of the town of Patterson, and back out on the highway toward the north, where they stopped at a point near K street, on the side of the highway.

Alfred B. Hughel and Sidney E. Lewis, employees of a private detective agency, then in the employ of the Standard Oil Company had been directed to station themselves near the town of Westley, which is about six miles north of Patterson, and to look for the license number of the car of Scrudder. This direction had

been given to them by John M. Sayers, hereinbefore described.

These men observed the Chrysler car pass through Westley, and after waiting a short time, they observed the Nash car of Scrudder pass. They followed this car toward Patterson and observed that it tried to elude them by speeding up, and finally by shutting off all its lights and passing into a side road. They went on into the town of Patterson and gave the alarm, and that the license number which they were looking for had arrived. They then went back north on the highway to the point where the Chrysler car was stopped, got from their car armed, and ordered the persons therein, namely, Rodger, Ciambrelli, Silva, Johnson, and Stanfield, to alight. Immediately, two other cars containing city and county officers and guards of the Standard Oil Company appeared on the scene. In one of these cars was Chief of Police Busengdal, Constable Kirk, and Night Officer Silva, of Patterson. In the other car were R. S. Swartz, Frank Jewett, and a man named Stimpson, all of whom were employed by the Standard Oil Company, either directly or through an agency. Hughel and Lewis, together with a man by the name of Lewis, also a guard for the Standard Oil Company, then left the Chrysler car in charge of the officers who had arrived, and proceeded north on the highway until they passed the Nash car of Scrudder, coming slowly towards Patterson. They then turned around and followed the Nash car to the point where the Chrysler car was stopped, and they there stopped the Nash car. In the meantime, Sheriff Hogan, Undersheriff Wright, and John Sayers had arrived from Patterson, driven north to Westley and back to the scene where the cars were stopped at a very high rate of speed. After they arrived, Swartz and Jewett began a search of the Chrysler car, Undersheriff Wright being present at all times, and they found six sticks of dynamite just behind the front seat of the Chrysler car, a role of fuse on the floor in the rumble seat, one piece of which had a fulminate cap, attached, a blackjack sticking in the side pocket of the car, and another stuck behind the cushion on the opposite side of the car.

Fitzgerald, riding in the rear seat of the Nash car, was told to throw out the dynamite, by some one riding in the front seat of the Nash car, just as they approached the spot where the other car had been stopped. He replied that it had been thrown out. The next morning at about daybreak, Hughel and Lewis found six sticks of dynamite, two pieces of fuse, one with a cap on, alongside the road where the Nash car had traveled in the last 200 or 300 feet of its path before it stopped. The appellants were arrested and taken to Modesto, and Scrudder and Marchant were released.

All appellants, and also Buyle and Marchant, were indicted by the grand jury. The latter two were not tried with appellants, and, of course, are not parties to this appeal. The indictment contained five counts—a conspiracy to dynamite a hotel; conspiracy to assault with deadly weapons; reckless and malicious possession of dynamite; knowingly and maliciously having in their possession dynamite; and possession of blackjacks and billies.

The indictment against Marchant was dismissed before trial, and the fourth count of the indictment dismissed against all defendants. Defendants were found not guilty on counts I, II, and V, and guilty on count III, with a recommendation for leniency. Appellant Patsy Ciambrelli was sentenced to Folsom state prison, and the remainder of appellants were sentenced to San Quentin prison. The defendants were found guilty, under count III of the indictment, of reckless and malicious possession of dynamite. This offense is defined by sections 5 and 6, California Statutes 1887, p. 110, General Laws 1931, Act 2433, sections 5 and 6, which read as follows:

"§ 5. *Prohibiting reckless possession of explosives.* Any person who, in the public street or any highway of any county, city and county, or town or city, or at, in, or near to any theater, hall, public or private school, or college, church, hotel, or other public building, or at, in, or near to any private habitation or in, on board of, or near any railway passenger train, or car or train, or cable road, or car of the same, or steam or other vessel, engaged in carrying passengers, or ferryboat, or other public place where human beings ordinarily pass and repass, shall recklessly or maliciously have in his or her possession any dynamite, nitro-glycerine, vigorite, hercules powder, giant powder, or other high explosive; or who shall recklessly or maliciously by use of such means intimidate, terrify, or endanger any human be-

ing, is guilty of a felony, and on conviction shall be punished accordingly.

"§ 6. *Defining reckless possession.* Any person not regularly engaged in the manufacture, sale, transportation, or legitimate use in blasting operations, or in the arts, of such substances as are named in this act, shall be presumed (prima facie) to be guilty of a reckless and malicious possession thereof, within the meaning of the foregoing section, if any such substance is found upon him, or in his possession, in any of the places, or under any of the circumstances specified in the preceding section."

Said count III of the indictment is in words and figures as follows, to wit: "Count Three. The Grand Jury of the County of Stanislaus, State of California, by this indictment found this 5th day of June, 1935, hereby accuses Robert J. Fitzgerald, Reuel Stanfield, Victor H. Johnson, Patsy Ciambrelli, Alphons Buyle, John Sousa, John Rodger, Henry Silva, John Burrows, and Hal Marchant, of the crime of felony, to-wit: reckless possession of explosives, committed as follows, namely: that said above named defendants did on or about the 20th day of April, 1935, at and in the said County of Stanislaus, State of California, recklessly and maliciously have in their possession in a public highway in the County of Stanislaus, State of California, namely, the public highway leading from the town of Patterson to the northern boundary of the County of Stanislaus, and in a place where human beings ordinarily pass and repass, namely, said public highway above described, a certain quantity of dynamite, fuses and caps, to-wit: 12 sticks of dynamite, 2 lengths of fuse and 2 copper caps."

It is the contention of the defendants and appellants that sections, supra, making the possession of explosive substances an offense embodying recklessness and maliciousness are unconstitutional under the Fourteenth Amendment of the Constitution of the United States and under article 1, sections 13 and 21, of the Constitution of the state of California, in that said sections deny the defendants due process of law, the equal protection of law, and further that defendants' constitutional and statutory right to a presumption of innocence in their favor is violated.

[2] It is conceded by appellants that "it is competent for a legislative body to provide by statute or ordinance that proof of certain facts shall be prima facie presumptive evidence of other facts, if there is a natural and rational evidentiary relation between the facts proved and those presumed; such statutes or ordinances are within the well settled power of a legislature to change the rules of evidence and do not infringe upon the rights of the judiciary nor violate the provisions of the federal or state Constitutions."

The foregoing is a correct statement of the general rule throughout the United States, including our own state. It is succintly set forth in Mobile J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 137, 55 L.Ed. 78, 32 L.R.A.(N.S.) 226, Ann.Cas.1912A, 463, as follows: "The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. * * * Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous." "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute." Yee Hem v. United States, 268 U.S. 178, 45 S.Ct. 470, 472, 69 L.Ed. 904. The same rule prevails in California. People v. Osaki, 209 Cal. 169, 286 P. 1025; People v. Cockrill, 62 Cal.App. 22, 216 P. 78.

[3] This rule is subject to certain qualifications. "A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. * * * 'It is not within the province of a legislature to declare an individual guilty or presumptively

guilty of a crime.' * * * State legislation declaring that proof of one fact * * * shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law." Manley v. Georgia, 279 U.S. 1, 49 S.Ct. 215, 217, 73 L.Ed. 575.

[4] It is the rule in this state that against a proved fact, or a fact admitted, a disputable presumption has no weight, but where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven; and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529.

"It becomes evident," state appellants, "that defendants not only had to contradict the presumption, but to overcome the case thus made out, without any further evidence offered by the state, as a result of the statute establishing the rule of evidence under question."

[5] From the portion of appellants' brief first quoted above, it appears that the sole question to be here considered is whether or not there is any rational connection between the fact proved and the ultimate fact presumed. Is it rational to presume that a person in possession of dynamite, and who is not regularly engaged in its manufacture, sale, transportation, or legitimate use in blasting operations, or in the arts, is guilty of reckless or malicious possession thereof? Putting the question in another manner, has the presumption created any relation in experience to the facts? McFarland v. American Sugar Ref. Co., 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899. As an example of a case which admittedly would not meet this test, if the Legislature should declare that every man found wearing a straw hat in September should be presumed guilty of any forgery which took place in that month, such an act would patently contravene the "due process" clause of the Federal Constitution. On the other hand, if the Legislature should declare that the possession of stolen goods shortly after a larceny should be prima facie evidence of guilt, and that the burden of rebutting the presumption rested upon the person in possession of such goods, such an enactment would be valid, the presumption not being purely arbitrary, as there is obviously a reasonable and rational connection between the possession of the stolen goods and the commission of the crime.

It may be observed that in enacting this statute the Legislature, in effect, enumerated certain persons who might possess explosives such as dynamite for legitimate purposes, and in effect said that all others who did not come within the classification would be presumed to possess it unlawfully. What is the nature of the article whose possession is thus restricted? "The degree of care required of persons having possession and control of dangerous explosives, such as firearms and dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them." Mattson v. Minnesota R. Co., 95 Minn. 477, 104 N.W. 443, 70 L.R.A. 503, 111 Am.St.Rep. 483, 5 Ann.Cas. 498. The same rule is found in 25 C.J. p. 185, § 8. The Penal Code of this state contains seven sections dealing with the possession, use, and transportation of dynamite.

That the possession of explosives can lead to tragic results is shown by the records of the Supreme Court, in the case of People v. Mooney, 177 Cal. 642, where the lives of a number of innocent persons were snuffed out by the explosion of a bomb. No person in California can purchase dynamite unless a record of the sale is made. Pen.Code, § 375a. In civil trials where damages are sought, all the plaintiff has to do is to prove that he was injured by an explosion of dynamite, which was under the control and in the possession of defendant. The proof of the explosion draws with it a presumption of negligence sufficient to establish a prima facie case for a recovery. Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 1021, 29 L.R.A. 718, 48 Am.St.Rep. 146. It is at once apparent that the article whose possession is here restricted is recognized and treated by our courts and Legislature as potentially dangerous and destructive, and there has been an increasing tendency, since the enactment of this statute, to further restrict and circumscribe its possession, use, and transportation. The law in question was enacted in 1887, but we may reasonably assume that dynamite was just as dangerous then as it now is, and that this was known to the Legislature at that time. As was stated in the Judson Case: "Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the ex-

perience of the past. What has happened in the past, under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown." And so the Legislature had a right to assume, from the inherent dangerous qualities of dynamite, that when it was possessed by persons who had no legitimate use for it, it was to be used for an unlawful purpose, and to provide that under such circumstances it would be presumed that a person possessing it for no legitimate purpose would possess it maliciously and recklessly. There is thus, in our opinion, a rational and evidentiary relation between the facts proved and those presumed, and consequently the Fourteenth Amendment to the Federal Constitution is not contravened, and the point is without merit.

It would unduly prolong this opinion to discuss the numerous cases cited by the parties on the matter of presumptions of this character. No instance is referred to where the facts are the same, or very similar. It would appear that the question of the rational connection between the facts presumed and the facts proved must be decided according to the peculiar facts involved. We have pointed out the extreme case which would contravene the "due process" clause, and the case which would be patently within the Constitution. Between these two extremes we find a very large number of cases which have been the subject of adjudication. The power of the state to enact statutes of this character is unquestioned by appellants, but the limit to which such legislation can be extended must ultimately and eventually depend upon the factual structure and the subject-matter of each case, in the light of the general rule we have noted.

[6, 7] Concluding our views on this question, it would appear that the practical operation of this presumption would be as follows: Persons charged under section 5 of the act for the offense of reckless or malicious possession of dynamite face the court at the inception of their trial with the usual presumption of innocence, and this continues throughout the trial to the conclusion thereof. Upon the production of evidence proving that they are not within the classes set forth in section 6, and that they were in possession of dynamite, the burden of going forward and producing evidence shifts to the defendants to meet the presumption that such possession was reckless or malicious. It is incumbent upon them to explain their possession, just as in a homicide charge, where the killing is proven, the burden is cast upon the defendant to explain how it happened, and unless he meets this burden to the extent of raising a reasonable doubt, the jury is justified from that proof alone in finding him guilty of murder. People v. Rodriguez, 182 Cal. 197, 187 P. 423, construing section 1105 of the Penal Code. During the entire trial in such cases the burden of proving the defendant guilty beyond a reasonable doubt never shifts, but is always upon the prosecution. In effect, a presumption of this character may be characterized as a substitute for evidence, but it does not operate to destroy the presumption of innocence, though it may be weighed by the jury against such presumption. Such presumptions are to be considered by the jury in the same manner as any proven facts before it. There is nothing in the statute which would operate "to deprive [defendants] of a reasonable opportunity to present the pertinent facts in [their] defense." Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 52 S.Ct. 103, 107, 76 L.Ed. 136, 78 A.L.R. 826. Their explanation of possession of the dynamite consisted of a denial of any knowledge of the presence of such explosive, although it was found in the bottom of their automobile in one case, and was evidently thrown from the other automobile. The verdict indicates that the jury were not satisfied with such an explanation. Every opportunity was given defendants to show how they came into possession of the dynamite, and the purposes for which it was intended, but no such evidence was produced. Under such circumstances, it would seem that defendants have greatly exaggerated any prejudicial effect which might be produced by the operation of this presumption. It must be remembered that this is not a case where the conviction rested solely upon the evidentiary effect of a presumption. Disregarding entirely the effect of the presumption, there was ample evidence which would justify a finding that the defendants possessed the explosive "recklessly and maliciously." Upon the night of April 20th, when the arrest occurred, witness Scrudder testified that he went to the Mohawk Tavern, where all defendants were assembled; that a conversation there took place in which it was said they were going to a town up country about fifty or sixty miles away, where a bunch of "finks" were housed; and that the Standard Oil Company were using that place to hide them, and that they were going to "dump" them. In the presence of all defendants the twelve sticks of dynamite and

the fuse were divided into two equal portions, one being placed in each automobile. It is thus at once apparent that the evidence afforded by the presumption was wholly supplanted by proof of actual facts. While this did not destroy the effect of the presumption as evidence, it does tend to nullify any prejudicial effect which the instructions might have upon the question of the effect of the presumption.

[8] It is contended that section 6 of the act in question, relating to the presumption, is unconstitutional, for the reason that it is not embraced within the title of the act. Appellants rely upon People v. Murguia, an opinion of this court found in 42 P.(2d) 325. It was there held that the clause providing for a presumption relating to the possession of firearms was void, since the subject was not mentioned in the title of the act. St. 1923, p. 695. Upon rehearing in the Supreme Court [57 P.(2d) 115] it was held that the presumption was included within the scope of the act to control and regulate the possession of firearms. The act here in question is entitled, "An act to protect life and property against the careless and malicious use or handling of dynamite and other explosives." Upon the authority of the case last mentioned, we hold the contention to be devoid of merit.

[9-11] It is urged that the act in question has been repealed by implication. This act appears in Statutes of 1887, beginning on page 110. It consists of eleven sections, all relating to the subject of explosives, except the last, which gives the effective date of the legislation. In 1905 (St.1905, p. 768), sections 1, 2, 3 and 4 of this act were enacted into section 375a of the Penal Code, and section 8 was enacted into section 601 of the Penal Code (St.1905, p. 687). It is contended that this indicates a clear intention to repeal by implication the *entire Act of 1887*, dealing with explosives. It is not contended that the Legislature re-enacted all the sections of the statute, nor does it appear that the new legislation dealt with the malicious or reckless possession of dynamite as an offense. "The repeal of statutes by implication is not favored." Traber v. Railroad Commission, 183 Cal. 304, 191 P. 366, 369; Merrill v. Gorham, 6 Cal. 41, 42; Hilton v. Curry, 124 Cal. 84, 87, 56 P. 784. It is the rule that "if the later statute does not cover the entire field of the first, and fails to embrace within its terms a material part of the first, it will not repeal so much of the first as is not included within its scope." (59 C.J., p. 921.) Under the rule stated, we hold that there was no repeal of the statute by implication, as there is no indication of any intention upon the part of the Legislature to accomplish this purpose. Appellant relies upon Mack v. Jastro, 126 Cal. 130, 58 P. 372, 373. The rule there set forth is that "whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is designed as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two." In the instant case, however, the Legislature never attempted to revise the entire matter connected with explosives. It merely took several provisions of the old statutes and re-enacted them, leaving the others intact. There was no intention of re-enacting another statute dealing with the *entire subject-matter*. The title of the subsequent legislation does not so indicate or even intimate. The rule quoted from Corpus Juris is therefore applicable and determinative of the question.

[12] It is next contended that the evidence is insufficient to sustain the verdict in two particulars: That the testimony of accomplices is not sufficiently corroborated; and that it was not proven that defendants were never engaged in dynamite business. As to the first point it appears beyond question from the record before us that the jury was justified in finding that Marchant and Scrudder were not ordinary accomplices, but were feigned accomplices. There is evidence showing that witness Scrudder was acting, at the time of the alleged offense, as a member of the San Francisco police department, under the direction of Captain Healey, and was in communication with that department during all the time covered by the evidence; that witness Scrudder was also in the employ of Harry Majors, a patrolman under Captain Healey. The position of counsel for appellants *here* is somewhat difficult to reconcile with his attitude during the *trial*, respecting this matter. On his cross-examination of Marchant he referred to him as a "feigned accomplice." Considerable of his argument to the jury was based upon denunciation of these witnesses for their duplicity. Referring to Marchant, he said: "This man is owned, body, soul and breeches, by the Standard Oil Company." Referring to Scrudder, he said: "I called him a stool-pigeon, and he accepted the word." In his argument before this court he contended that these witnesses were not feign-

ed accomplices. In his brief filed herein counsel for appellants designates Marchant as "the union man in the pay of his adversary." We are free to confess that, in view of the record, we have little faith in the sincerity of this contention. There is ample evidence from which the jury could find that neither of these witnesses cooperated with defendants for an unlawful purpose, and that each was doing everything in his power to detect crime. Our conclusion is that the evidence is sufficient to justify a finding by the jury that these witnesses were feigned accomplices, and as such their testimony required no corroboration. People v. Keseling, 35 Cal.App. 501, 170 P. 627, where numerous California cases are cited in support of the rule. "So, also, one who feigns complicity in the commission of a crime merely for the purpose of detecting and prosecuting the perpetrators is not an accomplice." 8 Cal.Jur., p. 175.

[13] It is contended that there is no evidence which would support an implied finding that defendants were not within the classification provided in section 6 of the act; hence, the presumption did not arise. The point is without merit. The business or occupation of each defendant is found in the record. None came under the classification. This is ample to support a finding that none of defendants came under any of the classes mentioned. No pretense was ever made at the trial that any defendant did actually come within the list of those persons against whom the presumption would not operate. No such defense was made.

[14, 15] It is next contended that the court erred in admitting, over the objection of the defendants, certain evidence relating to the theft of the dynamite. Witness Helen Brazelton testified that on April 10th she was invited by defendant John Rodger and one Alphonse Buyle (both union men), to take an automobile ride to Marin county; that they drove to a quarry; that the men got out of the car and went to the quarry, returning with a package wrapped in a newspaper; that this package was afterwards unwrapped in the presence of the witness, and that it contained a number of dynamite fuses and caps; that she heard Buyle say to Rodger that they had secured thirty-five sticks of dynamite; that these men asked witness if she would put away some "soup" for them, and she refused to do so.

From the foregoing and other evidence in the record there was ample justification for a finding by the jury that the dynamite, fuses, and caps were stolen on this occasion. The objection to the admission of this evidence was based upon the ground that it involved acts which were committed prior to the formation of a conspiracy to possess dynamite maliciously or recklessly, and it was made on behalf of each defendant. As hereafter appears, this evidence was clearly admissible against one of the defendants, Rodger. It was therefore competent evidence in the case, and the trial court could not properly exclude it. The utmost the court could do would be to limit its consideration, either at the time of its admission or in its instructions. Such is the well-recognized rule, which is fully explained by the Circuit Court of Appeals, per Rudkin, Judge, in the case of Robinson et al. v. United States, 33 F.(2d) 238, 240. There, five parties were tried upon a criminal conspiracy charge. Defendant Robinson contended that "the court erred in the admission of evidence against him, prior to any joint or other participation by him in any scheme." The court held that the assignment of error was not well taken, for the reason that, as explained above, no request for a limitation of the effect of the evidence was made at the trial. In the instant case there was no request for such limitation at any time. No instruction limiting the effect of this evidence was offered by defendants. Even in cases where the trial court has admitted evidence against one defendant, with an admonition to the jury that such evidence could not operate to bind the other defendants or in any manner or degree be considered by the jury as affecting them, it has been held that unless an instruction is offered limiting the effect of such evidence, the point cannot be urged as grounds for reversal. "It has been repeatedly held that, where testimony is properly received for a specific or limited purpose and it is important that its consideration in reaching a conclusion upon the facts should be restricted to that purpose, it is the duty of counsel representing the side against which such testimony may be supposed to militate to ask for an instruction limiting the effect thereof to the particular purpose for which it was admitted." People v. Lichtenstein, 22 Cal.App. 592, 135 P. 692, 700, citing numerous California cases. In the instant case, appellants failed to ask for a limitation to the effect of the evi-

dence when it was offered, and it would appear that the duty of offering an appropriate instruction was far more imperative than it was in the case last cited. Our conclusion is that defendants cannot now urge the point on this appeal. Even though the proper method had been pursued at the trial, we are of the opinion that such evidence was competent against all the defendants. It is no doubt the rule that acts of a person committed *prior to the formation of a conspiracy* are inadmissible against his subsequent conspirator. Morrow v. United States (C.C.A.) 11 F.(2d) 256.

[16-18] The first inquiry is: When was this conspiracy formed? Considering the evidence introduced by the prosecution, we find that on April 3, 1935, Donald W. Cobble, a member of one of the unions on strike, received a letter from his wife, who was a waitress at a hotel in Patterson, Cal., stating that strike breakers were housed in said hotel. Cobble took this letter, the same day, to union headquarters and delivered it to Mr. Merriweather, an officer of a striking union. On April 10th, defendant Rodger and one Buyle stole the dynamite as narrated by witness Brazelton. The last parties mentioned were members of a striking union. On April 20th, the day of the trip to Patterson, defendant Stanfield called at the office of Merriweather in the Ferry Building where union headquarters for the strike were maintained, and Merriweather gave said defendant money to defray the expenses of the proposed trip to Patterson.

It is the rule in this state and most jurisdictions "that in proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, and that a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact." People v. Schmidt, 33 Cal.App. 426, at page 444, 165 P. 555, 563. "The actual fact of conspiracy may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be directly proved. Any joint action on a material point, or collocation of independent but conspiring acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concurrence of sentiment; and one competent witness will suffice to prove cooperation of an individual conspirator." Wharton's Criminal Law, vol. 2, § 1667. The parties here are all members of striking unions. Cobble delivers the letter from his wife to union headquarters, and personally to a union official, Merriweather; a few days later members of the union steal the dynamite, fuse, and caps; on the day of the offense, Merriweather hands defendant Stanfield money to defray the expenses of the trip to Patterson, where it was proposed to dynamite the hotel which housed the strikebreakers. With such facts before it, and other facts and circumstances disclosed by the record, and guided by the rule stated, we believe that the jury was justified in finding that the conspiracy to commit the crime was formed on or about April 3d, and not on April 20th, as contended by appellants. This conspiracy was entered into by Rodger, Buyle, and Merriweather, the jury could readily infer, for the purpose of securing dynamite and transporting it to Patterson for the purpose of blowing up the hotel where strike breakers were reported to be housed. The authorities upon the question of acts committed prior to the formation of a conspiracy are not applicable, as this evidence sought to be excluded relates to acts performed *after* the formation of the conspiracy. In any event, this evidence was admissible against defendant Rodger, who stole the dynamite. If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding the evidence, simply because it involves the commission of another crime. People v. Tucker, 104 Cal. 440, 38 P. 195.

In the case of People v. Burke, 18 Cal. App. 72, 122 P. 435, defendant was charged with the malicious use of dynamite under the provisions of section 601 of the Penal Code. The trial court admitted evidence of the fact that defendant went to his mine and secured a quantity of dynamite, and such ruling was upheld. In the instant case, evidence of the taking of the dynamite from the quarry was also admissible, although such taking was unlawful. "Even where no relationship exists as between two offenses, if the offered evidence be pertinent to the proof of the offense charged, it is admissible." People v. Revley, 67 Cal.App. 553, 227 P. 957, 961, citing numerous California cases.

[19, 20] Witness Scrudder testified that on April 20th, defendants Stanfield and Ciambrelli talked over the fact that the dynamite was stolen. If these last two defendants had knowledge of that fact prior to the commission of the offense, they will be held to have ratified such prior act upon the part of other conspirators, and they cannot complain that such evidence was prejudicial to their defense. As to the other five defendants, it is true that there is no direct evidence showing that they had any knowledge that the dynamite was stolen. They entered the conspiracy after it was formed. The rule applicable to this situation is stated in 16 C.J. § 1307, p. 656, as follows: "Where one joins a conspiracy after its formation, and actively participates in it, he adopts the previous acts and declarations of his fellow conspirators, so that such acts and declarations, although done or made before he joins the conspiracy, are admissible against him." This rule is followed in Wishard v. State, 5 Okl.Cr. 610, 115 P. 796, 797; State v. Crab, 121 Mo. 554, 26 S.W. 548; Gilbert v. Commonwealth, 228 Ky. 19, 14 S.W.(2d) 194; State v. Pettit, 74 Wash. 510, 133 P. 1014, and appears to be general throughout the United States.

In U.S. v. Logan (C.C.) 45 F. 872, 889, the court, referring to a conspirator, instructed the jury that "his connection with it [the conspiracy] at any time makes him liable for all that has been done by any of his co-conspirators in pursuance of the conspiracy." This rule has definitely been adopted and applied in this state in the case of People v. Schmidt, 33 Cal. App. 426, 165 P. 555. Defendant was charged with murder committed by explosives which wrecked the Los Angeles Times Building, and thereby killed twenty-one people. The prosecution was permitted to introduce evidence of acts done in furtherance of a conspiracy all over the United States, in connection with the use of explosives by striking labor unions. Such evidence covered a period of several years prior to the entrance of defendant into the conspiracy. It was not shown that he had any connection whatever with such acts, or any direct knowledge thereof. It was urged by defendant that he was not a party to such acts, and was prejudiced by such evidence. The admissibility of such evidence against defendant was upheld. Assuming, therefore, that the question of the admissibility of this evidence was properly raised, and that the objection was in proper form, we conclude, nevertheless, that no error was committed in admitting such evidence.

[21, 22] Three more assignments of error are made with reference to the introduction of evidence by the prosecution. Witness Cobble testified to the receipt of a letter from his wife at the hotel at Patterson. We have fully explained that matter and what we have said upon the evidence of theft of dynamite is applicable here. We find no error in the admission of this evidence. Witness Marchant, a feigned accomplice, was permitted to testify to certain facts relative to his experiences while living in Seattle. This evidence was stricken out by the court at the conclusion of the trial, the court stating: "You will therefore dismiss any and all reference to this particular episode from your minds and entirely disregard all testimony relating thereto." We find no prejudicial error resulting from this incident.

[23] Lastly, it appears that at the conclusion of the trial the prosecution offered in evidence the minutes of the court to show that defendant, Buyle, who was not on trial, was represented by the same counsel who appeared for the other defendants on trial. While we are of the opinion that such evidence was not material, no showing has been made of any prejudice arising out of its admission in evidence.

[24-27] Prejudicial misconduct upon the part of the district attorney is next urged, and some seventeen "incidents" are set forth. The first ten relate to the conduct of the district attorney during the impanelment of the jury. Some of the prospective jurors were asked if they had any connection with the Communist Party. This was proper, as it is a matter of common knowledge that the party named believes in "direct action" in the settlement of controversies, and not in judicial determinations. If this were developed, bias and prejudice might well bar the prospective jurors from serving. Other members of the panel were asked if they knew Harry Bridges. While the question might well have been omitted, we see no prejudice arising from the mere mention of the name, and the fact that Bridges is a

labor leader in San Francisco according to newspaper reports. The other seven incidents occurred at the trial. The first is based on a question asked witness, Marchant, concerning a conversation with one Scroggins. An objection was made by counsel for defendants, and some discussion took place regarding the admissibility of the evidence. The objection was overruled, and the witness answered that he had talked to defendant, Stanfield, about Scroggins, and asked him if it could be arranged so that he could ship out when this man wanted to leave San Francisco. The court finally instructed the jury to disregard the evidence. No showing is made which would justify the court in holding that this incident was prejudicial.

[28] Several assignments are based upon comments made by the district attorney, upon the failure of the defense to produce and call Buyle as a witness. It was conceded at the trial that this party was unable to attend court, on account of illness, and this fact was before the jury. We are of the opinion that Buyle was a material witness, and that his testimony would have been admissible. It is undoubtedly the rule that the district attorney may comment upon the failure of the defendant to produce material witnesses who would substantiate his story. People v. Piero, 79 Cal.App. 357, 249 P. 541. It is not misconduct for the district attorney to refer in his argument to the fact that a codefendant was not called upon to testify on behalf of the defendant. People v. Ye Foo, 4 Cal.App. 730, 89 P. 450, 453; People v. Ruef, 14 Cal.App. 576, 114 P. 48, 54, 72. Furthermore, no inference unfavorable to defendant could have been drawn by the jury, arising out of the intent to withhold or suppress evidence, for the reason that the jury knew from the record that this witness was unable to attend court due to physical disability. The assignments are without merit. It may be stated that the chief authority relied upon by appellants is People v. Lee Chuck, 78 Cal. 317, 20 P. 719. In that case, however, the district attorney was commenting upon the failure to call witnesses whose evidence was "clearly incompetent."

[29, 30] Finally, it is urged that it was misconduct for the district attorney to comment to the effect that the defense could have called an expert witness to meet the testimony of the expert called by the people. The point has no merit whatever. Concluding this phase of the matter, we quote the following from People v. Ruef, cited above: "The rule requiring that the remarks of the district attorney must be willful, not supported by the record, and must contain a statement of something as a fact, either by direct statement or innuendo, and, further, that they must have been objected to or the court's attention called to them, or else they will not be held error sufficient to reverse a case, is founded upon principles of justice and fair dealing." In People v. Ye Foo, cited above, it is stated that: "It would have to be a clear case of such misconduct on the part of the district attorney to justify a reversal." Considering the assigned incidents as a whole, we do not believe that it shows a course of conduct, willfully pursued, to injure defendants by any unfair or improper means, nor do we find any such prejudice arising from such conduct as would justify a reversal.

[31] Error is next predicated upon the order of the court denying defendant Rodger's motion for a continuance of the trial, due to his illness. This matter was entirely within the discretion of the trial court, and we see no abuse of discretion involved in the denial of the motion.

[32] Complaint is made of the giving of several instructions. The court instructed the jury in the language of the statute, using the words, "shall be presumed prima facie to be guilty of a reckless and malicious possession thereof." Immediately following, the court instructed the jury that if the defendants committed certain acts "(being those described in the preceding instruction)" they are presumed to be guilty of the reckless and malicious possession thereof, as charged in the third count of the indictment. After retiring, the jury asked for further instructions, and both of these instructions were again given by the court. Appellants contend that the omission of the words "prima facie" in the second instruction was prejudicial error. An examination of text books on evidence and the codes of this state discloses that the words "prima facie" have never been applied to presumptions, nor have any presumptions ever been so classified. These words prop-

erly pertain to evidence, and we find prima facie evidence defined in section 1883 of the Code of Civil Procedure. As stated in 10 Cal.Jur. p. 684: "Prima facie evidence, then, is presumptive in character, and, indeed, it is expressly declared by section 1961 of the Code of Civil Procedure that: 'A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect.'" In our opinion the words "prima facie" add nothing to the effect of this law, and no greater burden would be cast upon defendants if they were omitted. In view of section 1961, Code of Civil Procedure, when the jury was instructed that guilt was presumed, this must have been understood to be a disputable presumption. There is no difference in law between the quantum and character of evidence necessary to overcome a "prima facie" presumption than that necessary to overcome a presumption. Both are equally disputable—unless, of course, the presumption is declared by law to be conclusive. The use of the word "presumption" in instructions, without any qualifying adjective, is the usual and accepted practice in our courts, where such presumption is rebuttable in character, and in no instances has a reversal been ordered because the jury might have understood that the presumption was conclusive in character. The case of Tanaka v. Granelli, 107 Cal. App. 547, 290 P. 515, involves such an instruction. Considering and reading these two instructions, we do not believe that the jury was misled to the prejudice of appellants.

[33] One other instruction is questioned, where the jury were told that: "Testimony showing motive, reason or purpose is always admissible in a criminal case." We see no merit in this contention. Appellants state that the jury might believe that the court was referring to the evidence of theft of the dynamite. Conceding that this may be the fact, we have held that such evidence was admissible, and this disposes of the objection.

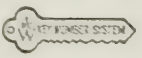
The following further points are urged for reversal: That the court erred in denying defendants' motion to discharge the jury; that the court erred in denying defendants' motion to exclude and suppress evidence; that the court erred in overruling the demurrer and denying motion to set aside the indictment. We do not find a sufficient showing of merit under these assignments to justify discussing them.

Concluding, we have endeavored to discuss fully every meritorious point raised, and this has resulted in a very extended opinion. Appellants were represented at the trial by able counsel, and every opportunity was given them to present their defense. Defendant Rodger, who was in the conspiracy from its very inception, was at the trial but failed to testify. The evidence of the People was clear and apparently convincing to the jury. Defendants were afforded a fair trial, and the record shows that they were fairly convicted, and it does not appear that there was any miscarriage of justice.

The appeal from the order denying motion in arrest of judgment is dismissed.

The judgment and the order denying motion for new trial are, and each of them is hereby affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.



14 Cal.App.2d 540

HINMAN v. CONARD.

Civ. 10883.

District Court of Appeal, Second District, Division 2, California.

June 10, 1936.

Hearing Denied by Supreme Court Aug. 6, 1936.

1. Appeal and error ⇐1071(6)

Where defendant, in suit to recover for reasonable value of services rendered, set up affirmative defense of estoppel based on plaintiff's acceptance without protest of wages paid, failure of court to make finding on such defense *held* reversible error, since issue was material and finding thereon would not be inconsistent with finding of implied contract to pay reasonable value of services.

2. Work and labor ⇐28(1)

Evidence *held* to support judgment and finding for plaintiff, based upon implied contract to pay plaintiff reasonable value of his services.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Ernest E. Hinman against Francis P. Conard. Judgment for plaintiff, and defendant appeals.

Reversed.

M. A. Woodward, of Sierra Madre, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an action to recover for services rendered. The complaint contains three counts—one on an open book account, one for the reasonable value of the services, and the third on an express contract. The answer of the defendant was first a denial, and second a separate and affirmative defense of estoppel. The court found for plaintiff on the second count. It is from this judgment the appeal is taken.

Defendant on August 1, 1932, employed plaintiff to work as a gardener and plaintiff's wife to work as a domestic and agreed to pay plaintiff $100 monthly and plaintiff's wife $50 monthly. The plaintiff and his wife were also to have the use of a four-room house on the defendant's premises, together with water and light. This agreement was carried out by the parties during the months of August and September. There is a sharp conflict in the evidence as to what then happened. The plaintiff contends that the defendant told him defendant's income had stopped temporarily and that he could pay the plaintiff's wife her $50 per month, and if they could get along on that it would be a matter of six months or a year, and then when his income started again he would make up to the plaintiff his $100 per month. The defendant, on the other hand, contends that he found plaintiff was wholly without experience as a gardener and that when defendant discovered this fact plaintiff agreed to the reduction in salary without any agreement whatever as to making up the $100 per month, the plaintiff's wife to get the $50 per month and he and his family to have the use of the home. Defendant paid plaintiff's wife $50 per month during the entire term of the employment which terminated July 15, 1935, and furnished the home. Plaintiff received no monetary consideration from defendant from October 1, 1932, to April, 1933. Commencing with May, 1933, and continuing to July 15, 1935, defendant paid plaintiff and plaintiff received the sum of $20 monthly. The plaintiff and his wife continued to work for the defendant, and they saw and conversed with the defendant practically every day during the 30 months to the end of the hiring and accepted his checks and the use of the home each month without any protest or any demand for back wages during all said time, and the plaintiff never made any demand for the back payments until after he was finally notified of his discharge. The defendant contends that during all said time the plaintiff by his acts and conduct and conversations led the defendant each month to believe that he was accepting his payments in full to date, and had the defendant not believed he was paying them in full he would have dismissed the plaintiff and not obligated himself for the higher wage. The importance of the defense of estoppel is apparent, but the trial court made no finding whatever thereon. The defendant contends that the trial court erred in failing to properly consider the defense of estoppel and to make a finding thereon.

[1] The answer of the plaintiff to this contention is that no findings were necessary on this special affirmative defense for the reason that such defense was inconsistent with the findings actually made upon the complaint and the denials of the answer, citing Wells v. Porter Estate, 205 Cal. 776, 272 P. 1039, and Hulen v. Stuart, 191 Cal. 562, at page 571, 217 P. 750, 754, where the court says: "We are entitled to draw necessary inferences from findings in order to support a judgment. Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 49, 97 P. 10, 18 L.R.A.(N.S.) 1106. From the facts found, and from the judgment ordered, it is evident, in the light of the entire record, that if more complete findings had been made they would have been adverse to the contentions of the appellant. If that be so, the failure to find further is not a ground for the reversal of the judgment. Krasky v. Wollpert, 134 Cal. 338, 342, 66 P. 309." The finding of the trial court that there was a contract implied by law to pay the reasonable value of services is not at all inconsistent with a further finding that the plaintiff by his acts and conduct estopped himself from demanding the reasonable value of his services.

The instant case is more in line with the case of Taylor v. Taylor, 192 Cal. 71, at page 81, 218 P. 756, 760, 51 A.L.R. 1074,

where the court says: "The system of express findings (sections 632 and 633, Code Civ.Proc.), which prevails in this state, requires a finding when there is a material issue. This applies not only to issues raised upon allegations of the complaint, but issues raised upon affirmative defenses in the answer. 2 Hayne on New Trial (Rev. Ed.) § 240, p. 1319, and cases there cited. * * * The finding of the trial court that the allegations and averments of the special defense, which merely set up the divorce proceedings and the rendition of the judgment by the Nevada court, were true, did not, in the remotest sense, dispose of the issue of fraud relied upon by appellant to nullify such judgment in so far as it related to the existence of community property. The evidence bearing upon such issue has been brought here. Therefore the court may not indulge in a presumption that, had findings been made on the subject of fraud, they must have been consisted with other findings actually made and relied on by respondent to support the judgment. It is only in the absence of such evidence that the presumption may be indulged in." In the instant case the evidence is before us. We have read the entire record. And we are unable to say, as was said in Hulen v. Stuart, supra, that "it is evident, in the light of the entire record, that if more complete findings had been made they would have been adverse to the contentions of the appellant." Whether the plaintiff was estopped to assert his claim was a material issue for the trial court to determine and defendant was entitled to a determination of it.

[2] Other contentions are raised by the defendant. We hold against the defendant on his contentions that the findings do not support the judgment; that the judgment is contrary to the law; that the evidence does not support the findings; that the plaintiff had elected to stand upon an express contract; that the judgment is against public policy; that the judgment is unconstitutional; that "the trial court abused its discretion in taking plaintiff's word alone." Other contentions made by the defendant will not arise in a second trial.

Judgment reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

14 Cal.App.2d 526

In re GILL'S ESTATE.

Civ. 10167.

District Court of Appeal, First District, Division 1, California.

June 10, 1936.

Hearing Denied by Supreme Court Aug. 6, 1936.

1. Wills ⇐324(1)

Weight of testimony is exclusively for jury and trial court in will contest as in other proceedings.

2. Wills ⇐386

Verdict or finding in will contest will not be disturbed on appeal, where there was real and substantial conflict of evidence on fact issues.

3. Wills ⇐155(1)

Will is obtained under undue influence, where improper pressure or other unfair conduct overcomes testator's volition, resulting in his execution of paper representing, not his will, but that of another.

4. Wills ⇐55(10), 166(5)

Evidence that will is unnatural and that beneficiary conspired with others to take advantage of testator's weakened condition justifies finding of his unsoundness of mind, undue influence over him, or both.

5. Wills ⇐55(1), 166(1)

In considering sufficiency of evidence to establish unsoundness of testator's mind or undue influence over him in will contest, jury may believe all evidence supporting contestant's claims, unless inherently so improbable as to be unworthy of belief, and disregard as untrue all of proponent's evidence contradicted in any way or otherwise impeached.

6. Appeal and error ⇐994(3)
Trial ⇐140(1)

Unless witness' testimony is inherently improbable, jury or trial judge, sitting in jury's place, is exclusive judge of witness' credibility.

7. Witnesses ⇐409

It is jury's right and duty to determine to what extent it will believe or disbelieve testimony of witness whose credibility is assailed by impeaching evidence in nature of contradictions or otherwise.

8. Wills ⇐55(1), 166(1)

Evidence in will contest *held* sufficient to support jury's findings that testator was

of unsound mind when will was executed and that it was procured through undue influence of proponent, who was sole beneficiary thereunder.

9. Wills ⊂329(5)

Refusal to instruct jury in will contest as to difference between unsoundness of mind in medical and legal senses *held* not error, where no claim was made that testator was of unsound mind in popular acceptation of term, but only claim was that he was in stupor because of illness and had no conception of what was happening when will was executed.

10. Wills ⊂337

Refusal to grant proponent new trial of will contest on ground of newly discovered evidence, which was merely cumulative on question of condition of testator's mind when will was executed and known to proponent at time of trial, *held* not abuse of discretion.

11. Wills ⊂384

Error in instructing jury that "nine of you or a majority" could return verdict in will contest was harmless to proponent, where jury unanimously declared will invalid.

12. Appeal and error ⊂1070(1)

Failure to challenge regularity of verdict when returned into court by polling jury precludes party complaining thereof from raising objection thereto on appeal.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

In the matter of the estate of John Gill, deceased. From a judgment revoking the probate of deceased's will, contested by Edith Gill and others, Mabel Greer, proponent, appeals.

Affirmed.

Charles A. Christin, William T. Eckhoff, and John E. Manders, all of San Francisco (Thomas J. Keegan, of San Francisco, of counsel), for appellant.

Ross & Ross, of Redwood City, and M. Mitchell Bourquin, of San Francisco (Clinton L. Markley, of San Francisco, of counsel), for respondents.

TYLER, Presiding Justice.

Appeal from a judgment revoking probate of a will after trial by jury. Mabel Greer, proponent and appellant, was sole beneficiary under the will contested. Contestants are the three sisters of John Gill, the decedent. He died testate, leaving an estate of about $42,000 and no surviving issue. The jury unanimously declared the contested will to be invalid, because at the time it was executed deceased was of unsound mind and because he was acting under the undue influence of appellant Mabel Greer. She challenges the sufficiency of the evidence to sustain the finding of the jury and also complains of the giving of one instruction, the refusal of another and the denial of her motion for a new trial. The record is voluminous, consisting of some 1300 pages. As is usual in cases of this character, the evidence is conflicting.

[1-5] At the outset it may be stated that the rule that a verdict or finding will not be disturbed upon appeal where there is a real and substantial conflict of evidence on the issue of facts involved applies to litigation over the validity of wills as well as to any other kind of litigation. In re Estate of Doolittle, 153 Cal. 29, 94 P. 240. All questions of the weight of the testimony are exclusively for the jury and for the trial court. The rule is the same in will contests as in other proceedings; and a verdict and finding in such a case will not be disturbed when there is a real and substantial conflict upon the issues of fact involved. In re Estate of Snowball, 157 Cal. 301, 107 P. 598. A will is obtained under undue influence where improper pressure or other unfair conduct has overcome the volition of the testator, resulting in his executing a paper which represents, in fact, not his will, but that of the person exercising the influence over him. In re Estate of Stoddart, 174 Cal. 606, 163 P. 1010. Where the evidence establishes that the will is unnatural and that the beneficiary conspired with others to take advantage of the testator's weakened condition, a finding of unsoundness of mind or undue influence, or both, is justified. In re Estate of Jones, 166 Cal. 108, 135 P. 288. In considering the question of the sufficiency of the evidence the jury is warranted in believing as true all of the evidence in support of contestant's claims, unless it is inherently so improbable as to be unworthy of belief, and in disregarding as untrue all the evidence of proponent which is in any way contradicted or otherwise impeached. Guided by these principles, we are of the opinion that

the evidence fully supports the finding of the jury that decedent was of unsound mind and that the will was procured through the undue influence of appellant. No claim was made that deceased was insane in the strict and popular sense of that word, but it was and is claimed that at the time the will was executed, and long prior thereto, he was in a stuperous condition, unable to speak or to know or understand what was going on around him, and in no mental capacity to make a will.

[6-8] It appeared in evidence that John Gill, the decedent, was born in England about seventy years prior to the execution of the will in question. He was unmarried at the time of his death and was survived by three sisters, two married and one (Edith) a spinster, living in England. Some ten months prior to his death, the appellant, Mabel Greer, had acted as Gill's housekeeper at his home in Daly City, for which services she was paid $20 a month in wages. Gill had been ailing for some time and was stricken with his last sickness on February 19, 1933, and died March 22, 1933. The will in question was made on his deathbed, two days prior to his death. There is evidence to show that during his last sickness appellant was endeavoring to have deceased make his will, and had requested one Ewers, a friend of long standing of the deceased, to assist her, promising to reward him for his efforts. Appellant testified that Gill had informed her he desired to make a will, and requested that a certain justice of the peace be sent for, but he could not be located. A Mrs. Burkett, from whom appellant purchased groceries, volunteered to procure her attorney to draw the will. The attorney was sent for and he testified he drew the will according to instructions received from the deceased, and that he was of sound and disposing mind. He further testified that at his suggestion Mrs. Burkett was appointed the executrix. Ewers, one of the witnesses to the will, testified that the deceased was practically dead when he signed the instrument; that he could not talk and his eyes were glassy. Dr. Walker, who saw and examined the deceased on Saturday afternoon, the day before the will was made, testified unequivocally that Gill was of unsound mind and in a stupor, too far gone to respond when spoken to or to understand anything, and was then dying from retention of urine and interference with the function of the kidneys, which hospitalization might have arrested. The doctor left orders for his removal to a hospital, but appellant, though told that Gill would surely die unless something was done to arrest his condition, failed to carry out the doctor's orders. The doctor also testified that Gill's condition was progressive, and that any interruption of his stupor, or a lucid interval, under the circumstances was impossible. Constant draining and injections to clear the blood, in the opinion of the doctor, offered the only hope of recovery, but even under the most favorable reaction to this treatment, had it been performed, it would have required a week or so to relieve Gill of his stuperous condition. The doctor catheterized Gill and removed about a quart of urine, which was decomposed and contained pus, from the bladder. As heretofore stated, this was the condition of Gill the day before the will was executed. It also appeared that two days before that time Gill was visited by his landlord and his wife, and later in the day by Matthew Benn, a teller from the San Francisco Bank. All three of the witnesses had known Gill for some time. The landlord and his wife both testified that they concluded from Gill's condition that he was not of sound mind. They tried to get him to talk, but he only moaned and could not answer. It also appeared that appellant was endeavoring to obtain some money from Gill's bank account. A check had been made out, but the bank had refused to cash it because of the irregularity of the signature. The bank dispatched Mr. Benn, the teller, to Gill's home to ascertain his condition. He rode out with Mrs. Burkett, the executrix, and she informed Benn that Gill was very sick; that she felt he was dying, and that he was in dire need of money for medicine and food. This was the day prior to the execution of the will. Benn testified that upon his visit Gill did not utter a single word while he was in the room, a period of four or five minutes. At Gill's bedside Benn was asked by appellant or Mrs. Burkett whether he would advance $200 rather than one hundred called for by the check. Gill at that time was oblivious to the entire transaction. In face of the plea for medicine and food Benn cashed a check for $100 upon the understanding that no more money would be paid to them until a guardian had been appointed. This witness testified that Gill did not utter a single word during his presence; that he looked very, very ill and had great difficulty in breathing. The testimony of

Benn contradicted that of appellant, who testified that Gill had conversed with the witness. Ewers, a friend of Gill's for many years and one of the subscribing witnesses to the will, had been with Gill constantly during his last illness and testified that fourteen days prior to Gill's death he could hardly speak and ceased holding any conversation with any one; that for the last week or eight days he recognized no one, and to inquiries addressed to him he made no response whatever; that during this period he had nothing to eat except coffee on gauze put between his lips; that he was practically dead for a week prior to the making of the will, and at the time of its execution he was of unsound mind. Appellant seeks to impeach the testimony of Ewers with the assertion that he made a demand for money from the executrix of the estate, and had made inconsistent statements as to the state of mind of the deceased at the time of the execution of the will. Unless it appears that a witness' testimony is inherently improbable, the jury, or trial judge sitting in place of a jury, is the exclusive judge of his credibility, and although impeaching evidence in the nature of contradictions or otherwise has been received, it is still not only the right, but the duty of the jury to determine to what extent it will believe or disbelieve the testimony of the witness thus assailed. In re Estate of Russell, 189 Cal. 759, 210 P. 249; 27 Cal.Jur., p. 182. There was, as above indicated, other testimony to the same effect as that given by Ewers. It further appeared in evidence that the deceased was very fond of his youngest sister, and some six weeks before his death he had told a friend that he intended making a will leaving her all of his property, as she had been so kind and attentive to their mother in her lifetime. It also appeared that deceased had sent his youngest sister money from time to time and had assured her that he would look out for her as long as she lived. There was further testimony to the effect that deceased mistrusted and disliked his housekeeper and desired to get rid of her, as he was of the opinion she was after his money. We do not deem a further review of the evidence to be necessary. It is manifest from what we have said that there was abundant evidence to show, beyond doubt, that the deceased was for days prior to the execution of his will of unsound mind and in a stuperous condition, unable to speak or understand what was going on about him; that this condition was progressive and that he could not have enjoyed a lucid interval. The evidence is also sufficient to show that appellant procured the making of the will. Under all these circumstances we cannot disturb the verdict upon the grounds advanced by appellant. With the conflict in the evidence we have nothing to do. From a reading of the entire evidence it would seem that the jury reached a proper conclusion. In re Ross' Estate, 173 Cal. 178, 159 P. 603; In re Estate of Jones, supra; In re Estate of O'Connor, 51 Cal.App. 339, 196 P. 792.

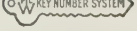
[9-11] Appellant complains of the refusal of the trial court to instruct the jury as to the difference between medical unsoundness and unsoundness of mind in a legal sense. There was no evidence that justified the giving of the instruction. No claim was made that deceased was of unsound mind in the popular acceptation of that term, the only claim being that due to illness deceased was in a stupor and had no conception of what was going on around him at the time of the execution of the will. Nor was there any abuse of discretion of the trial judge, as claimed, in refusing to grant a new trial on the ground of newly discovered evidence. The claimed evidence was merely cumulative upon the question of the condition of the mind of the testator and was known to appellant at the time of the trial. And finally, it is claimed that the court erred in instructing the jury that a majority of them could return a verdict. The record in this connection reads: "* * * when and as nine of you or a majority of the jury" have agreed, etc. It is claimed by respondents that the mistake was a result of a stenographic error as the six lawyers engaged in the case were all present when the charge was read and it had not challenged the attention of any of them. However this may be, the error was harmless, as it could not possibly affect the rights of appellant.

[12] Special issues were submitted to the jury. The first was whether contestants were the sisters of the deceased; (2) at the time of the execution of the purported will, dated March 19, 1933, was decedent, John Gill, of sound mind; (3) was said purported will procured through the undue influence of Mabel Greer; (4) was said purported will procured through the undue influence of Augusta Burkett. To the first special issue the jury answered unanimously "Yes"; to the second they answered unanimously "No"; to the third

they answered unanimously "Yes"; to the fourth they answered unanimously "No." It thus appears that the jury was unanimously against appellant on all the issues which affected her claim. The attorneys for appellant had it within their power to make the verdict more certain by polling the jury and thus ascertaining whether the verdict was lawful. Failure to challenge the regularity of a verdict in this respect when it is returned into court will be held to preclude one from raising any objection thereto. Kosak v. Boyce, 185 Wis. 513, 201 N.W. 757; Dick v. Heisler, 184 Wis. 77, 198 N.W. 734; Bentson v. Brown, 186 Wis. 629, 203 N.W. 380, 38 A.L.R. 1417; Waters v. Markham, 204 Wis. 332, 235 N.W. 797.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



14 Cal.App.2d 484

JOURNIGAN et al. v. STENZEL et al.

Civ. 10013.

District Court of Appeal, Second District, Division 1, California.

June 8, 1936.

1. Pledges ⇐55

Pledgee of personalty may sue on indebtedness without foreclosing on property pledged.

2. Mortgages ⇐375

Lenders, secured by trust deed on borrowers' land and also by water company's stock entitling borrowers to water for necessary irrigation, *held* entitled to maintain action for deficiency remaining after sale of land alone, as against contention that lenders thereby violated agreement that on foreclosure land and stock would be sold together.

3. Mortgages ⇐375

Lenders *held* entitled to maintain action for deficiency after sale under trust deed as against contention that lenders were bound first to foreclose lien created by stipulation entered into after default judgment in deficiency action, whereby parties agreed that default should be vacated but that stipulated lien should stand as security for any judgment thereafter recovered in action and should expire on entry of judgment; it being impossible under circumstances for lenders to foreclose such lien (Code Civ.Proc. § 726).

4. Mortgages ⇐375

In action for deficiency after sale under trust deed, excluding evidence sought to be elicited on cross-examination that payments had been made by acceptance of corporate stock *held* error.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Edward L. Journigan and another against Minnie E. Stenzel, individually and as administratrix of the estate of Amos E. Stenzel, deceased, and others. Judgment for plaintiffs and defendant named appeals.

Reversed.

John C. Packard, of Los Angeles, for appellants.

Vernon W. Hunt and Richard E. Reese, both of Los Angeles, for respondents.

HOUSER, Presiding Justice.

From the record herein, in substance it appears that some time prior to the date on which the action which furnishes the foundation for the appeal herein was commenced, the defendants borrowed $12,000 from plaintiffs for which such defendants gave to plaintiffs their promissory note; and, as security for said loan and promissory note, made and delivered to a trustee, for the benefit of plaintiffs, defendants' trust deed to certain real property that was improved as a walnut grove, together with a certificate for certain shares of stock in a water company, by reason of which defendants became entitled to and did procure water for the necessary irrigation of said walnut grove. In the course of events, default in the payment of the promissory note having occurred, on demand of plaintiffs, the trustee sold the real property only for a sum considerably less than the amount due on account of the indebtedness represented by the promissory note. Thereafter plaintiffs commenced the instant action against defendants to recover a deficiency judgment

against them for the difference between the amount due on the promissory note and the amount realized by plaintiffs upon the sale of the walnut grove.

On the trial of the action, pursuant to notice theretofore given by defendants to plaintiffs of defendants' intention so to do, the latter offered to amend their answer to the complaint in two particulars namely:

(1) That in the "foreclosure" of the trust deed, by causing the real property only to be sold, plaintiffs had violated the agreement made by the parties to the effect that, in the event of "foreclosure," the real property *and* the water stock would be sold together; and that, because of such breach of contract, on the sale of said real property it had not brought the price that would have been received for it, and thereupon have been creditable on the promissory note, that would have been realized had the said provision of the said agreement not been violated by plaintiffs.

(2) That (as in substance was alleged) because, after a default judgment against defendants had been taken in the instant action and said judgment thereafter had become a lien upon or against the property of defendants, in consideration of an agreed or stipulated lien to the same legal effect as was created by and in consequence of said judgment, it had been agreed and stipulated by the parties that, in order that defendants might appear and defend in the action, the said judgment and default be vacated, but that the said later and stipulated lien would stand as security for any judgment that thereafter might be recovered in the action, "said lien to expire on the entry of judgment either for or against said Stenzels" (defendants);—the said defendants asserted that, for the reason that under the provisions of section 726 of the Code of Civil Procedure but one action may be maintained to foreclose a mortgage, and that the security given may not be waived, before the plaintiffs were entitled to maintain the instant action (if at all), it was necessary that the lien created and arising by the agreement or stipulation of the parties be first foreclosed.

Appellants specify prejudicial error, in that the objection by plaintiffs to the filing of defendants' said proposed amendments to their answer was sustained by order of the trial court.

[1, 2] With reference to the situation embraced within the facts as outlined in the first proposed amendment to defendants' answer, the authorities indicate with precision that, where personal property is pledged as security for a loan, the pledgee may sue on the obligation without foreclosing on the property pledged. Savings Bank of St. Helena v. Middlekauff, 113 Cal. 463, 45 P. 840; Ehrlich v. Ewald, 66 Cal. 97, 4 P. 1062; Sonoma Bank v. Hill, 59 Cal. 107; In re Bank of Oakley, 131 Cal.App. 203, 206, 21 P.(2d) 164; Mission Brewing Co. v. Rickert, 39 Cal.App. 668, 673, 179 P. 720; Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 20, 73 P. 625; Bank of America Nat. Trust & Savings Ass'n v. Schumacher, 6 Cal.App.(2d) 651, 45 P.(2d) 239; Bromberg v. Brower, 6 Cal.App.(2d) 699, 44 P.(2d) 1063.

In view of such decisions it should follow that whatever legal rights may have accrued to defendants in the premises were not presentable by them in the instant action.

[3] As to the second proposed defense, it appears that the stipulation by which the lien in question was created was entered into after the instant action was commenced; that such lien was to operate only until judgment should be rendered in the instant action, at which time the stipulated lien was to expire automatically. In such circumstances, it would have been impossible for plaintiffs to foreclose such lien. It therefore follows that the contentions presented by appellants in that regard cannot prevail.

[4] Finally, appellants urge the point that prejudicial error was committed by the trial court in sustaining objections that were interposed by plaintiffs to questions propounded by defendants on cross-examination of plaintiff Edward L. Journigan.

It may be remembered that the action was brought for the purpose of recovering a judgment for the difference in amount between that due on the promissory note and the amount realized on the trustee's sale of the walnut grove. As a witness in his own behalf, Journigan had testified that, other than the sum of $50 interest which he had received in payment on account of the loan, nothing had been paid. On cross-examination, the trial court sustained objections that were interposed by plaintiffs to questions propounded by defendants to the witness, which questions, if answered, according to defendants' "offer of proof" (which also was denied), would have established the fact that "payments were subsequently made on the note by the acceptance of the water

stock under a collateral agreement. * * *"

It should be clear that, if the amount due on the promissory note was reduced, either by the payment of money or by the "acceptance of water stock," or of any other thing of value, the defendants should have been permitted to prove that fact, in order that the judgment, if any, that thereafter might be rendered against them, would be reduced in amount, either in accordance with the price agreed upon by the parties or, if not so agreed, by its market value. For aught that appears herein, the water stock may reasonably have been worth, and may have been accepted by plaintiffs in full satisfaction of, the amount due on the promissory note; or possibly at some lesser amount. The amount of such assumedly possible credit on the obligation, to which defendants may have been entitled, may have been great, or comparatively small; but in any event, in the existence of either of such situations, manifestly defendants should have the benefit thereof.

The judgment is reversed.

We concur: YORK, J.; DORAN, J.



14 Cal.App.2d 511

PEOPLE v. WALSH.

Cr. 2849.

District Court of Appeal, Second District, Division 1, California.

June 9, 1936.

1. Perjury ⇐33(1)

Evidence *held* to support conviction for perjury based on denial of defendant, who was shot at dinner party, that woman identified by other guests as his assailant was woman who fired shot.

2. Criminal law ⇐1130(2)

Assignment of error based on refusal to give certain instructions was not reviewable in absence of compliance with court rule which required printing in opening brief in full or substance thereof, clearly stated with citation to line and page of manuscript, where such instructions may be found, of instructions which were given as well as refused bearing upon subjects covered by refused instructions (Rules of District Courts of Appeal, rule 8).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Joseph E. Walsh was convicted of perjury, and he appeals.

Affirmed.

S. S. Hahn, W. O. Graf, and Phi. O. Clough, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

DORAN, Justice.

Appellant was convicted of the crime of perjury, which offense was the outgrowth of the following events: Appellant, together with four other guests, one man and three women, attended a dinner party at the home of one George H. Ennis, who was the host. They had almost finished their dinner when one Lora M. Hewitt appeared on the scene and fired four or five shots from a revolver at appellant, from a distance of 10 or 12 feet, wounding him. At the trial of Lora M. Hewitt, appellant herein testified that said defendant Hewitt did not shoot him; that the woman who shot him was not Lora M. Hewitt. Ennis and the other guests, however, identified Mrs. Hewitt. At the trial of appellant it was stipulated that she was the one who fired the shots. It was this testimony of appellant, given at the trial of Lora M. Hewitt, that forms the basis of the present perjury charge.

At the trial of defendant and appellant, the same testimony by the same witnesses was introduced, and it was further established that appellant had lived with Lora M. Hewitt as man and wife for about ten months preceding the shooting.

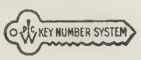
[1] Appellant urges as grounds of appeal that the evidence was insufficient to warrant a conviction and that there was an entire lack of corroborating proof. It is sufficient to state that the claims are without merit.

[2] Finally, it is urged by appellant that judgment should be reversed on account of the refusal by the trial court to give

certain instructions requested by appellant. In this connection, appellant has not complied with one of the rules adopted by the judicial council for the District Courts of Appeal, namely rule 8, which requires the printing in the opening brief, in full, "or the substance thereof clearly stated, with citation to the line and page of the transcript where such instructions may be found," of instructions which were given as well as refused, bearing upon the subjects covered by the refused instructions.

The judgment and the order denying a new trial are affirmed.

We concur: HOUSER, P. J.; YORK, J.



14 Cal.App.2d 537

PEOPLE v. GONZALES.

Cr. 2862.

District Court of Appeal, Second District, Division 2, California.

June 10, 1936.

1. Criminal law ⇐860

In prosecution for violating Deadly Weapons Act, there was sufficient foundation for implied finding that barrel of weapon was less than 12 inches in length and capable of being concealed on person, where no evidence was introduced as to length of barrel of revolver, but weapon was exhibited to jury and was introduced in evidence (St.1923, p. 702, § 15; St.1931, p. 2316, § 2).

2. Criminal law ⇐1173(2)

In prosecution for violating Deadly Weapons Act, failure to give instruction that act "shall not apply to antique pistols or revolvers incapable of use as such" *held* not prejudicial if error where, although revolver was about 60 years old and could be fired only in special manner, it was capable of use as firearm (St.1923, p. 702, § 15; St.1931, p. 2316, § 2).

3. Criminal law ⇐1170(2)

In prosecution for possessing firearm capable of being concealed upon person where trial court permitted inquiries as to construction, manipulation, and fire of weapon, failure to permit expert witness to state whether gun could be practically used or used in a practical manner or in manner of ordinary pistol *held* not prejudicial.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Ernest P. Gonzales was convicted of violating the Deadly Weapons Act, and he appeals.

Affirmed.

Richard H. Cantillon, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Section 2 of the Deadly Weapons Act, as amended (St.1923, p. 696, as amended by St.1931, p. 2316), makes it a felony for an alien, narcotic addict, or felon to have in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person. The latter terms are defined in the act to include all firearms having a barrel less than twelve inches in length. Section 15 of the act (St.1923, p. 702) provides that it shall not apply to antique pistols or revolvers incapable of use as such.

Defendant was found guilty by a jury of violation of this act. From the judgment of conviction and order denying motion for new trial he appeals.

It is admitted that appellant had previously committed a felony, for which he had been imprisoned and was on parole when arrested in this case.

[1] Three points are raised upon this appeal. No evidence was introduced as to the length of the barrel of the revolver found under the seat of the auto owned by appellant and in which he was being driven by another man at the time of his arrest. The revolver, however, was exhibited to the jury, was introduced in evidence, and has been transferred to this court with the record of the case. It is obvious that the barrel of the revolver is much less than twelve inches long, and the jury could observe its length, which of itself is sufficient, in the absence of any objection by appellant at the trial, to furnish sufficient foundation for the implied finding of the jury that the weapon was of the size interdicted by the statute. People v. Cruz, 113 Cal.App. 519, 298 P. 556.

[2] The court instructed the jury that "it is not a defense * * * that the gun was a gift, heirloom, keepsake, curio or relic." No instruction was requested or given as to the provision that the Deadly Weapons Act "shall not apply to antique pistols or revolvers incapable of use as such." Testimony was that the revolver found in appellant's possession was about sixty years old and that it could be fired only in a special manner. It was loaded, however, with six shells, and testimony of appellant's own witness, as well as that of the prosecution, was that the gun was capable of use and could be used and fired. Under this state of the evidence, even if, as appellant asserts, the court committed error in failing to instruct as to the exceptions of section 15 of the act, the error was harmless. No other conclusion could be reached in the case than that the revolver, although old, was capable of being used as a firearm.

[3] Similarly as to appellant's final point that the court curtailed the examination of his expert ballistic witness, we find no error warranting any interference with the judgment. It is true that the court refused to allow this witness to state whether the gun could be "practically used, used in a practicable manner," or whether it could be used "in the manner of an ordinary pistol," but by other permitted inquiries the facts as to the construction, manipulation, and firing of the weapon were sufficiently called to the attention of the jurors.

The judgment and order are affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 594

In re VAUGHAN.

NORMAN v. VAUGHAN.

Civ. 10544.

District Court of Appeal, Second District, Division 1, California.

June 16, 1936.

1. Costs ⇐9

In probate proceedings, trial judge with all records before him has power to fix and determine proper fees.

2. Insane persons ⇐41

Where guardian of incompetent, while guardian was secretary of state institutions, filed waiver of compensation for services as guardian, and, after ceasing to occupy official position, filed second waiver while seeking extraordinary fees for his attorneys for guardianship services, which fees were allowed, order denying guardian compensation *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceedings in the matter of the estate and guardianship of Harry J. Vaughan, also known as Harry Vaughan, incompetent, wherein Paul Norman petitioned for guardianship fees, which petition was contested by Harry J. Vaughan. From an adverse order, Paul Norman appeals.

Affirmed.

J. R. Klawans, of San Francisco, and George C. Watson, of Los Angeles, for appellant.

Robert H. Gillmore, G. Randolph Miller, and Gerald C. Kepple, all of Whittier, for respondent.

YORK, Justice.

This appeal raises only the question as to whether or not it was an abuse of discretion on the part of the trial court to make the order appealed from. An examination of the record discloses that it not only was not an abuse of discretion on the part of the trial court, but that the portions of the order from which this appeal is taken were properly made.

[1] In a probate matter it is particularly within the power of the trial judge, who has all of the records before him, to fix and determine what fees are proper. In the case before us, the trial court, after fully considering all of the services rendered, together with the amount of money involved and the form of waiver made by appellant guardian, made the order now complained of, and it is not within the province of this court either to reverse or modify the same for any of the reasons urged by appellant.

[2] Although it is true that the first waiver of compensation filed by the guard-

ian waiving his right to receive any fees as such guardian was made at a time when he was secretary of the state department of institutions, the second waiver was filed by him some fourteen or fifteen days after he had ceased to occupy that official position, and was made when he was asking to have extraordinary fees allowed to his attorneys on the ground, as stated by him that "* * * your petitioner at the time of his appointment was a state official, to-wit: Secretary of State Institutions for the State of California, and as such, he personally waived any right to services as guardian in this matter. That he has relied upon counsel to aid and assist him in doing and performing the services as herein stated, and that your petitioner at this time respectfully prays for an order of this court allowing attorneys' fees to his counsel in the sum of Four Thousand ($4,000.00) Dollars, which he believes to be a fair and reasonable amount to be allowed, taking into consideration the size and extent of the estate, the legal services done and performed, and the fact that your petitioner is not asking this court for any fees for himself as guardian. Your petitioner further states that there is no intent or agreement by and between petitioner and counsel for any allocation of said attorneys' fees, except as herein stated."

Upon the hearing of this petition on June 4, 1934, the court made its order allowing $2,000 to each of said attorneys for services rendered, as set forth in said petition. Thereafter, upon filing the final account in said estate, the guardian for the first time asked that guardianship fees be allowed to him. The court, after hearing this petition, denied his application for any fees whatsoever, but did make a further allowance on account of attorneys' fees. These two waivers filed by the guardian are so broad in their scope that the order of the trial court refusing to allow any fees to appellant guardian, as such guardian, cannot be disturbed by this court.

Those portions of the order appealed from are, and each of them is, affirmed.

We concur: HOUSER, P. J.; DORAN, J.

HONAN et al. v. NATIONAL THRIFT CORPORATION OF AMERICA et al.

Civ. 10824.

District Court of Appeal, Second District, Division 2, California.

June 5, 1936.

Hearing Denied by Supreme Court Aug. 3, 1936.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

On modification of opinion.

For prior opinion, see 57 P.(2d) 967.

Elvon Musick and Howard Burrell, both of Los Angeles, for appellant.

McGee & Robnett, Daly B. Robnett, and Robert Lee Collins, all of Los Angeles, for respondents.

PER CURIAM.

The last three paragraphs of the opinion heretofore filed herein are hereby ordered stricken therefrom, and in lieu thereof the following is substituted:

"Appellant also complains as to the disposition which the trial court made with reference to the $6,000 which it is admitted respondents received from National Thrift Corporation upon the execution of the note. Treating the note as usurious on account of the exaction from the makers of the 15 per cent. 'bonus,' the court decreed that, while respondents were indebted to National Thrift Corporation in the sum of $6,000, the money was not due until July 25, 1937, the expiration date of the usurious loan. Also, relying upon the provisions of the Usury Law (St.1919, p. lxxxiii), the court refused any interest upon the $6,000 advancement.

"Appellant is not in a position to object as to the court's action with relation to the $6,000. That matter concerns defendant National Thrift Corporation alone, and no appeal having been taken by said defendant, the judgment of the trial court as to it and as to the disposition of the $6,000 is final. Appellant not being in any manner concerned as to the item in question, it may not be heard to complain thereof upon appeal. Lake v. Superior Court, 187 Cal. 116, 200 P. 1041.

"Judgment affirmed."

14 Cal.App.2d 554

In re SEWALL'S ESTATE.

CRONIN et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 11005.

District Court of Appeal, Second District, Division 1, California.

June 12, 1936.

1. Wills ⇐473

Where court could not say from construction of will as a whole that testatrix would not have created trust for charitable purposes had she known that provision for care of burial plot was invalid, failure of latter provision did not invalidate will (Probate Code, §§ 101, 102, 1080).

2. Wills ⇐473

Invalid provision in will for care of burial plot as attempt to create trust in perpetuity *held* not controlling testamentary purpose so as to invalidate whole will, which left most of estate for relief of blind children and other charitable uses, notwithstanding provision for care of plot was expressed first (Probate Code, §§ 101, 102, 1080).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceedings in the matter of the estate of Kathryne H. Sewall, also known as Kathryn H. Sewall, also known as Katheyrne H. Sewall, also known as Katheryne M. Sewall, deceased, wherein Annie E. Cronin and others filed a petition, which was contested by the Security-First National Bank of Los Angeles, as executor of the estate of Kathryne H. Sewall, etc., deceased, and as trustee for the California Community Foundation. From the decree, the petitioners appeal.

Affirmed.

John S. DeLancey and Clarence DeLancey, both of Oakland, for appellants Annie E. Cronin, Katherine Fitzmoris, Mary Lockwood, Kathryne M. Flynn, Nellie C. Wallace, John M. Kelly, Austin J. and Edward D. Roche, Mary B. Cleary, Blanche MacCulley, Helen Bierly, David F., Daniel J., Richard G., David J., Catherine, Mary F., and James A. Roche, Agnes C. Burger, and Anna L. Heinold.

James M. Thomas, of San Francisco, and Arthur W. Kennedy, of Los Angeles, for appellants Catherine Roche Scully, Joan Ambrose Ianne, Catherine, Daniel, and James Ambrose, and Annie Ambrose Turner.

Fogel & Beman and Lobdell & Watt, both of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

SHINN, Justice pro tem.

Appeal from a decree of the superior court of Los Angeles county, under section 1080 of the Probate Code, determining who is entitled to distribution of estate. Appellants are cousins of the decedent, who died testate, leaving no other heirs. By her will, testatrix left her entire estate in trust for certain charitable uses and purposes, with two exceptions; namely, she authorized and directed the trustee to set aside property of the value of $7,500, and out of the net income therefrom to pay to Bea Suderstrom the sum of $300 per annum for and during the remainder of her natural life, and she further provided as follows: "d. From the remainder of the net income from the trust estate, including such net income from the $7,500.00 fund aforesaid as shall exceed $300.00 per year, there shall be paid the expenses of the perpetual care and maintenance of Plot Number 842, in Section 4 of Calvary Cemetery, St. Louis, Missouri, in which are the graves of my father, and mother, Michael and Mary Gallagher, and in which plot I direct that I myself be buried." Bea Suderstrom having predeceased testatrix, the bequest to her failed.

The provisions of paragraph (d) were held by the court to be invalid, for the reason that the trust therein attempted to be created was in perpetuity and not for charitable purposes. The remaining provisions of the will were upheld, and it was decreed that the trustee was entitled to distribution of the entire estate. Appellants' contention is that the conceded invalidity of the provisions of paragraph (d) extended to and nullified the entire will, and such is the question presented upon this appeal.

[1] Certain familiar rules of interpretation are involved. Where the intention of the testator cannot have full effect, it must have effect as far as possible, and an interpretation is to be preferred which will prevent total intestacy. Probate Code, §§ 101 and 102. In Re Estate of Van Wyck, 185 Cal. 49, at page 62, 196 P. 50, 56, it

was said: "The real question presented where a will contains both valid and invalid provisions is whether the two are so parts of a single plan or scheme or otherwise so dependent one upon the other that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others." We have only to determine whether the trial court correctly decided that the main and controlling testamentary purpose was to create a charitable trust and that the provision for the perpetual care of the burial lot was incidental thereto. Unless the court can say from a construction of the will as a whole that testatrix would not have created the charitable trust had she known that the provision for care of the burial plot could not be given effect, the failure of the latter provision does not invalidate the will.

[2] It appears that the estate was of the value of some $43,000. All of the estate except the sum of $7,500 was left in trust, with provision for the payment of $300 per year from the net income to Father Flanagan's Home for Boys of Overlook Farm, Omaha, Neb., admittedly a charitable institution. The remaining net income was to be used by the trustee in its absolute and uncontrolled discretion for the relief of blind children not over the age of sixteen years, with the power in the trustee to use all or any part of the principal of the trust estate for that purpose. The will contained a suggestion that the net estate should be used equally for the benefit of the Roman Catholic Orphanage, in the San Francisco diocese and in the Los Angeles diocese, although preference was expressed for its use for the relief of blind children. The provisions for charitable uses all referred to the net income remaining after provision had been made to meet the bequest to Bea Suderstrom and the expenses of the perpetual care and maintenance of the burial plot, and for this reason it is contended by appellants that the valid and invalid provisions of the will are so dependent and intermingled as to be incapable of separation without defeating the main testamentary purpose. We are satisfied that the trial court correctly rejected this construction. It is true that the expressed wishes of testatrix cannot lawfully be given full effect, but we should, if possible, avoid allowing the partial defeat of her wishes to operate so as to defeat the remainder. Testatrix had a high and praiseworthy purpose in leaving by far the greater share of her estate to be used for the relief of blind children. Likewise praiseworthy was her wish to provide for the care of the burial plot which held the graves of her mother and father, but the share of the estate devoted to the latter use was quite naturally comparatively small, and, while this provision was no doubt an important one in the testamentary scheme, it does not appear to have been predominant. There is no purpose expressed in the will to condition the provisions creating the charitable trusts upon the due execution of the trust for the care of the burial plot. The fact that sufficient income was first to be devoted to the latter use does not make it of first importance. How profound and sincere the desire of testatrix was to aid in the relief of blind children is to be gathered from the terms of the will, which devoted five-sixths of her estate to that purpose, to the exclusion of collateral kindred. The trial court concluded that the provision of the will held invalid was not indispensable to the plan of the testatrix for the use of her estate and gave effect to her wishes in so far as it was lawful to do so. This determination was just, and is sustained by the authorities. In re Estate of Willey, 128 Cal. 1, 60 P. 471, and cases therein cited.

The decree appealed from is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

14 Cal.App.2d Supp. 757

MISRACH v. LIEDERMAN et al.

SPIEGELMAN v. BOWLUS et al.

C. A. 3147, 3361.

Appellate Department, Superior Court, Los Angeles County, California.

May 27, 1936.

1. Attachment ⇐302
Execution ⇐188

Proceeding on third party claim for determination of title to property is a special proceeding created by statute ancillary to a pending action and in aid of remedy afforded by attachment or writ of execution (Code Civ.Proc. § 689, as amended by St. 1935, p. 1958).

2. Courts ⇐190(2)

Orders of municipal court granting new trials in proceedings to determine title to property on third party claims *held* not appealable, since trial by jury on such hearings is not matter of right, and appeal from order granting new trial is authorized only in such cases (Code Civ.Proc. § 689, as amended by St.1935, p. 1958; § 983, as amended by St.1935, p. 1963; Const. art. 1, § 7, as amended in 1928).

Appeals from Municipal Court of Los Angeles; Ray P. Brockman and Ellis A. Eagan, Judges.

Action by I. Misrach against J. Liederman and others wherein Alfred Flores filed a third party claim, and action by Sam S. Spiegelman, etc., against William Hawley Bowlus and others, wherein Jacob Teller filed a third party claim. From orders granting new trials in proceedings to determine title on third party claims, third party claimants appeal.

Appeals dismissed.

John Oliver, of Los Angeles, for appellant Flores.

Porter & Sutton, of Los Angeles, for appellant Teller.

Gabriel Berg, of Los Angeles, for respondent Misrach.

Irving Shore, of Los Angeles, for respondent Spiegelman.

BISHOP, Judge.

We are of the opinion that an appeal is not authorized from either of the orders of which complaint is made. Each order purported to grant a new trial in a proceeding to determine title where a third party claim had been made. The orders differ in that the one in the first case, Misrach v. Liederman, was made before the 1935 amendments to the Code of Civil Procedure had become effective, while all the proceedings in Spiegelman v. Bowlus were under the Code provisions as they now appear. We are considering these appeals together because they present a common problem and in spite of their differing genealogy each requires the same solution, viz., the dismissal of the appeal.

[1, 2] Section 983, Code of Civil Procedure, as amended by St.1935, p. 1963, governing appeals from municipal courts, now authorizes an appeal "from an order granting a new trial * * * in an action or proceeding where a trial by jury is a matter of right." We have heretofore held that this section, before the 1935 amendments, should, with respect to an order granting a new trial, be understood as it now reads. Treiman v. Kennon (1934) 139 Cal.App.(Supp.) 796, 30 P.(2d) 636. It is apparent, therefore, that unless in the proceedings which gave rise to the orders appealed from, jury trials were "a matter of right," the appeals must be dismissed. See, applying an identical Code provision respecting appeals from superior court orders, Bettencourt v. Bank of Italy Nat. Trust & Sav. Ass'n (1932) 216 Cal. 174, 13 P.(2d) 659; Mitchell v. Rasey (1934) 139 Cal.App. 350, 353, 33 P.(2d) 1056.

Section 689 Code of Civil Procedure, as amended by St.1935, p. 1958 which prescribes the proceedings by which a hearing is had on a third party claim, did not mention the matter of a trial by jury, before its amendment in 1935, and now serves only as a cross-reference to us, for it reads: "Nothing herein contained shall be construed to deprive any party of the right to a jury trial in any case where, by the Constitution, such right is given."

Our State Constitution of 1849 provided, in article 1, § 3, and our present State Constitution, article 1, § 7, provides, simply, "The right of trial by jury shall be secured to all, and remain inviolate"; "forever," the earlier Constitution added. Repeatedly it has been held, as stated in Koppikus v. State Capitol Commissioners (1860) 16 Cal. 248, 253, 254, in language from which quotations are frequently made: "The provi-

sion of the Constitution, that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. It is true, that the civil law was in force in this State at the time of the adoption of the Constitution, but its framers were, with few exceptions, from States where the common law prevails, and where the language used has a well defined meaning. The people who, by their votes, adopted the Constitution, at least a vast majority of them, were also from countries where the common law is in force, and they looked upon the right secured as the right there known and there held inviolate. It is in this common law sense that the language has always been regarded by the Courts of this State. It is a right 'secured to all,' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several States of the Union. It is a right, therefore, which can only be claimed in actions at law, or criminal actions, where an issue of fact is made by the pleadings. It cannot be claimed in equity cases, unless such issue be specially framed for a jury under the direction of the Court. It cannot be asserted upon an issue at law, for that is a matter purely for the Court. The fact, therefore, that property and rights of property may be involved in the disposition of a particular case or proceeding, does not determine the right to a trial by jury. There must be an action at law, as contradistinguished from a suit in equity, and from a special proceeding, or a criminal action, and an issue of fact joined therein upon the pleadings, before a jury trial can be claimed as a constitutional right."

We find the following cases applying the principles thus declared and reaching the conclusion that because the action or special proceeding was one where, at common law, a jury trial was not a matter of right, it was not made a matter of right by our Constitution: Grim v. Norris (1861) 19 Cal. 140, 79 Am.Dec. 206 (equity); People ex rel. Heyneman v. Blake (1862) 19 Cal. 579 (eminent domain); Cassidy v. Sullivan (1883) 64 Cal. 266, 28 P. 234 (divorce); In re Estate of Moore (1887) 72 Cal. 335, 13 P. 880 (probate); In re Wharton (1896) 114 Cal. 367, 46 P. 172, 55 Am.St.Rep. 72 (disbarment); In re Coburn (1913) 165 Cal. 202, 131 P. 352 (to declare incompetent); Vallejo & N. R. Co. v. Reed Orchard Co. (1915) 169 Cal. 545, 556, 147 P. 238 (condemnation); Cline v. Superior Court (1920) 184 Cal. 331, 193 P. 929 (removal of officer); In re Liggett (1921) 187 Cal. 428, 202 P. 660 (to declare narcotic addict); In re Daedler (1924) 194 Cal. 320, 228 P. 467 (to declare ward of court); Ex parte O'Connor (1915) 29 Cal.App. 225, 155 P. 115 (to declare insane); In re Bundy (1919) 44 Cal.App. 466, 186 P. 811 (to declare incompetent); Gregory v. Hecke (1925) 73 Cal.App. 268, 238 P. 787 (to revoke license); Hutchinson v. Reclamation Dist. No. 1619 (1927) 81 Cal.App. 427, 254 P. 606 (mandamus).

Since the amendments of 1935, the steps to be taken respecting a hearing on the question of title to property either attached or levied upon and claimed by a third party, have been rather fully described by section 689 of our Code of Civil Procedure. The following provisions quoted from the section reveal the nature of the proceeding: "Whenever a verified third party claim is delivered to the officer as herein provided * * * the plaintiff or * * * the third party claimant, * * * shall be entitled to a hearing in the court in which the action is pending * * * for the purpose of determining title to the property in question. Such hearing must be granted by the said court upon petition therefor, which must be filed within ten days after the delivery of the third party claim to the officer. Such hearing must be had within twenty days from the filing of such petition, unless continued as herein provided. Ten days' notice of such hearing must be given to the officer, to the plaintiff or the person in whose favor the writ runs, and to the third party claimant, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question. * * * At the hearing had for the purpose of determining title, the third party claimant shall have the burden of proof. The third party claim delivered to the officer shall be filed by him with the court and shall constitute the pleading of such third party claimant, subject to the power of the court to permit an amendment in the interests of justice, and it shall be deemed controverted by the plaintiff or other person in whose favor the writ runs. * * * No findings shall be required in any proceedings under this section. At

the conclusion of the hearing the court shall give judgment determining the title to the property in question, which shall be conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have said property taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment. In such judgment the court may make all proper orders for the disposition of such property or the proceeds thereof." The 1935 amendments, in the main, made explicit in the section that which had before been implicit, and in no way changed the fundamental character of the proceeding. From the viewpoint of the third party claimant, it had and has some of the characteristics of an action in replevin, but it is not a replevin action. Measured by the relief the hearing affords the plaintiff, it resembles a creditor's bill in equity, but it was and is not. It was before the amendments, as now, a special proceeding created by statute, ancillary to a pending action and in aid of the remedy afforded by an attachment or writ of execution.

It is not seriously urged that the hearing on a third party claim prescribed either before or since the effective date of the 1935 amendments is one to which, at common law, a trial by jury was attached. It is true that early in the history of this state a distant relative of our present proceeding was known and one of its characteristics was the use of a jury. See sections 131 and 218 of the Practice Act. (St. 1851, 2d Sess. pp. 71, 85.) This proceeding, however, with its jury of six, selected and presided over by the sheriff himself, was not recognized as a judicial proceeding, Perkins v. Thornburgh (1858) 10 Cal. 189, and see Duncan v. Superior Court (1930) 104 Cal.App. 218, 220, 285 P. 732. Clearly its pre-existence does not support the conclusion that a jury trial is a matter of right in proceedings taken pursuant to the provision of section 689, Code of Civil Procedure.

A search among authorities elsewhere raises no doubt as to the correctness of our conclusion. We either find no procedure approaching ours or it is governed by a statute providing for a jury of some sort. For example, note Schell v. Husenstine (1883) 15 Neb. 9, 16 N.W. 758. The statement in Jarecki Mfg. Co. v. Fleming (1934) 170 Okl. 70, 38 P.(2d) 925, 928, that "A third party claiming either real or personal property levied upon might be entitled to a jury trial upon the question of his right and title to the property" was unsupported by authority and was plainly dictum, as shown by the sentence which followed, "But we have no such condition here."

The case of McMahan v. Works (1880) 72 Ind. 19, is readily to be distinguished. Not only was the procedure there involved based upon a Code provision bearing resemblance not to our section 689 Code of Civil Procedure but rather to our section 717, Code of Civil Procedure, authorizing the examination of debtors of judgment debtors, but, possibly by judicial legislation, the proceedings had been developed into what was virtually a creditor's bill, an action which because of its equitable nature would not, in this state, carry with it the right to a jury trial.

Considered as orders granting new trials, therefore, the orders are not appealable. Because of the possibility that there is no authority for the granting of a new trial in a proceeding on a third party claim [we have noted Nelson v. Superior Court (Cal.App.1936) 57 P.(2d) 1351] the thought has occurred to us that, if these orders are unauthorized as orders granting new trials, they should be considered simply as special orders made after final judgments, and hence appealable under section 983, C.C.P. The case of Diamond v. Superior Court (1922) 189 Cal. 732, 739, 210 P. 36, stands in the way of such a conclusion, holding, as it does, that certiorari and not appeal is the proper remedy for an unauthorized granting of a new trial. We also find Stanton v. Superior Court (1927) 202 Cal. 478, 489, 261 P. 1001, and Delmuto v. Superior Court (1932) 119 Cal. App. 590, 595, 6 P.(2d) 1007, apparently holding that such unauthorized orders are to be annulled by certiorari; an appeal will not lie. See, also, Casgrave v. Howland (1864) 24 Cal. 457, 458.

The appeals are, accordingly dismissed; respondents to have their respective costs on appeal.

SHAW, P. J., concurs.

Laws 1931, Act 5128, § 121; Pen.Code, §§ 687, 1023; Const. art. 1, § 13).

2. Homicide ⊂⊃31

Where death ensues from commission of unlawful act not amounting to felony, from commission of lawful act which might produce death in unlawful manner, or from commission of lawful act without due caution and circumspection, offense is "manslaughter" regardless of particular means or methods by which committed (Pen.Code, § 192).

[Ed. Note.—For other definitions of "Manslaughter," see Words & Phrases.]

3. Homicide ⊂⊃135(1)

In manslaughter prosecution, manner of commission of offense need not be pleaded (Pen.Code, § 192).

4. Criminal law ⊂⊃1167(5)

Supreme Court would not disturb trial court's ruling that plea of once in jeopardy substantially complied with statutory provisions, in absence of either party's being misled or injured by ruling (Pen.Code, § 1017, subd. 4, as amended by St.1933, p. 2023).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Homer M. Herbert was convicted of manslaughter, and he appeals.

Affirmed.

For opinion of District Court of Appeals, see 51 P.(2d) 456.

P. G. McIver, of Montebello, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

This appeal comes to us on petition for a hearing after decision by the District Court of Appeal, Second District, Division 1, Houser, P. J., and York, J., sponsoring the majority opinion. A carefully prepared and exhaustive dissenting opinion by Roth, J. pro tempore, was filed, in which many of the decisions of the state bearing upon the question as to what facts are essential to constitute double jeopardy within the meaning of article 1, § 13, State Constitution, and the provisions of sections 687, 1023, and other sections of the Penal Code pertinent to the subject, are reviewed. The case was

6 Cal.2d 541

PEOPLE v. HERBERT.

Cr. 3961.

Supreme Court of California.

June 19, 1936.

1. Criminal law ⊂⊃200(1)

Conviction of defendant for manslaughter based on identical facts on which defendant had already been sentenced on plea of guilty to charge of reckless driving *held* not objectionable on ground that defendant was twice put in jeopardy for same offense (Gen.

taken over to give this court an opportunity to further consider the questions raised by the appeal. Upon such consideration we have reached the conclusion that the opinion of the District Court of Appeal, together with such observations as we have added, sufficiently disposes of the issues raised by the appeal. We shall not enter into an extended discussion in an attempt to compose seemingly conflicting views expressed in the decisions of the various courts of the state which have been cited to support one side or the other of the proposition.

The language of the Constitution, which provides that "no person shall be twice put in jeopardy for the *same* offense," and the several statutes which provide that no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted, or for an offense necessarily included in the indictment of which a person might have been convicted under said indictment or information, is so clearly stated in the Constitution and the statutes as to leave no doubt as to what facts do or do not constitute double jeopardy or a second conviction for the *same* offense. No judicial interpretation is necessary as an aid in determining the meaning of the clear language of either the Constitution or the statutes.

The opinion of the District Court of Appeal, the greater portion of which we hereby adopt as our opinion, was prepared by Mr. Justice Conrey as a memorandum opinion while he was a member of said court. He was advanced to the office of associate justice of this court before this appeal was officially disposed of by the District Court of Appeal. Said court, upon an examination of the appeal, adopted the reasoning of and the conclusion reached by Mr. Justice Conrey in his consideration of the cause as its opinion and decision in said matter and filed the same, with a few minor changes, as the opinion of that court. We herewith adopt and issue said opinion as our own, supplementing it with a few added observations:

"On November 17, 1934, defendant was driving an automobile at approximately 50 miles per hour in the rain, in the city of Montebello. As he thus approached an intersection of two streets, he attempted to pass an automobile that was in front of him, but realizing that he could not do so safely, applied his brakes, as a result of which his car skidded a distance of approximately 135 to 150 feet and careened into another automobile that was being driven by one Briscoe, as a consequence of which collision, Briscoe suffered injuries from which he died on the 19th day of November, 1934. On November 26, 1934, or about a week after Briscoe's death, defendant was charged with a violation of section 121 of the California Vehicle Act (Deering's Gen.Laws, 1931, Act 5128), to wit, reckless driving. Said section reads as follows: 'Any person who drives any vehicle upon a highway in so negligent a manner as to indicate either a wilful or a wanton disregard of the safety of persons or property shall be guilty of reckless driving and upon conviction shall be punished by imprisonment in the county jail for a period of not less than five days nor more than ninety days or by fine of not less than twenty-five dollars nor more than two hundred fifty dollars, or by both such fine and imprisonment.'

"To such charge defendant pleaded guilty; sentence was pronounced which sentence was in part suspended; the net result being that defendant paid a fine of $10. On January 16, 1935, by information filed against him, defendant was charged with the commission of the crime of manslaughter, a felony, committed as follows: 'That the said Homer M. Herbert on or about the 17th day of November, 1934, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously and without malice, kill one Joseph Briscoe, a human being.' It was stipulated by respective counsel that the said charge of manslaughter was based upon the identical facts which have been briefly summarized and upon which defendant had been already sentenced on his plea of guilty to the charge of reckless driving. To this information defendant entered pleas of not guilty and once in jeopardy. Trial was had without a jury, and the trial court found against defendant on his plea of once in jeopardy; found him guilty of manslaughter; pronounced sentence; suspended the same and placed defendant on probation. From the judgment entered pursuant thereto, and from an order denying his motion for a new trial, defendant has appealed to this court. * * *

"The decisive question is, was the defendant placed in jeopardy twice for the same offense; or, to phrase it more specifically, does the charge of manslaughter on the facts as outlined necessarily include the crime of reckless driving? * * *

" 'The offense of reckless driving, in violation of section 121 of the California Ve-

hicle Act, to which Herbert pleaded guilty in the police court, was not necessarily included in the manslaughter, viz., *the killing of Briscoe* "unlawfully, feloniously and without malice," by the defendant. It must be admitted that on November 26, when the complaint on the misdemeanor charge was filed, both offenses were complete, as the reckless driving and the primary injury to Briscoe both occurred on November 17, and the death of Briscoe followed on the 19th.

" 'As far as prior jeopardy is concerned, as that situation is described in section 1023 of the Penal Code, and applying that description or definition to the facts here, the manslaughter was not an offense necessarily or at all included in the misdemeanor charge, of which the defendant "might have been convicted under that indictment or information," that is, under the misdemeanor charge. It is true that on November 26 the facts were such that in a proper forum, the defendant then might have been prosecuted for manslaughter in the killing of Briscoe. In such prosecution he would have been placed in jeopardy, not for the separate offense of reckless driving, but for causing the death of Briscoe, by means of reckless driving plus the hitting of Briscoe. Under the manslaughter charge, he could not have been acquitted of manslaughter and convicted of reckless driving. Under the misdemeanor charge in the police court, he could not have been convicted of manslaughter.

" 'In the case at bar, defendant's reckless driving of his car, that is, "in so negligent a manner as to indicate a wilful or a wanton disregard of the safety of persons or property," happened to be an act committed in violation of law; but for the purposes of trial of the instant case this conduct of the defendant, when proved, was merely part of the evidence of his unlawful killing of a human being which in this instance was done "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Pen.Code, § 192.

" 'I am aware of the rule that where there are several degrees of a single kind of crime, the defense of "once in jeopardy" is, under some circumstances, available, even where the prior action relates only to the lesser degree. Thus, an acquittal of manslaughter would protect against a subsequent prosecution for murder of the same victim at the same time as in the first case. I do not think that such rule applies to the case at bar.

" 'It is a constitutional right, that "no person shall be twice put in jeopardy for the same offense." I do not think that this defendant has been "twice put in jeopardy for the same offense."

" 'The latest case on this question is People v. Coltrin (Cal.App.) 48 P.(2d) 973, see discussion on pages 977 and 978.'

"The facts in the case of People v. Wilson, 193 Cal. 512, 226 P. 5, are similar to those of the instant case. In principle, the decision in the cited case would seem to be determinative as against the point for which appellant herein so stoutly contends."

The facts, briefly summarized, are as follows: On November 17, 1934, one Joseph E. Briscoe suffered injuries by reason of the reckless driving of an automobile by defendant in violation of section 121, Act 5128, Deering's General Laws, 1931. He died as the proximate result of said injuries three days thereafter and before any criminal proceedings had been filed against the defendant. On November 26, 1934, the defendant was charged with the violation of said section 121, the offense being punishable as a misdemeanor. He pleaded guilty to said charge and paid a fine in the sum of $10 which was assessed against him. On January 16, 1935, he was charged with and convicted of the crime of manslaughter. The court suspended sentence and placed him on probation.

[1] It is the position of defendant that to convict him of both offenses is to twice put him in jeopardy for the *same offense*. Article 1, § 13, State Const.; section 1023, Pen. Code. We are of the view that a conviction of both said offenses is not an impairment of the twice in jeopardy provision of the Constitution, or a violation of the penal statute. They are not the *same* offenses nor is one, to use the language of the Penal Code, "*necessarily* included within the other." One provides for a minor misdemeanor punishment for the violation of section 121 of an act regulating the use and operation of vehicles on streets and highways. It makes no attempt to punish for the consequences, if any, which may flow from the act of reckless driving. The other offense, manslaughter, is a felony and was at common law an offense malum in se.

[2, 3] Unjustifiable homicide, whether murder or manslaughter, has always at common law and in American criminal juris-

prudence been classified as an offense malum in se. Such offenses are more intensely evil than acts malum prohibita. The latter are such acts as are in themselves indifferent and become right or wrong as the municipal legislature sees proper for protecting the welfare of society and more adequately carrying on the purposes of civil life. Bouvier's Law Dictionary, vol. 2, p. 2066. The facts essential to constitute the crime or offense are not the same in each offense. A violation of the regulatory provisions of the Vehicle Code prohibiting reckless driving of motor vehicles is complete upon a showing that a vehicle was recklessly driven, and it matters not that no injury was done to persons or damage was done to property. The ingredient of manslaughter is that a human life was unlawfully taken. The offense is not complete unless death ensues from the injury within one year and a day from the day the injury is inflicted. The statute defining it is general and it makes no difference as to the particular means or methods by which it is committed if death ensues from the commission of an unlawful act not amounting to a felony, or from the commission of a lawful act which might produce death in an unlawful manner or the commission of a lawful act without due caution and circumspection. Section 192, Pen.Code. The manner of its commission need not be pleaded. The bar of the statute is different in the two grades of offenses. Three years are required to bar a prosecution for manslaughter, while one year will bar a prosecution for a misdemeanor. The two offenses are different in substance and are not governed by the same procedural provisions of the Penal Code, and in no case could an information or indictment be framed by which a person charged with one offense be convicted of the other. Matter describing reckless driving in an information charging manslaughter would be regarded as idle words so far as authorizing the conviction of a misdemeanor is concerned, and the only possible purpose for which it could be considered, if at all, would be to identify the particular offense of manslaughter.

We gave consideration to the double jeopardy plea in the case of People v. Coltrin, 55 P.(2d) 1161, and we are of the view that what is there said is conclusive against the contention of appellant in the instant case.

[4] The point was raised by respondent that defendant's plea of once in jeopardy was not made or entered with the full and formal requisites set forth in section 1017, subd. 4, Penal Code (as amended by St.1933, p. 2023). The trial court, however, treated the plea as substantially complying with provisions of the statute, and we are not disposed to disturb the ruling. Neither party was misled nor injured thereby.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.



6 Cal.2d 548

PEOPLE v. SAM.

Cr. 3972.

Supreme Court of California.

June 19, 1936.

Homicide ⊂=253(1)

Evidence which clearly established that murder of accused's divorced wife was a willful, deliberate, and premeditated killing *held* to justify trial court in finding killing to be murder in first degree upon accused's plea of guilty, notwithstanding showing of sordid conditions under which accused's youth was spent, alleged immoral conduct of his mother, his use of drugs, his affection for his son, and similar evidence.

In Bank.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Bill Sam was convicted of murder in the first degree, and he appeals.

Affirmed.

Frank G. Warren, of Stockton, for appellant.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., and F. C. Clowdsley, Dist. Atty., and Chester E. Watson, Asst. Dist. Atty., both of Stockton, for the People.

PULLEN, Presiding Justice.

An information was filed against this defendant charging him with murder. Upon arraignment, he appeared without counsel. Thereafter counsel was appointed, and the arraignment for plea was, upon request, continued one week. Upon the day so fixed, defendant appeared with his counsel and entered a plea of guilty. The court thereafter fixed the time upon which judgment would be pronounced, and on that day and prior to the passing of sentence, witnesses were sworn and evidence introduced in order that the court might determine the degree of the crime. At the conclusion of the hearing, at which nine witnesses were called to testify, including the defendant, the court found the degree of the crime to be murder of the first degree and fixed the penalty at death.

The matter now comes automatically before this court on appeal under the provisions of section 1239 of the Penal Code, as amended by St.1935, p. 1868. We have read the record and it appears that defendant, an American-born Chinese, had, some seven or eight years prior to the tragedy, married Violet Sam, a Chinese girl, and they became the parents of a boy, who was at the time of the trial about six years old.

A few months prior to the homicide Violet Sam had obtained an interlocutory decree of divorce and was supporting herself by working in a restaurant in Stockton. Defendant, prompted by jealously, went to the café where the wife was employed and there shot her to death.

Some six days prior to the murder defendant wrote a letter to his son in which he foreshadowed the death of his wife, and other letters to friends bidding them farewell and asking them for their forgiveness.

Upon this appeal appellant now claims the court unduly restricted him in his attempt to show by certain witnesses his early life and the sordid conditions under which his youth was spent and the effect it had upon his mind and point of view. Counsel contends he should have been permitted by the court to present evidence of this early experience, together with the excessive use by appellant of narcotics, and the fact appellant believed his wife to be consorting with a white man, which drove him temporarily insane, and that under the circumstances appellant should not suffer the death penalty imposed upon him.

In spite of the sustaining of objections to certain questions asked of witnesses for the defendant, the early life and experience of appellant does appear in evidence, and the trial court had before it all of the facts in the life of defendant, the alleged immoral conduct of his mother, his use of drugs, the affection he had for his son, and practically everything that counsel for defendant had attempted to present to the court.

The evidence clearly and conclusively establishes that the murder was a willful, deliberate and premeditated killing, and justified the court in finding the same to be murder of the first degree and fixing the penalty as it did.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.



6 Cal.2d 516

Ex parte MARK.

Cr. 3973.

Supreme Court of California.

June 18, 1936.

Constitutional law ⇐240(1), 296(1)
Habeas corpus ⇐32

Municipal ordinance prohibiting laundries remaining open, soliciting, picking up, and delivery of laundry between 6 p. m. and 7 a. m. applicable to all laundries within city *held* to deny due process, and equal protection of law, and hence person convicted of violating ordinance was entitled to discharge on habeas corpus (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

In Bank.

Original proceedings in the matter of the application of Byron Mark for a writ of habeas corpus.

Petitioner ordered discharged from custody.

John L. McNab, of San Francisco, and Leo A. Sullivan, of Oakland, for petitioner.

F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondent.

PER CURIAM.

The petitioner was convicted in the police court of the city of Oakland of a violation of section 5-8.22 of an ordinance regulating the operation of laundries in that city. The writ of habeas corpus issued for the purpose of considering the question of the operative effect of that section of the ordinance.

The ordinance as a whole is comprehensive in its scope and embraces regulations dealing with the housing, operation, sanitation, etc., of laundries conducted within the confines of the city. Section 5-8.22, pertaining to "Hours," provides that it shall be unlawful to carry on laundering operations, to keep any such establishment open, or to solicit, pick up, or deliver laundry on Sundays and specified holidays and on any other day between the hours of 6 o'clock p. m. and 7 o'clock a. m. The petitioner was convicted of operating his laundry on a weekday after 6 o'clock p. m. The question is whether the enactment of said section is a reasonable exercise of the police power of the municipality.

The petitioner presents two main objections to the regulation: First, that the hours when closing the establishment is enjoined and the soliciting, picking up and delivery of laundry is prohibited have no relation to the general health or safety of the community, and that the regulation is therefore an unreasonable deprivation of the rights of the petitioner; and, second, that the selection of laundries as the object of the closing regulations from numerous other lawful pursuits not less noxious is a classification which is discriminatory and invalid. The facts do not involve the Sunday or holiday closing regulation. The propriety of classification of laundries for many purposes of regulation may be assumed. It may also be assumed for the purposes of this proceeding that the classification of laundries, within specified districts, for the purpose of regulation of hours of operation, may be proper. It is then to be determined whether the prohibition as to remaining open, operating, soliciting, picking up and delivery of laundry between the hours of 6 p. m. and 7 a. m., applicable to all laundries within the city, has such reasonable relation to the general health and safety of the community as to justify it as a valid exercise of the police power.

In support of the return to the writ it is contended that similar regulations have been upheld, and reliance is placed upon the cases of Barbier v. Connolly (1885) 113 U. S. 27, 5 S.Ct. 357, 359, 28 L.Ed. 923; Soon Hing v. Crowley, 113 U.S. 703, 5 S. Ct. 730, 733, 28 L.Ed. 1145; Ex parte Moynier, 65 Cal. 33, 2 P. 728; and In re Wong Wing, 167 Cal. 109, 138 P. 695, 51 L.R.A.(N.S.) 361.

In Barbier v. Connolly the prohibition extended only to laundries within a certain prescribed district in the city of San Francisco, and limited the closing regulation to the hours between 10 p. m. and 6 a. m., and the prohibition to the washing and ironing of clothes during those hours. The court in that case, through Mr. Justice Field, said: "The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least, any correction of their action in such matters can come only from state legislation or state tribunals." In Soon Hing v. Crowley the same Justice, in considering the validity of a similar ordinance prescribing similar prohibitions involving laundries in San Francisco, followed the earlier pronouncement made in Barbier v. Connolly. In the Soon Hing Case Mr. Justice Field, after repeating in substance the foregoing quoted language, stated: "And it is of the utmost consequence in a city subject, as San Francisco is, the greater part of the year to high winds, and composed principally within the limits designated of wooden buildings, that regulations of a strict character should be adopted to provent the possibility of fires. That occupations in which continuous fires are necessary should cease at certain hours of the night would seem to be under such circumstances a reasonable regulation as a measure of precaution."

A similar regulation adopted by the board of supervisors of San Francisco nearly a year prior to the adoption of the ordinance involved in the case of Barbier v. Connolly was the subject of inquiry in the case of Ex parte Moynier, supra, which was decided about a year earlier than the decision in Barbier v. Connolly. It was held in the Moynier Case that the prescribed hours for closing laundries (10 p. m. to 6 a. m.), within certain limits were related to and necessary for the proper police and sanitary condition of the city.

In re Wong Wing, supra (1914), involved a regulation prescribing the closing hours of laundries within the city limits of San Francisco. There the prohibition was directed against the washing, mangling, starching, ironing or other work on clothes between the hours of 6 o'clock p. m. and 7 o'clock a. m. The court cited the three cases hereinabove discussed and came to the conclusion that those cases authorized the municipal legislative body to prescribe as the hours of labor in laundries the usual period of business activity in similar sorts of employment. While the hours of the cessation of labor in the laundries prescribed in the present case are the same as those involved in the Wong Wing Case, the similarity in the prohibition ceased at that point and a distinction exists which must be noted and which may well be determinative of the invalidity of the present legislation. In the case before us, the prohibition is not limited to the washing and ironing of clothes, but extends as well to the keeping open of the establishment and to the soliciting, picking up or delivery of any laundry during the hours between 6 p. m. and 7 a. m. The decisions in the cases hereinabove noted were based on the hypothesis that the restrictions addressed to the washing, ironing, etc., of clothes during the nighttime in designated areas had some reasonable relation to the prevention of fires at a time when fires were a greater hazard and menace to life and property. The reasonable relation of the prohibition to the exercise of the police power may be said also to be true, ostensibly at least, of the Wong Wing Case. A similar ordinance today, as at the time when the foregoing cases were decided, depending on all of the facts pertinent to the inquiry, might nevertheless still be deemed to have sufficient relation to the preservation of life and property as to justify its enactment as a valid exercise of the police power. But no case has been presented which holds, and it is not seriously contended, that the extension of the prohibition to the keeping open of the establishment, and to the soliciting, picking up, and delivery of laundry, applied to all laundries in the city, evidences anything more than an intention to enact a law prescribing hours of labor in laundries without any relation to the exercise of the police power in any sense independent of the regulation of hours of labor.

In Yee Gee v. City and County of San Francisco (D.C.) 235 F. 757, the court differed in its conclusions with the result in the Wong Wing Case and held that a regulation identical with that involved in the latter case, even though it extended only to laundering operations, was no more than merely a limitation upon the hours of labor with no relation to the exercise of the police power, and that as such it was an unreasonable and unwarranted intrenchment upon the liberty of the citizen in the conduct of his business. In discussing the application by this court in the Wong Wing Case of the principles of the cases of Barbier v. Connolly and Soon Hing v. Crowley, the court said, 235 F. 757, 762, at page 762: "It will thus be seen that the Supreme Court of California rested its ruling largely, if not entirely, upon the authority of the Barbier and Soon Hing Cases, under the assumption that the principles there announced had equal application to the regulation before them. With the greatest respect for the views of that court, I think its opinion fails to take note of the very material difference between the two measures. In the one instance, the regulation was restricted in its application to certain specified and defined districts of the city, and prescribed a period of cessation from labor well within the acceptation of what would at once be regarded as having reasonable relation to the object sought, that of the protection of the public from the danger of uncontrolled fires. In the other, the regulation is made to apply to the entire limits of a great city, embracing a territory some 10 miles wide by 15 miles long, without regard to differing physical conditions obtaining therein, and with a limitation of the hours of labor to a period which, to say the least, having regard to the nature of the business, at once gives rise to a question in the mind whether it bears any reasonable relation to any conceivable necessity for protection to the public from

such dangers. It seems to me that this radical difference between the two regulations may not be ignored. That the Supreme Court of the United States did not ignore it will at once appear from their discussion of the subject. They repeatedly refer to the fact that in the cases before them the regulation as to hours of labor applied only to certain specified limits within the city, and they construe its purpose to have reference to the special conditions existing in those districts."

The fundamental law of the land has been held to be inconsistent with any restriction other than voluntary upon the particular hours of the day when a citizen may labor, when such restriction is in no sense otherwise related to an appropriate exercise of the police power. Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L.Ed. 937, 3 Ann.Cas. 1133; Yee Gee v. City and County of San Francisco, supra; Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664; Ganley v. Claeys, 2 Cal.(2d) 266, 40 P.(2d) 817; Skaggs v. City of Oakland (Cal.Sup.) 57 P.(2d) 478; In re Boehme (Cal.App.) 55 P.(2d) 559; McDermott v. City of Seattle (D.C.) 4 F.Supp. 855; Chaires v. Atlanta, 164 Ga. 755, 139 S.E. 559, 55 A. L.R. 230. It becomes apparent at once that, even if the restriction of the hours of labor as such were conceded, without more, to be within a legitimate exercise of the police power, nevertheless, before such a regulation may be deemed valid it must be so enacted as to operate uniformly. As noted by Mr. Justice Field in the earlier case of In re Quony Woo (C.C.1882) 13 F. 229, 231, "the business of a laundry—that is, the washing of clothing and cloths of various kinds, and ironing or pressing them to a condition to be used—is not of itself against good morals, or contrary to public order or decency. It is not offensive to the senses, or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. It would be absurd to affirm that it is." Remarks were added to the effect that the municipality has the power to regulate the method of operation and conduct so as to guard against any menace to the public health or safety. This the city of Oakland has done by the enactment of the other provisions of the ordinance in question. Without extending further the discussion of an obvious matter, it must be concluded that the reasons assigned in the decisions in the last-cited cases answer in the negative all of the contentions made in support of the validity of the further provision relating solely to "Hours," and are pertinent and compelling in arriving at the conclusion that that section of the ordinance is an unreasonable restriction upon the rights of laundry owners, operators, and employees in the city of Oakland, is in violation of article 1, § 13, of the State Constitution and the Fourteenth Amendment to the Federal Constitution, deprives the petitioner of his liberty and property without due process of law and denies him the equal protection of the law.

It follows that the petitioner should be discharged from custody, and it is so ordered.



6 Cal.2d 779

In the Matter of the Application of WONG WAY for Writ of Habeas Corpus.

Cr. 3974.

Supreme Court of California.

June 18, 1936.

In Bank.

John L. McNab, of San Francisco, for petitioner.

F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondent.

PER CURIAM.

In this case, as in the case of In re Byron Mark (Cal.Sup.) 58 P.(2d) 913, this day decided, a writ of habeas corpus was issued for the purpose of considering the validity of the arrest and conviction of the petitioner for a violation of section 5-8.22 of the same ordinance of the city of Oakland which was involved in the Mark Case. Inasmuch as each case depended upon identical questions of fact and law, the disposition of the matter in the Mark Case is controlling here.

It is therefore ordered that the petitioner be discharged from custody.

6 Cal.2d 500

PEOPLE v. WILLIAMS.

Cr. 3964.

Supreme Court of California.

June 17, 1936.

1. Criminal law ⊂⊃369(2)

Evidence logically tending to prove any fact necessary or pertinent to proof of crime charged is admissible, although tending to prove commission of other and distinct offenses, and to prejudice the accused in minds of jurors.

2. Criminal law ⊂⊃371(2)

In prosecution for larceny from the person by removing coin purse from woman's handbag, evidence that accused had opened purses of women at other stores shortly before commission of crime for which accused was prosecuted *held* admissible to rebut testimony accused stumbled upon coin purse by accident, as against contention such evidence was contrary to rule accused must be tried only on the offense charged.

In Bank.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Mrs. Ollie Williams was convicted of larceny from the person, and she appeals.

Affirmed.

Prior opinion, 51 P.(2d) 96.

Gladys Towles Root, William Crop, and Crop & Crop, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

SHENK, Justice.

The defendant was convicted on a charge of larceny from the person. She has appealed from the judgment entered upon a verdict.

There is no contention that the evidence is insufficient to support the verdict. The principal question presented is whether the court committed prejudicial error in permitting, over the objection of the defendant, evidence relating to prior attempts by the defendant to commit similar offenses. It is claimed that the evidence was inadmissible because it amounted to proof of offenses not charged in the information.

The prosecution sought to prove that a coin purse, containing money and found in the defendant's possession, was taken by her with the intent to steal it from the handbag carried by a Mrs. Henig while the latter was marketing in the Grand Central Market in Los Angeles. It was shown beyond contradiction that the coin purse belonged to Mrs. Henig and that it was in the defendant's possession when she was apprehended in the market by an officer from the police department. The defendant denied stealing the purse and testified that she stumbled over it and then picked it up from the floor of the market.

One witness testified that he and another officer assigned to work with him on pickpocket detail had been following the defendant; that he observed the defendant walk toward Mrs. Henig who was carrying some bundles and her handbag in front of her; that the defendant, as she came opposite Mrs. Henig, reached out with her left hand, opened the handbag and then passed her; that a few paces further she turned back and when she caught up with Mrs. Henig again she reached out with her left hand and took the coin purse out of Mrs. Henig's handbag. The witness testified that he then grasped the defendant's wrist and hand which held the coin purse, and that as he did so the defendant dropped the purse to the floor, saying at the same time, "I didn't take it, I found it on the floor."

The question is whether the trial court erred in admitting in evidence the further testimony of the officers that on the morning of the same day they had received from Kress' store a description of a woman who was suspected of pickpocket operations; that they followed the defendant, who answered the description, for about twenty minutes prior to the occurrence in the Grand Central Market, and that during that period they saw her open in a similar manner another woman's purse in one of the five and ten cent stores in the same neighborhood, but that before the defendant had caught up again with the woman the latter had closed her handbag; that a second attempt of the same nature occurred in another of the stores before the defendant entered the Grand Central Market.

[1, 2] The defendant contends that the admission of such evidence is contrary to the rule that the defendant must be tried only on the offense charged; that the evidence was not relevant to prove intent, a common scheme or plan, or absence of

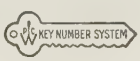
mistake or accident, and that its admission was prejudicial to her rights. It may be assumed that the act of taking the coin purse from the handbag carried by Mrs. Henig as proved by the prosecution, was sufficient, without more, to provide evidence of an intent to steal it, which was a necessary element of the crime charged. The attitude of the defendant caused the prosecution to deem it necessary to rebut by additional evidence the claim of her innocent purpose. In the cases relied upon by the defendant, such as People v. King, 23 Cal.App. 259, 137 P. 1076, evidence relating to distinct offenses was held inadmissible, not necessarily because it was evidence of offenses other than that charged in the information, but because under the facts of the particular cases evidence tending to prove such other offenses had no relevancy to prove the charge for which the defendant was then on trial. The test of admissibility in such cases is an affirmative answer to the inquiry: Is the evidence offered relevant to prove any material issue in the trial of the offense charged? And it is relevant if it logically tends to prove any fact necessary or pertinent to the proof of the crime charged, although it also tends to prove the commission of other and distinct offenses and to prejudice the defendant in the minds of the jurors. People v. Walters, 98 Cal. 138, 32 P. 864; People v. Lane, 101 Cal. 513, 36 P. 16; People v. Sanders, 114 Cal. 216, 230, 46 P. 153; People v. Cook, 148 Cal. 334, 340, 341, 83 P. 43; People v. Morani, 196 Cal. 154, 236 P. 135; Jones, Commentaries on Evidence, vol. 1, § 143, p. 725; Wigmore on Evidence, vol. 1 (2d Ed.) § 346, p. 654. It must appear to be obvious that evidence of similar conduct of the defendant, at least immediately prior to the commission of the offense charged, was relevant to rebut her testimony that she stumbled upon the purse by accident. There may be room for argument that in the present case such evidence was merely cumulative in view of the testimony of the officers that the defendant was actually observed in the act of opening Mrs. Henig's pocketbook and taking the coin purse therefrom. But without more the jury may have been put to it to determine whether to believe the testimony of the officers as to what their observations were with reference to the defendant's actions in taking the purse from Mrs. Henig's person, or to believe the defendant's testimony that she innocently stumbled over the purse and then picked it up from the floor. The evidence of her prior conduct was a distinct aid to the jury in arriving at a verdict.

The following cases, in addition to the authorities hereinbefore cited, tend to support our conclusion that the questioned evidence was relevant and admissible: People v. Lopez, 59 Cal. 362; People v. Cunningham, 66 Cal. 668, 4 P. 1144, 6 P. 700, 846; People v. Rogers, 71 Cal. 565, 12 P. 679; People v. Fehrenbach, 102 Cal. 394, 36 P. 678.

We have examined the other contentions made by the defendant and have concluded that no prejudicial error or misconduct is attributable either to the court or to the district attorney in the course of the trial.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.



6 Cal.2d 523

BOGGS et ux. v. NORTH AMERICAN BOND & MORTGAGE CO. et al.

L. A. 15645.

Supreme Court of California.

June 18, 1936.

1. Appeal and error ⊂⊃83

Determination of court on petition for postponement of sale under moratorium act is "final judgment" in special proceeding and hence appealable notwithstanding such determination is denominated an "order" in act (Code Civ.Proc. § 963, subd. 1; St.1935, p. 1210, § 5).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

2. Appeal and error ⊂⊃460(2)

Appeal from order dismissing petition for postponement of sale under moratorium act does not stay right of trustee to proceed with sale; order being self-executing (St. 1935, p. 1208).

3. Appeal and error ⊂⊃781(4)

Sale under trust deed pending appeal by debtor from dismissal of petition under

moratorium act for postponement of trustee's sale *held* not to render questions moot so as to authorize dismissal of appeal, since sale would be set aside if trial judge had abused his discretion, where assignee of trust deed purchased at trustee's sale (St. 1935, p. 1211, § 10; p. 1215, § 23).

4. Appeal and error ⊜983(3)

Order denying postponement of sale under moratorium act will not be reversed on appeal except where it clearly appears as matter of law that trial court abused its discretion (St.1935, p. 1208).

5. Appeal and error ⊜811

On motion to dismiss appeal from judgment dismissing petition for postponement of sale under trust deed on ground questions involved had become moot owing to sale under trust deed pending appeal, Supreme Court could not pass on whether trial judge had abused his discretion, since effect would be to advance case out of its regular order (St.1935, p. 1208).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Clarence S. Boggs and wife against the North American Bond & Mortgage Company, a corporation, Louis C. Drapeau, building and loan commissioner of the state of California, and others, under the moratorium and trust deed acts (St.1935, p. 1208). From an adverse judgment, the petitioners appeal. On motion of Louis C. Drapeau to dismiss appeal.

Motion denied.

A. V. Kaufman and Golden & Kaufman, all of Los Angeles, for appellants.

James C. Ingebretsen, of Los Angeles, for respondents.

SEAWELL, Justice.

Respondent Louis C. Drapeau moved to dismiss the appeal herein on the ground that the questions involved have become moot. Respondent is building and loan commissioner of the state of California, and in this capacity is in charge of the liquidation of California Mutual Building & Loan Association. We are of the view that the motion to dismiss the appeal must be denied.

Said California Mutual Building & Loan Association by assignment became the owner of a note and deed of trust executed by appellants Clarence S. Boggs and Margaret K. Boggs, which deed of trust covers apartment house property in the city of Los Angeles. Mr. and Mrs. Boggs filed a petition in the superior court of Los Angeles county under the Moratorium and Trust Deed Act of 1935 (Stats.1935, p. 1208; Deering's Codes, Laws and Const. Amdts., 1935 Supp., Act 5104a, p. 1336), alleging that respondent Louis C. Drapeau on behalf of California Mutual Building & Loan Association had filed a notice of default and election to sell under the power of sale contained in said deed of trust, and praying that the court restrain the defendants from proceeding with the sale. Said act provides that upon hearing "the court may make its order, if it finds equitable grounds for relief, ordering that such sale not be held until after such date as the court considers just and equitable, but in no event beyond February 1, 1937, or may make its order dismissing such proceeding." Section 10. In the instant case the court made its order denying and dismissing the petition, from which order the appeal herein is prosecuted by the Boggs.

[1] An order granting or dismissing a petition for postponement under the moratorium act is appealable. Although under section 5 of the moratorium act the determination of the court upon a petition for postponement of sale is denominated an "order," it is nevertheless a final judgment in a special proceeding within the meaning of subdivision 1, § 963, Code of Civil Procedure.

Respondent Louis C. Drapeau contends that the questions involved in the appeal herein have become moot for the reason that during the pendency of the appeal the trustee's sale was held. At said sale the property was purchased by California Mutual Building & Loan Association, which by assignment had become the holder of the deed of trust before the petition for postponement of sale was filed. Respondent Drapeau, as trustee in liquidation of said building and loan association, relies on a large number of cases in which it has been held that an appeal from an order refusing to grant or dissolving an injunction against the performance of a single act will be dismissed if the act is done pending the appeal. Wright v. Board

of Public Works, 163 Cal. 328, 125 P. 353; Bernard v. Weaber, 23 Cal.App. 532, 138 P. 941; 2 Cal.Jur. 125; 14 Cal.Jur. 210. It is the theory of these cases that after the act sought to be restrained has been done, it would be an idle judicial act to consider on appeal whether it should have been enjoined. This principle has a wide variety of valid applications, but it should not control in the instant case. We are of the view that if it be held on appeal that the trial judge abused the equitable discretion confided in him by the moratorium act in denying a postponement, a trustee's sale held pending the appeal taken by the debtor will be set aside where the beneficiary under the deed of trust or his assignee has purchased at the trustee's sale.

[2] The taking of an appeal from an order dismissing a petition for postponement does not stay the right of the trustee to proceed with the sale. The order of the Superior Court denying a petition for postponement is self-executing. The prosecution of an appeal from an order refusing to grant or dissolving an injunction does not create or revive an injunction pending the appeal. 2 Cal.Jur. 411, 438, 440; 23 Cal.Jur. 986. But if it is held on appeal that the debtor upon the showing made by him was entitled as a matter of law to a postponement, the sale will be set aside. Section 23 of the moratorium act provides that any sale of real property under a deed of trust made in violation of the act shall be voidable, except as against a bona fide purchaser or encumbrancer for value, at the instance of the record owner at the time of such sale. We are of the view that upon reversal of an order denying a postponement this section applies to a sale held pending the appeal.

A decree for foreclosure of a mortgage may be stayed pending an appeal by the mortgagor. If it is not stayed, the foreclosure sale may be held pending the appeal. But upon reversal on appeal the sale will be set aside if the mortgagee has purchased, either by the court on appeal (section 957, Code Civ.Proc.), or upon motion in the lower court. Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L.R.A. 419, 101 Am.St.Rep. 84; Reynolds v. Harris, 14 Cal. 667, 76 Am.Dec. 459; Mills v. Laing, 38 Cal.App. 776, 177 P. 493; 2 Cal. Jur. 1000, 1062; 2 R.C.L. 291–301. It is also held that where property has been purchased by a party to the action upon an execution sale had upon a money judgment, the sale will be set aside where the judgment is reversed on appeal. Respondent contends that the situation in the mortgage foreclosure and execution sale cases is not analogous. In said cases the basis of the sale is a judicial decree. Upon reversal of the judgment or decree the foundation for the sale proceedings is destroyed, and it is proper that restitution should be made. But where moratorium relief is denied, the sale is held under a power of sale contained in the trust deed. It does not depend upon a decree which is later reversed, but upon a provision in the contract of the parties. This difference exists, but nevertheless the cases afford support for the conclusion we reach herein.

Wright v. Board of Public Works, 163 Cal. 328, 125 P. 353; Faria v. Brandon, 206 Cal. 730, 276 P. 106; Shultz v. O'Rourke, 118 Cal.App. 207, 4 P.(2d) 797; and Bernard v. Weaber, 23 Cal.App. 532, 138 P. 941, present applications of the rule that an appeal from an order refusing to grant an injunction will be dismissed if the act is done pending the appeal. In Wright v. Board of Public Works, supra, plaintiffs sought to restrain sale of their property for delinquent taxes, on the ground of irregularities in the assessment. Pending appeal from an order denying the injunction, the tax sale was held. The court dismissed the appeal. We recognized that by reason of the claimed invalidity in the assessment the plaintiffs might be entitled to other relief, as, for example, an injunction against the execution of deeds to the purchasers at the tax sale. But as the sale had taken place, we refused to review the grounds of alleged invalidity in the assessment, on which it was claimed the injunction against sale should have been granted, and on which plaintiffs' right to other relief would depend. But on appeal from an order denying postponement of sale under the moratorium act, if it is held that when the trustee's sale takes place pending the appeal, the proceeding becomes moot, the debtor will be left without remedy, although the Superior Court judge may have abused his discretion. Thus he will be deprived of relief under the moratorium act. The order denying the postponement would become final upon dismissal of an appeal therefrom, and would be res judicata between the parties. The debtor could not thereafter bring another action, claiming that the trial court

should in the first instance have granted an injunction against sale, and on that ground procure the sale to be set aside.

In Faria v. Brandon, 206 Cal. 730, 276 P. 106, an injunction was sought to restrain an execution sale upon a money judgment, apparently on the ground that the property levied on was not owned by the judgment debtor. We held on appeal from the order denying the injunction that a conveyance of the property made by the judgment debtor to his wife was in fraud of creditors, and, further, that as the sale had taken place the question was moot. In that case if the property had belonged to a third person, notwithstanding the appeal had been dismissed on the ground that the sale rendered the injunction proceeding moot, the third person would not be without remedy to establish his rights in the property. In Lansdown v. Smith & Sons R. Corporation, Ltd., 1 Cal.App. (2d) 618, 37 P.(2d) 127, it was held that after a trustee's sale had taken place, an appeal by a junior incumbrancer from an order denying an injunction against sale became moot. In this case, also, if the sale was in fact unauthorized and wrongful as to the junior incumbrancer, he would have other remedies. In these cases the grounds urged as affecting the validity of the sales concerned other matters than an alleged abuse of judicial discretion reviewable only on appeal in the proceeding in which discretion is alleged to have been abused.

Mention must also be made of Brennan v. American Trust Co., 3 Cal.(2d) 635, 45 P.(2d) 207. In that case the trustors under a deed of trust sought to enjoin a trustee's sale before the enactment of the moratorium legislation authorizing the postponement of sale. The injunction was denied and the debtors appealed. Respondents made a motion in this court to dismiss the appeal or affirm judgment. Pending the appeal, the trustee's sale had been held, and it appears from the record that at such sale the beneficiaries under the deed of trust were the purchasers. Appellants contended that in times of economic depression the courts had general equitable power to restrain a trustee's sale which would be inequitable. In affirming the judgment, we held that this right did not exist independent of statute. As noted above, the injunction was sought before the enactment of the Moratorium Act authorizing the postponement of trustee's sale. Our opinion further states that the actual sale of the property rendered the injunction proceeding moot. This statement was not necessary to the decision, inasmuch as we held that the judgment should be affirmed on the ground that the trial court properly denied the injunction, and in so far as it is in conflict with our holding herein it is disapproved.

We confine our decision herein to cases where the beneficiary under the deed of trust or his assignee purchases at the trustee's sale. We do not determine whether upon a reversal of an order denying a petition for postponement a trustee's sale held pending the appeal will be set aside where a third party is the purchaser.

[3-5] Respondent's motion to dismiss the appeal on the ground that the questions involved therein have become moot must be denied. In denying the motion to dismiss the appeal, we express no opinion on the merits of the questions involved on the appeal. It may be said that it is only where it clearly appears that as a matter of law the trial court abused its discretion in denying a postponement, that an order denying such postponement will be reversed on appeal. In the instant case, on the consideration of the motion to dismiss, we cannot consider the appeal on its merits. That is, we cannot pass on the question whether the judge below abused his discretion in denying the postponement. 2 Cal.Jur. 749, and cases there cited. The effect of considering the case on its merits would be to advance it out of its regular order. Respondent moved to dismiss the appeal on the ground that the questions involved had become moot, and that a disposition of the appeal on its merits would not affect any substantial rights of the parties. He did not move to dismiss the appeal or affirm judgment under rule 3 of this court. If he had made a motion under this rule, it would be competent for the court upon a proper submission of the cause to consider the appeal on its merits, but respondent did not make a motion under said section.

The motion to dismiss the appeal is denied.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; LANGDON, J.

14 Cal.App.2d 472

BOYES v. EVANS et al.

Civ. 5544.

District Court of Appeal, Third District, California.

June 5, 1936.

Rehearing Denied July 3, 1936.

1. Appeal and error ⇐1011(1)

Appellate court could not disturb judgment for plaintiff in action for personal injuries received in unprovoked assault because evidence was irreconcilably conflicting, unless plaintiff's evidence appeared on its face to be inherently improbable.

2. Appeal and error ⇐994(3), 1012(1)

In trial by court without jury, weight and sufficiency of evidence and credibility of witnesses is for trial judge.

3. Assault and battery ⇐35

In action by Chinese for personal injuries received in unprovoked assault by narcotic inspector, evidence *held* to support findings that inspector without cause violently beat Chinese while searching person and home without warrant on suspicion so as to bruise him painfully and impair his health, and to support judgment against inspector (Pen.Code, §§ 149, 307; Gen.Laws Supp.1933, Act 5323).

4. Assault and battery ⇐7

Narcotic inspector or officer who commits unprovoked assault and battery on individual without cause in apprehending individual without warrant on suspicion or upon mere information that individual may be guilty of misdemeanor becomes a "trespasser" and is liable as such for injuries inflicted (Pen.Code, §§ 149, 307; Gen.Laws Supp.1933, Act 5323).

[Ed. Note.—For other definitions of "Trespasser," see Words & Phrases.]

5. Arrest ⇐63(4)

Ordinarily, officer has no legal right to attempt to arrest for misdemeanor on suspicion or even on mere information of another person without first procuring warrant (Pen.Code, §§ 149, 307; Gen.Laws Supp. 1933, Act 5323).

6. Witnesses ⇐275(2)

In action for personal injuries received in unprovoked assault, sustaining objection to defendants' question whether plaintiff had authorized member of family to settle case *held* not error where there was no proof or offer to prove that plaintiff belonged to family of person referred to and entire offer was based on hearsay evidence.

7. Evidence ⇐213(1)

It is not permissible to show that party to litigation has offered to compromise cause, and rule excludes not only offer, but also all negotiations with relation to compromise.

8. Appeal and error ⇐1047(3)

In action for personal injuries received in unprovoked assault by officer, denying officers' motion to strike out statement that immediately after beating plaintiff told witness that some officers had knocked him down and kicked him *held* harmless where plaintiff had testified to same assertion, notwithstanding statement was too remote to constitute part of res gestæ.

9. Appeal and error ⇐1048(6)

In action for $25,000 general damages for personal injuries received in unprovoked assault, sustaining plaintiff's objection to cross-examination question whether plaintiff had changed his mind as to amount of damages he was entitled to since filing complaint *held* harmless.

10. Assault and battery ⇐24(1)

Prayer for general damages in action for personal injuries received in unprovoked assault included compensation for pain and suffering.

11. Assault and battery ⇐38

Compensation allowed for pain and suffering in action for personal injuries received in unprovoked assault is within court's or jury's discretion.

12. Evidence ⇐43(1)
Witnesses ⇐346

It is common knowledge that counsel often inserts in pleading maximum figures claimed for general damages in suit involving pain and suffering, which are sometimes extravagant, and fact that client verifies complaint containing such figures throws no substantial light on client's veracity.

13. Assault and battery ⇐14

$500 general damages and $500 punitive damages to Chinese violently beaten by narcotic inspector without cause while searching Chinese and his house without warrant on suspicion so as to bruise Chinese pain-

fully and impair his health *held* not excessive (Civ.Code, § 3294; Pen.Code, §§ 149, 307; Gen.Laws Supp.1933, Act 5323).

14. Appeal and error ⊂1004(1)
Damages ⊂208(8)

Amount to be allowed as punitive damages in action for personal injuries received in unprovoked assault is largely within judge's or jury's discretion, and will not be disturbed unless it is grossly excessive or appears to have been result of passion or prejudice (Civ.Code, § 3294).

15. Assault and battery ⊂35

Evidence that narcotic inspector beat and kicked Chinese while searching person and home without warrant on suspicion *held* to show malice on inspector's part, entitling Chinese to punitive damages (Civ.Code, § 3294; Pen.Code, §§ 149, 307; Gen.Laws Supp.1933, Act 5323).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Suit by Lim Sing against Harry D. Evans and another. Plaintiff having died during pendency of the action, Florence Boyes, as administratrix of the estate of Lim Sing, deceased, was substituted as plaintiff and respondent. From the judgment, the named defendant appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Seibert L. Sexton, Deputy Atty. Gen., for appellant.

Foltz, Rendom & Wallace, of Stockton, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, Harry D. Evans, has appealed from a judgment which was rendered against him in a suit for damages for personal injuries received by the deceased in an unprovoked assault upon him. The cause was tried by the court sitting without a jury. The court found that the appellant, without cause, violently beat and struck the deceased, knocking him to the floor, and that he kicked him upon his thigh, sides, and back with such force as to severely bruise and injure him, causing grievous pain and suffering and resulting in the impairing of his health. Judgment was accordingly rendered against the appellant for special damages in the sum of $136, general damages in the sum of $500 and punitive damages in the further sum of $1,000. Upon motion for a new trial the punitive damages were reduced to the sum of $500; the total damages were fixed at the sum of $17,136 and costs of suit, and the motion for a new trial was thereupon denied. From this judgment the defendant Harry D. Evans has appealed.

It is contended the findings and judgment are not supported by the evidence for the reason that the plaintiff's testimony is inherently improbable; that the court erred in admitting and rejecting testimony during the course of the trial and that the record contains no evidence of malice in fact on the part of the appellant to support the award of exemplary damages.

[1, 2] After reading the entire record, we are convinced the plaintiff's evidence is not inherently improbable. In fact, certain circumstances strongly support the findings of the court to the effect that Lim Sing, the plaintiff's intestate, received from the appellant a brutal beating and kicking which may have resulted in his subsequent death. The evidence is irreconcilably conflicting, but unless the plaintiff's evidence appears on its face to be inherently improbable, this court has no power to disturb the judgment on that account. The trial judge is a man of high character and wide judicial experience. He listened to the evidence and observed the witnesses on the stand. It is exclusively his province to judge of the weight and sufficiency of the evidence, and the credibility of witnesses. We have no disposition to disturb his judgment in those matters.

While the testimony is hopelessly conflicting, there is evidence to support the following statement of facts: Lim Sing was a slight, little Chinese weighing only 114 pounds and being 62 years of age. He had lived in America for 38 years. He seems to have been an industrious, harmless old man, whose occupation was that of a cook during most of his residence in this country. He lived at number 115 East Sonora street in Stockton, in the vicinity of which for many years he had conducted the Yokohama Restaurant, in company with two partners. The restaurant was generously patronized by Chinese customers. He did the cooking for that restaurant, for which he was paid $75 a month. His countrymen testified they had never heard of his smoking or dealing in opium or any of its derivatives. It is evident he

was a law-abiding person. While it does appear that a man by the name of Lim Sing in company with a dozen other Chinese was arrested in an opium den in Oakland about a year before the assault which is involved in this case occurred, the charge was dismissed against them. He denied that he was ever arrested at Oakland on an opium charge or at all, and substantial evidence was adduced to prove an alibi on his part to the effect that he was then in Stockton attending to his regular business. At least that is the only charge which was attempted to be proved against him in spite of his many years of residence in California and in the city of Stockton.

Lee Soon ran a cigar stand at the corner near the Yokohama Restaurant, where Lim Sing was accustomed to buy cigarettes. Lee Soon lived with his wife and several children in the second story of a building just across the street from his cigar stand. The appellant was a large man much heavier and stronger than Lim Sing. He was an inspector employed by the California Narcotic Board, working under the supervision of Mr. Walker. In company with Mr. George H. Hoffman, another narcotic inspector, the appellant went to Stockton to investigate alleged violations of the narcotic laws. He claims to have met a Chinese janitor of the International Hotel of Stockton about August 25, 1934, whom he characterized as a smoker and a peddler of "dope," who, under a threat of arrest, pointed out Lim Sing as a "big peddler of dope." It is significant that the appellant did not remember the janitor's name; he made no effort to apprehend the janitor for violating the law; he never afterwards saw him, and he did not know where he could be located. It does not appear that the janitor told Evans that Lim Sing was a well-known Chinese restaurant man in that city for many years, or where he lived. Evans made no effort to procure a warrant either to arrest Lim Sing or to search his premises for narcotics.

Shortly after noon on August 27, 1934, Evans and Hoffman were going down El Dorado street in Stockton in the vicinity of the Yokohama Restaurant. They were not provided with search warrants and do not claim they were searching for any particular person. Lim Sing had just finished eating his lunch and was crossing the street to purchase some cigarettes at the cigar stand of his friend Lee Soon. As he entered the cigar stand, Evans and Hoffman noticed him and followed after him. Evans seized the Chinese as he reached the counter and charged him with throwing some mysterious package back of the counter, but made no effort to search for it. He then shook Lim Sing and accused him of having opium in his possession. The frightened and helpless Chinese denied that he possessed or ever used opium or any other narcotics. He repeatedly exclaimed "wassa-malla, wassa-malla, me no have." Evans, however, searched his person, turning his pockets inside out and scattering his money about the floor. Then, on suspicion that he lived in the house across the street, Evans rushed him over there and entered the rooms where Lee Soon and his family lived. Finding no evidence of the presence of narcotics, he hurried the Chinese back to the cigar store, and seeing his money still scattered about the floor, he ordered him to pick it up. Evans then demanded to know where Lim Sing lived. The Chinese produced a water receipt and said "I show." It was marked number 115 East Sonora street. The two inspectors then rushed the little Chinese off for his home, hustling him up the outside stairway and forcing him to unlock the door and admit them. They shoved him into the room and demanded that he show them where he kept his dope. Vainly he protested that he had no opium. Evans roughly shoved and hauled the Chinese about, striking him repeatedly and threatening and cursing him violently. Having searched the rooms without finding any trace of narcotics, Evans demanded that he should get his key and unlock a trunk which was there upon the floor. While Lim Sing was protesting and tremblingly trying to unlock the trunk, Evans struck and kicked him repeatedly until he fell upon the floor, where he lay crying and screaming for help. Several neighbors heard his cries for help. One Americanized Chinese boy nicknamed George Young, who worked at a neighboring gas station, heard the cries and hastened to Lim Sing's room. As he looked in through the partly open doorway he saw Evans violently kicking the prostrate body of the Chinese. Young shouted, "What is the matter?" Evans then rushed out and seizing Young, he pulled him into the room and shoved him down on a bed, saying, in a threatening manner, "Don't get up, * * * sit down, you s—— of—— a b——, * * * if you get up, I going to kill you." The boy says that while he sat there he heard Evans curse Lim Sing and saw him kick him twice. Being unable

to unlock the trunk, Lim Sing says that the inspectors broke it open. They finally ordered Young to leave the room. He went away. No opium or narcotics of any sort were found. Several witnesses testify that they saw the two inspectors leaving the room about 1 o'clock.

Within an hour or two after the beating, Dr. Edwin Frost was called to treat Lim Sing's wounds. He testified that he found him helplessly lying in bed, unable to get up; that he was complaining of severe pain in his right side; that he found bruises on his right hip and side, one of which was the size of his hand; that there were also bruises over the lower ribs and on the right elbow, with "a lot of swelling." There were no broken bones or incisions of the flesh. Lim Sing was unable to move his leg without great pain. He was suffering from severe nervous shock. He was first treated by the doctor and then sent to the hospital, where he remained for about a week under the care of Dr. Frost. When he came out of the hospital he had lost about ten pounds in weight. Several Chinese witnesses said that he was suffering from nervous shock and that he seemed to be mentally deranged. He moaned and cried out in the nighttime and was terrorized when he saw an officer. He died March 15, 1936, after this suit was tried and the judgment had been rendered. He was a witness at the trial.

It is true that both inspectors denied they searched Lim Sing at the cigar stand or elsewhere, or that either of them cursed, struck, kicked or roughly handled him. They did admit that they went with him to his room and "looked around" for dope, but found none. In spite of the denial that either of the inspectors had searched the person of Lim Sing for opium, Mr. Evans admitted on cross-examination conducted under the provisions of section 2055 of the Code of Civil Procedure as follows:

"Q. His money didn't fall on the floor there at all? A. Yes, his money fell on the floor.

"Q. You didn't put your hands on him at all down in that store? A. We searched him there, yes.

"Q. What? A. We searched him.

"Q. How did you search him? A. Looked in his pockets.

"Q. How did you look in his pockets? A. Just reached in with our hands."

On cross-examination of Mr. Evans, for the purpose of impeachment, he was asked and answered the following questions as follows, which were read from a previous preliminary examination of another case, with reference to the kicking and beating of Lim Sing in his room:

"Q. Did you use some force on him there? A. No, not that I know of.

"Q. You didn't get him down, he wasn't on the floor when you were kicking him while you were there? A. No, sir, I don't think so."

[3] The admissions of Mr. Evans concerning the episode in the cigar stand, his examination of the rooms of Lee Soon, the hustling of Lim Sing over to his rooms, and the search of those rooms, all without a warrant and without legal authorization to do so; the outcries of the Chinese which were heard by several countrymen and brought one boy to his aid, and the fact that almost immediately after the inspectors had left his rooms, Lim Sing was found by the doctor who was called, injured and helpless, with numerous severe contusions and bruises just where he said he had been kicked, may be accounted for in no other reasonable way than that which is related by the Chinese. Indeed, it seems improbable that his injuries and bruises were inflicted in any other manner. The evidence of Mr. Evans' unwarranted beating and kicking of the Chinese seems very convincing. These facts amply support the findings and judgment.

[4, 5] A narcotic inspector or peace officer who commits an unprovoked assault and battery on an individual without cause in apprehending him without a warrant on suspicion or upon mere information that the accused may be guilty of a misdemeanor becomes a trespasser and is liable as such for the injuries inflicted. Ordinarily an officer has no legal right to attempt to make an arrest for a misdemeanor on suspicion or even on mere information of another person without first procuring a warrant therefor. 5 C.J. 639, § 37; Penal Code, § 149. The furnishing of narcotics is a mere misdemeanor. Penal Code, § 307; Narcotic Act of California, Stats. of Calif. 1929, p. 380, and amendments, Deering's Supp. of 1933, p. 1985, Act 5323.

[6, 7] It was not error for the court to sustain an objection on the part of the plaintiff to a question propounded to Lim

Sing on cross-examination, as follows: "Q. Did you ever authorize Lum Chin Fong, in Oakland, to settle this case for you?" In support of this question counsel for the defendants stated that, "It has come to our attention that this man, or rather a memmer of the Lum family, of which this man is a member, has approached the Narcotic Division for the purpose, as stated to them, he would dismiss this suit if the Narcotic Division would waive two felony complaints against two members of the Lum family." The question to which the objection was sustained is incompetent, and the answer was properly excluded. There is no proof and no offer to prove that Lim Sing belonged to the Lum family. The entire offer was based upon hearsay evidence. A mere offer to compromise the suit and dismiss it in consideration of the "waiving of criminal complaints against two members of the Lum family" would not affect the merits of this suit. It is a well-established rule of law that it is not permissible to show that a party to litigation has offered to compromise the cause. The rule not only excludes the offer to compromise, but also all negotiations with relation thereto. 22 C.J. 308, sec. 347.

[8] It was harmless to deny defendants' motion to strike out a statement made by the witness, Fong Duck, who went to the room of Lim Sing, immediately after the beating occurred and found him lying on the floor crying in pain, to the effect that "He (Lim Sing) said a couple of officers knock him down and kicked him." This statement was merely cumulative. Lim Sing was a witness at the trial and testified to exactly that assertion. The statement may be deemed to have been too remote to constitute a part of the res gestæ, but it was harmless.

[9-12] Likewise, it was harmless to sustain plaintiff's objection to the question addressed to Lim Sing on cross-examination, as follows: "Have you changed your mind as to the amount of damages you are entitled to since the filing of this complaint?" There is no merit in this question. The complaint prays for general damages in the sum of $25,000. This includes compensation for pain and suffering, which element is necessarily uncertain and largely within the discretion of the court or jury. It is a well-known fact that counsel often inserts in a pleading the maximum figures claimed for general damages in a suit involving pain and suffering, which figures are sometimes extravagant. The fact that a client verifies a complaint containing such figures, even though they be deemed to be extravagant, throws no substantial light on the veracity of the client.

[13-15] The amount of general damages which was allowed is not excessive. We are of the opinion the award was very conservative.

Nor is the sum allowed as punitive damages erroneous or excessive. The court first allowed $1,000 as exemplary damages, but, on motion for a new trial, reduced that sum to $500. That sum is not out of proportion to the amount of general damages which was allowed. The amount to be allowed as punitive damages is largely within the discretion of the judge or jury, and will not be disturbed unless it is grossly excessive or appears to have been the result of passion or prejudice. 8 Cal.Jur., p. 866, § 109; 8 R.C.L., p. 680, § 218. It is necessary that punitive damages must be supported by substantial evidence that the accused person was guilty of "oppression, fraud, or malice, express or implied." Civ. Code, § 3294. The present record contains ample evidence of oppression and implied malice. If the beating and kicking of an individual on the part of an officer who wrongfully searches his person and home without a warrant on mere suspicion created by an unreliable person who apparently had an ulterior motive in pointing out the victim to the officer as a user or peddler of narcotics, does not constitute oppression, it would be difficult to find a case warranting that conclusion on the part of a trial judge. Moreover, it is a reasonable assumption, from the circumstances of this case, that the appellant discredited the statements of Lim Sing. This resentment was probably caused by race prejudice against an inoffensive Chinese. It is therefore evident that the unprovoked attack was prompted by malice. The cursing and beating of Lim Sing under such circumstances furnish substantial evidence of malice on the part of the appellant.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

14 Cal.App.2d 716

STANTON v. GUARANTY LIQUIDATING CORPORATION.

Civ. 10957.

District Court of Appeal, Second District, Division 2, California.

June 22, 1936.

1. Contracts ⇐156

When general and particular provisions of a contract are inconsistent, the particular provisions are controlling (Code Civ.Proc. § 1959).

2. Landlord and tenant ⇐133(2)

Lease providing that in event of loss of leased property through foreclosure, there should be no liability for damages to tenant, and containing subsequent provision that in event of foreclosure landlord could either permit tenant to harvest crop or reimburse tenant for value of work performed *held* to require landlord on foreclosure to reimburse tenant for value of work and labor performed, particular provision in lease controlling over general provision (Civ.Code, §§ 1641, 1652; Code Civ.Proc. § 1959).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by F. E. Stanton against the Guaranty Liquidating Corporation. From an adverse judgment, the defendant appeals.

Affirmed.

George W. Fenimore, of Los Angeles, for appellant.

John Oliver, of Los Angeles, for respondent.

WOOD, Justice.

Defendant appeals from a judgment in plaintiff's favor in the sum of $286.70, which was found by the court to be the fair value of work and labor performed on premises leased by plaintiff from defendant.

Certain ranch property was leased by plaintiff for the term of thirteen months commencing December 1, 1934. The lease contained the following provisions: "In the event the property should be sold by lessor during the term of this lease, this lease will be terminated upon the expiration of thirty days from the date of service of a written notice to quit upon said lessee. In the event of foreclosure of the above described property, or in the event lessor fails to protect his interest in the equity in said property, lessee agrees to quit the premises upon demand in writing by lessor, or of the legal holder of said property, and further agrees that there shall be no liability to lessor for damages as the result of the termination of this lease by the occurrence of one or more of the above contingencies. In the event of sale, foreclosure or loss of property by lessor during the term of this lease the lessor has the option of either permitting the lessee to harvest the crops planted at time written notice has been served OR the lessor agrees to reimburse lessee for a fair value of the work and labor performed on said premises, said fair value to be agreed upon by lessor and lessee or to be determined by three (3) arbiters, one to be appointed by each of said parties and the third to be appointed jointly by said parties."

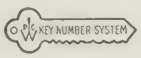
The defendant lost the property through foreclosure proceedings and the defendant surrendered possession of the property on written demand of the holder of the legal title.

[1, 2] Appellant's statement of the question involved is as follows: "Where the parties execute a lease on agricultural property, and provide that in the event of loss of the property through foreclosure, that there shall be no liability for damages to the lessor, does a later provision in the same lease, providing that lessor, in the event of sale or foreclosure, has the option of either permitting the lessee to harvest the crops or of agreeing to reimburse lessee for the fair value of the work and labor performed, impose an obligation on the lessor, when foreclosure occurs, to reimburse the lessee for the value of his work and labor?" Appellant points out that the provisions of the lease above quoted are inconsistent and argues that the language used in the first part of the lease, "and further agrees that there shall be no liability to lessor for damages as the result of the termination of this lease by the occurrence of one or more of the above contingencies," relieves it from making payment to plaintiff. We cannot agree with this contention. A contract must be construed in its entirety and the intention of the parties must be gathered from the whole instrument taking it by its four corners. Civ.Code, § 1641. The general provision above quoted is followed by a special provision whereby defendant agreed that in certain circumstances following the fore-

closure he would pay to plaintiff the fair value of the work and labor performed on the premises. When general and particular provisions of a contract are inconsistent, the particular provisions are controlling. Code Civ.Proc. § 1959. In holding that the parties intended that defendant should be bound by the special provision, the trial court correctly interpreted the contract of the parties. The judgment of the trial court is in conformity with "the general intent and purpose of the whole contract." Civ.Code, § 1652.

The judgment is affirmed.

We concur: GOULD, Justice pro tem.; CRAIL, P. J.



14 Cal.App.2d 673

EDLUND et al. v. LOS ANGELES RY. et al.

Civ. 10477.

District Court of Appeal, Second District, Division 1, California.

June 19, 1936.

Hearing Denied by Supreme Court Aug. 17, 1936.

1. Negligence ⇐68

As regards question of contributory negligence, person may not continue to assume that law is being observed after knowing, or having opportunity by use of reasonable care to know, that it is not being observed.

2. Automobiles ⇐226(1)

Failure of motorist to observe in morning of clear day that bus was stopped on street in full view so that motorist ran into rear end of bus *held* contributory negligence as matter of law, barring recovery for injuries received in collision, notwithstanding negligence, if any, of bus driver in stopping bus with rear wheels 10 feet from nearest curb in violation of city ordinance.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Esther Bernice Edlund, a minor, by Andrew G. Edlund, her guardian ad litem, and another, against the Los Angeles Railway and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Lon A. Brooks and Dwight H. Reay, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (Penn Cummings, of Los Angeles, of counsel), for respondents.

SHINN, Justice pro tem.

[1, 2] At about 8:35 in the morning of a clear day, plaintiff Esther Bernice Edlund, aged 20 years, drove a coupé into the rear end of defendant's motorbus. If in so doing she was guilty of contributory negligence as a matter of law, the direction of the verdict by the court was proper; otherwise it was erroneous. Esther Bernice Edlund is herein referred to as plaintiff. She had been following the bus easterly on wide Olympic boulevard. It preceded her across the intersection of La Brea, where she stopped for a traffic intersection signal, and she followed it through after the change of signals. In the third block east of La Brea the bus was stopped, backed ten or fifteen feet, and again stopped, with the front wheels slightly closer to the curb than the rear wheels and some ten feet away from the south curb. A man walked out to the bus and with one foot on the step stood talking through the open front door to the bus driver. At this time plaintiff's coupé, approaching at about twenty miles an hour, crashed into the rear of the bus. She had observed the bus as she approached it but thought it was continuing to move forward, realizing that it was stopped too late to avoid striking it. Although she applied the brake and endeavored to stop her car, it collided with the bus with great force. There was nothing to interfere with plaintiff's vision. She not only had ample opportunity to see the bus, but did see it. Her mistake was in judging that the bus was moving and not standing still, which was the obvious result of her failure to look with sufficient care to distinguish between a moving and a stationary bus. It is claimed that her failure to observe more closely was due to her expectation that the bus would not stop. In support of this contention she relies upon an ordinance of the city of Los Angeles making it unlawful to stand an automobile on a public street with the two right wheels more than two feet from the regularly established curb line, claiming that she had a right to expect compliance with the

terms of this ordinance. This explanation of her conduct, in our opinion, does not excuse her obvious negligence. The fact that the bus driver had no lawful excuse for standing his bus where he did is important upon the question of his negligence but has no bearing upon the question of plaintiff's negligence. Plaintiff is not less blameworthy because the stopping of the bus was unlawful. The accident would have happened just the same if the bus had stopped because the motor had ceased to function or for some other sufficient reason. There are many circumstances in which stopping a motor vehicle more than two feet from the curb line would not constitute a violation of the ordinance. Plaintiff had no right to assume that any vehicle stopping in her pathway would be violating the law. But conceding that the bus driver was guilty of negligence, and giving full effect to his conduct as a violation of the law, the rule that plaintiff had the right to rely upon his observing the law can be given little weight. One may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed. Plaintiff knew that the bus was preceding her and saw or, in the exercise of ordinary care, could have seen it in the act of stopping, backing up, and standing still while the driver engaged in conversation with a pedestrian. During all of this time plaintiff was approaching at a speed of twenty miles an hour. Had she been vigilant she could easily have observed her danger in time to stop or to turn aside. Having the fullest opportunity to look carefully, she saw the bus while it was standing still and thought it was moving. If she had been looking ahead, she no doubt would have seen a man standing in the street with one foot on the step of the bus and could scarcely have failed to realize from that fact that the bus was not moving. We can see no room for a reasonable difference of opinion upon the question of plaintiff's negligence. Had the case gone to the jury and resulted in a verdict in plaintiff's favor, an appeal would have called for a reversal. Under the rules governing the direction of verdicts by the court, a recital of which is unnecessary, plaintiff's contributory negligence was clearly established.

Cases in which motorists have been held guilty of negligence as a matter of law for running into vehicles which were stationary or slowly moving along streets in front of them are Christy v. Herbert M. Baruch Corp., 135 Cal.App. 355, 27 P.(2d) 660; Nicholson v. Porter, 118 Cal. App. 555, 5 P.(2d) 659; and Binford v. Purcell, 2 Cal.App.(2d) 87, 37 P.(2d) 732. The views we have expressed find support in these cases, which fully justify the action of the trial court in directing a verdict for the defendants in the instant case.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



14 Cal.App.2d 586

PEOPLE v. ROEBLING.

Civ. 1884.

District Court of Appeal, First District, Division 1, California.

June 16, 1936.

1. Criminal law ⇐531(3)

Admission of confession of defendant charged with lascivious acts on boy *held* not abuse of discretion where evidence as to whether confession was obtained from defendant while in drunken stupor was conflicting (Penal Code, § 288, as amended by St.1933, p. 1028).

2. Criminal law ⇐532(2)

Admissibility of confession rests in judicial discretion of trial court, and in absence of showing of abuse of discretion trial court's action will not be disturbed.

3. Infants ⇐20

Evidence *held* to sustain conviction of lascivious acts on boy (Penal Code, § 288, as amended by St.1933, p. 1028).

4. Criminal law ⇐660

Trial court is entitled to have its alleged transgressions called to its attention so that any possible prejudice caused thereby can be removed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Criminal law ⇐656(8), 660

Remark of trial court in reply to defendant's counsel that signature to confession alleged to have been obtained while defendant was in drunken stupor was a "wonderfully firm hand for a drunken man" *held* not misconduct where no objection nor request that jury be instructed to disregard it was made, especially in view of constitutional amendment permitting comment on facts.

6. Criminal law ⇐656(8), 660

Remark of trial court that drunken men and children tell the truth in reply to quotation on drunkenness by counsel for defendant who was seeking to exclude confession on ground defendant had signed it in drunken stupor *held* not misconduct where no objection was made and no admonition to jury was requested, especially in view of constitutional amendment permitting comment upon facts (Const. art. 1, § 13, as amended in 1934).

7. Indictment and information ⇐176

Where time is not of essence of crime it may be proved that act was committed at any time before information and within period of limitations (Const. art. 1, § 13, as amended in 1934).

8. Criminal law ⇐1032(7)
Indictment and information ⇐176

Failure to prove that lascivious act on boy occurred on day charged in information did not justify reversal where evidence showed offense was committed within period of limitations and defendant did not request an election as to particular act on which prosecution would rely, although boy in general way testified to other similar acts (Penal Code, § 288, as amended by St. 1933, p. 1028).

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

William Roebling was convicted of lewd and lascivious conduct on child, and he appeals.

Affirmed.

William J. Gloria, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Defendant was charged, tried, and convicted of violating section 288 of the Penal Code, as amended by St.1933, p. 1028. Motion for a new trial was made and denied and defendant was sentenced to the state prison. He appeals from the judgment and order denying his motion for a new trial.

[1-3] He first complains of the insufficiency of the evidence. In support of this contention he claims that he was convicted solely on a confession signed by him, which was neither free nor voluntary, and which was obtained from him while he was in a drunken stupor. There is a conflict in the evidence as to the drunken condition of appellant when he signed the statement. The testimony of the officer concerning his condition at that time fully justified the court in admitting the confession in evidence. The question of the admissibility of a confession is one for the exercise of judicial discretion of the trial court, and in the absence of a showing of abuse of that discretion its action will not be disturbed. Here there is no such showing. People v. Lehew, 209 Cal. 336, 287 P. 337. Moreover, the record shows that the boy upon whom the lascivious acts were perpetrated fully testified to their commission. This evidence was in itself sufficient to support the verdict. People v. Halistik, 69 Cal.App. 174, 230 P. 972.

[4-6] Appellant next complains of misconduct of the trial judge. When the admission of the confession was objected to, the trial judge, after an examination of the signature of defendant, stated it was a "wonderfully firm hand for a drunken man." The remark was not addressed to the jury, but was in reply to remarks made by the attorney for defendant. No objection was made to the remark of the judge and no request for an admonition to the jury to disregard it. A trial court is entitled to have its alleged transgressions called to its attention so that any possible prejudice caused thereby can be removed. 8 Cal. Jur. 510. Moreover, in view of the constitutional amendment of 1934 (Const. art. 1, § 13), a court is permitted to comment upon the facts. Another remark of the trial court is objected to as constituting misconduct. Attorney for defendant in commenting on the drunken condition of defendant when he made the confession gave a quotation from a certain author as to when a man was drunk, to which the judge replied

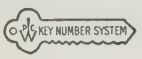
others had said that drunken men and children tell the truth. No objection was made to the remark and no admonition to the jury to disregard it was asked. What we have said concerning the other remark of the judge here applies.

Appellant objects to a question asked by the prosecution of one of the witnesses, which it is claimed revealed the fact that defendant had been arrested but not convicted for associating with a seven year old girl. The question did not carry the claimed implication. An objection to the question was sustained. We fail to see that the question in any manner prejudiced the rights of defendant.

[7, 8] And, finally, appellant claims that the prosecutor failed to prove that the offense charged occurred on the day alleged in the information. The prosecuting witness was not sure whether the offense was committed before or after the date charged. Where time is not of the essence of the crime it may be proved that the act was committed at any time before the information and within the period of limitations. People v. Becker, 140 Cal.App. 162, 35 P. (2d) 196. Here the evidence shows that the offense was committed well within the statutory period. Moreover, at no time did defendant request the district attorney to make any election as to the particular act upon which he would rely, although the boy in a general way testified to other similar acts.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.



14 Cal.App.2d 681

CLEVELAND v. GORE BROS., Inc., et al.

Civ. 10168.

District Court of Appeal, Second District, Division 1, California.

June 19, 1936.

Corporations ⇐617(1)

Corporate tenant's assignee suing during period when tenant's franchise was suspended *held* not entitled to recover damages from stockholders of corporate lessor under their statutory liability, for tenant's eviction, where stockholders had interposed defense of suspension of franchise while franchise was suspended, notwithstanding subsequent revival of franchise (Code Civ.Proc. §§ 359, 338, subd. 1).

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Ada Cleveland against Gore Bros., Inc., and others, wherein the Dome Billiard & Bowling Company was cross-defendant. From an adverse judgment, the plaintiff appeals.

Affirmed.

Irvin C. Louis and H. B. Pool, both of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, and Smith & Dunn, of Santa Monica, for respondents.

DESMOND, Justice pro tem.

Defendants in this case are stockholders of Ocean Park Realty Corporation, a California corporation. Plaintiff sought unsuccessfully to recover damages from them, under statutory liability, for an alleged tort, eviction of her assignor from leased premises. From the adverse judgment she now appeals, apparently, though not expressly stated, upon the ground that the evidence submitted did not justify certain findings of the trial court and the judgment based thereon.

In 1925, Ocean Park Realty Corporation leased to Dome Billiard & Bowling Company, also a California corporation, certain real property for a term of twenty years. According to plaintiff's complaint, and she sues as assignee of the Dome Billiard & Bowling Company, the eviction which forms the basis of her action took place on July 31, 1930. Within three years thereafter, on July 15, 1933, this action was filed. At 6 p. m. of the Saturday preceding the first Monday of March, 1933, all the corporate rights, privileges, and powers of Dome Billiard & Bowling Company, except the right to defend any action, had been suspended for failure to pay taxes and penalties imposed upon the corporation, the suspension continuing without interruption or revivor until May 10, 1934. Meantime, on November 29, 1933, defendants had filed an answer setting up the bar of the statute of limitations, section 338, subd. 1 and section 359 of

the Code of Civil Procedure; also, as a fourth separate answer and defense, alleging "that the franchise of said corporation was suspended by the Secretary of State of the State of California for non-payment of the franchise tax during the period from the 16th day of March, 1933, to and including the present time"; further, "that the above entitled action was filed on the 15th day of July, 1933, during the period that the franchise of said corporation was suspended by the Secretary of State of the State of California for non-payment of the franchise tax of said corporation."

The trial court being satisfied upon evidence adduced, and stipulations as to facts entered into, that the allegations of this fourth defense were true, heard no evidence upon the matter of the claimed eviction or alleged resulting damages, as being immaterial, but made appropriate findings upon the facts proved in regard to the suspension, and concluded, among other things, "that plaintiff, Ada Cleveland, being the agent and trustee of and for Dome Billiard & Bowling Company, a corporation, for the commencement and prosecution of this action, was subject to the same incapacities with respect to its commencement and prosecution as Dome Billiard & Bowling Company, during the period of time that its corporate rights, privileges and powers were suspended." Among additional conclusions were the following:

"That the revivor and restoration of the said corporate rights, privileges and powers of Dome Billiard and Bowling Company, a corporation, occurred on the 10th day of May, 1934, and did not have retroactive effect in respect to the commencement and prosecution of said action. * * *

"That, while the said action was pending from the date of the commencement thereof, that is, from the filing of the original complaint on file in this cause, still, between said last referred to date and the 10th day of May, 1934, the said action did not toll the Statute of Limitations in respect to the cause of action, if any, stated in plaintiff's complaint and/or first amended complaint on file herein. * * *

"The Court further concludes that the plaintiff is entitled to take nothing herein and the defendants are entitled to judgment for their costs of suit."

The judgment based on these findings and conclusions seems to us valid on the authority of Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446, and Smith v. Lewis, 211 Cal. 294, 295 P. 37. We have examined carefully the cases cited by appellant, particularly Kehrlein-Swinerton Const. Co. v. Rapken, 30 Cal. App. 11, 156 P. 972, and Maryland Casualty Co. v. Superior Court, 91 Cal.App. 356, 267 P. 169, 171, upon which counsel mainly relies, and find that they are not in point on the issues before us. For example, in the last-mentioned case, the court referring to an earlier case, California Savings & Loan Society v. Harris, 111 Cal. 133, 43 P. 525, says: "The corporation complied with the section of the Code before the defendant raised the point against it. It was held that a defense based upon the noncompliance with said section must be put forward during the time of the noncompliance with the section, and that, after the corporation had complied with the section, a defense based upon previous violation of the section would not lie." As we have noticed, in the case at bar, the defense was put forward during the time of noncompliance, when on November 29, 1933, the answer containing the fourth defense was filed, approximately six months before the date of the said revivor.

Judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



14 Cal.App.2d 622

GASPAR v. PERADA et al.

Civ. 9866.

District Court of Appeal, First District, Division 2, California.

June 17, 1936.

1. Appeal and error ⇨1010(1)

Findings that street sweeper suing for injuries sustained when hit by automobile was not contributorily negligent and that driver of automobile was negligent would not be disturbed where supported by ample evidence.

2. Appeal and error ⇨854(2)

Alleged erroneous reasons given by court in support of its decision were not part of judgment and were not reviewable on ap-

peal where judgment was amply supported by evidence.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by August Gaspar against John Perada and others. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Paul C. Dana and Francis Berton Perry, both of San Francisco, for appellants.

Jordan L. Martinelli and George H. Harlan, both of San Rafael, for respondent.

SPENCE, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff in an action brought to recover damages for injuries sustained by plaintiff when struck by an automobile driven by defendant John Perada. The cause was tried by the court sitting without a jury.

The accident occurred at about 4:45 a. m. on the morning of June 16, 1930. Plaintiff was a street sweeper, and, at the time of the accident, he was sweeping near the gutter on the north side of Fourth street between B and C streets in San Rafael. He was approximately in the middle of the block. Defendant Perada was driving his automobile in a westerly direction along Fourth street. It was after sunrise, and said defendant saw plaintiff as defendant reached B street. Plaintiff was engaged in sweeping and had his back turned toward said defendant. In proceeding along Fourth street, said defendant struck plaintiff, throwing him onto the sidewalk. Defendant continued on to C street, where he turned around and returned to the scene of the accident.

[1] Appellants contend that the evidence was insufficient to show negligence on the part of the driver of the automobile; that the trial court "erred in finding that plaintiff was not guilty of contributory negligence"; and that the trial court "erred in determining that the doctrine of imminent peril did not apply." We find no merit in any of these contentions. There was a conflict in the evidence. Appellant Perada introduced evidence tending to show that he was put in a position of imminent peril by the movement of a Ford automobile and a truck approaching from the opposite direction in the block where the accident occurred and that he was not guilty of negligence in striking respondent. But there was other evidence tending to show that there were no other vehicles traveling in that block at the time, and that the striking of respondent was due solely to the negligence of appellant Perada. The trial court resolved the conflict in favor of respondent, and there was ample evidence to sustain its findings.

[2] Appellant further contends that "the reasons given by the court in support of its decision were erroneous." We do not find anything erroneous in the reasoning of the trial court, but even assuming that the reasons given were erroneous, they constituted no part of the judgment and are not reviewable upon an appeal from the judgment which is amply supported by the evidence. 2 Cal.Jur. 808, § 476.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



14 Cal.App.2d 688

WHITE-SATRA v. CITY OF LOS ANGELES.

Civ. 10899.

District Court of Appeal, Second District, Division 2, California.

June 19, 1936.

1. Municipal corporations ⇐812(9)

City *held* not liable for injuries sustained by pedestrian who fell over defective sidewalk, where claim for damages was filed with city clerk more than 3 and less than 6 months after accident; statutory requirement that claim for injuries be filed within 90 days after accident being mandatory (St. 1931, p. 2475).

2. Municipal corporations ⇐812(6)

Pedestrian's failure to file verified claim for injuries sustained on defective sidewalk, within statutory period, *held* not cured by allegations in complaint that pedestrian sent "notice of complaint" of defective condition

of sidewalk to department of public works within statutory period and that she wrote letter upon subject to member of city council within statutory period, since neither communication complied with requirements of statute (St.1931, p. 2475).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by L. Frances White-Satra, also known as L. Frances, also known as Lettie White, against the City of Los Angeles. From a judgment for defendant, after sustaining a demurrer to the amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Paul C. Hill and W. H. Hodges, both of Los Angeles, for appellant.

Ray L. Chesebro, Frederick Von Schrader, and Bourke Jones, all of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff brought this action for damages against defendant municipal corporation, alleging that she was injured by falling over a defective and broken sidewalk on December 26, 1934. The claim for damages was filed with the Los Angeles city clerk April 30, 1935, more than three and less than six months after the accident. Demurrer to the amended complaint was sustained without leave to amend, and from the resultant judgment plaintiff appeals.

[1] Section 376 of the charter of the city of Los Angeles provides that, "except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six months after the occurrence from which the damages arose." By the Statutes of 1931, p. 2475 (Deering's Gen. Laws, Act 5149, p. 2562) it is provided (section 1) that, "whenever it is claimed that any person has been injured * * * as a result of the dangerous or defective condition of any public street * * * a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality * * * within ninety days after such accident has occurred." Perusal of the foregoing provisions of the city charter and general laws demonstrates that the 90 days' period controls in the filing of claims such as the one here in question, and by noncompliance with the statutory provision appellant is barred. Statutory requirements in this regard have been held mandatory. Johnson v. City of Glendale (Cal.App.) 55 P.(2d) 580; Douglas v. City of Los Angeles (Cal.Sup.) 53 P.(2d) 353; Spencer v. City of Calipatria (Cal.App.) 49 P.(2d) 320.

[2] Appellant's failure to file her verified claim within the statutory period is not cured by allegations in her amended complaint that she sent a "notice of complaint" of the defective condition of the sidewalk in question to the department of public works on January 31, 1935, and that she wrote a letter upon the subject to a member of the Los Angeles city council February 4, 1935. Neither communication complied with the requirements of the 1931 statute, supra, and, therefore, under the authorities above cited, the prerequisite steps to maintaining a suit against the municipality to enforce the asserted liability are lacking.

Determination of this point makes unnecessary the consideration of other propositions argued in the briefs.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 676

LUCAS v. METROPOLITAN LIFE INS. CO.

Civ. 10662.

District Court of Appeal, Second District, Division 1, California.

June 19, 1936.

Hearing Denied by Supreme Court Aug. 17, 1936.

1. Appeal and error ⇐719(6)

Trial court's findings had to be accepted as facts, in absence of specifications of insufficiency of evidence to support findings (Code Civ.Proc. § 648).

2. Insurance ⇐665(1)

Where widow sought to recover from insurer for husband's death alleging execution of insurance contract by agent and that agent was negligent, to widow's damage, in delaying to communicate to insurer information with regard to issuing different pol-

icy from that which husband had applied for, evidence *held* to sustain finding that no contract had been consummated and that there was no negligence properly chargeable to insurer which could be considered proximate cause of widow's alleged loss.

3. Insurance ⇐665(2)

Where widow sought to recover from insurer for husband's death alleging execution of insurance contract by insurer's agent, evidence *held* insufficient to warrant finding that agent had authority to make binding contract, so that insurer was not bound by any agreement agent might have made.

4. Insurance ⇐665(2)

Where applicant agreed with agent to accept smaller accident policy when notified that larger policy applied for could not be issued unless by amended application, in widow's action to recover for applicant's death, evidence *held* to support finding that neither policy was issued or delivered, so that no contract took effect (Civ.Code, § 1626).

5. Insurance ⇐130(4)

Mere delay in acting on application does not create contract of insurance.

6. Insurance ⇐130(4)

What is a reasonable lapse of time within which insurance agent should have communicated information regarding application to insurer is within sound discretion of trial court.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Edith Lucas against the Metropolitan Life Insurance Company, a corporation. From an adverse judgment, plaintiff appeals.

Affirmed.

Thomas F. McCue, of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for respondent.

ROTH, Justice pro tem.

Plaintiff is the widow of deceased Eben Lucas, who, on January 15, 1933, at Alhambra, Cal., made application for a policy of accident insurance in the sum of $5,000. Deceased will hereinafter be referred to as "applicant." The application was received at the home office of the Metropolitan Life Insurance Company, hereinafter called "company," on February 1, 1933. On February 3d, in response to said application the company transmitted to its Alhambra office an accident policy with amended application which set forth additional specific information as to the nature and character of the applicant's employment. The letter of transmittal accompanying said documents stated directly that the policy inclosed was not to be delivered unless the amended application was signed by applicant after verification of the facts stated therein by the company's agent. On March 20, 1933, the Alhambra agent of the company advised applicant of the situation, whereupon the agent was informed by applicant that he could not sign the amended application, because the particulars in which the application had been amended were contrary to the facts. The agent then informed applicant that the policy could not be delivered, it appearing from the discussion which ensued between applicant and agent immediately thereafter that applicant's business was such that he could not be classed as a preferred risk. It was suggested by the agent that if applicant reduced the face of the policy to $3,000, that he then, as an ordinary risk, could obtain a $3,000 policy for the same premium that he could have obtained the $5,000 policy, if he had been accepted as a preferred risk. To this suggestion applicant agreed and paid $10 on account of the first premium, for which the agent receipted. On March 25th, the agent wrote to the company stating the facts with regard to applicant's employment, and asking that the policy be reduced to $3,000. Upon receipt of this letter by the company on April 7, 1933, it was referred to its health underwriter, who dispatched a letter to Alhambra asking the agent for more detailed information as to applicant's occupational duties. This letter stated that when the information requested was received, applicant's request for the $3,000 policy as an ordinary risk would be considered. The letter of the health underwriter was received in Alhambra on April 14th, and in the meantime, particularly on April 7th, the applicant in the performance of his occupational duties was killed.

[1] It is not clear whether plaintiff seeks to recover on the theory of tort or contract.

One of her theories is that a contract for insurance to the reduced amount of $3,000 was actually made on March 20, 1933; the other, that by reason of the agent's negligence in failing to communicate the information obtained by him on March 20th to the company until April 6th, a policy was not issued or delivered to applicant to the damage of the plaintiff in the sum of $3,000. In view of the findings of the trial court, we are convinced that plaintiff is not entitled to recover on either theory. The trial court found as facts: That the agent had no authority to enter into a contract of insurance binding on the company; that the $5,000 policy was not issued or delivered; that the $3,000 policy was never issued or delivered; that on March 20, 1933, when applicant learned of the necessity for signing the amended application, he gave the true facts to the agent and asked if the $3,000 policy could be issued for the same premium; that there was no agreement between applicant and agent for the issuance of the $3,000 policy; that there was no negligence in the conduct of the home office, or in that of the agent with reference to the letters exchanged on the subject of additional information; that the agent's failure to transmit prior to March 25th, the information received on March 20th was not negligent, nor was it the proximate cause of the plaintiff's loss; and that, "Under and by virtue of the terms of the written application attached hereto and marked Exhibit 'A,' said Eben Lucas agreed in writing that no insurance would be in force on said application unless and until a policy was delivered to him in person and the full premium stipulated in such policy was received by defendant (company) in cash, and that said policy should not cover any accident occurring prior to such delivery and payment of full premium." These findings of the trial court must be accepted as facts since there are no specifications of insufficiency of the evidence to support them or any of them. Code Civ.Proc. § 648; Bernstein v. Minney, 96 Cal.App. 597, 599, 274 P. 614; Crow v. Crow, 168 Cal. 607, 611, 143 P. 689; Schultz v. City of Venice, 200 Cal. 50, 54, 251 P. 913.

[2] Because of other questions raised, we have scrutinized the entire record and find that all of the findings briefly above stated have ample support in the evidence, and in our opinion are decisive of the case on either theory. The trial court concluded from ample facts that no contract of insurance had ever been consummated, and was justified in further concluding that there was no negligence properly chargeable to company, which could be considered the proximate cause of plaintiff's alleged loss.

[3-5] There were no facts upon which the court could properly make a finding that the agent had authority to make a binding contract of insurance for company. The court, as already stated, did find otherwise, and this finding is not attacked. The company therefore was not bound by any agreement the agent might have made, and the finding is that no agreement was made. Toth v. Metropolitan Life Insurance Co., 123 Cal.App. 185, 193, 11 P.(2d) 94; Western Indemnity Company v. Industrial Accident Commission, 182 Cal. 709, 721, 190 P. 27. The finding that neither policy was issued or delivered, based even upon the facts that have been scantily summarized, is sound as a matter of law. Civ.Code, § 1626; Haskell v. Doty, 78 Cal. 424, 21 P. 10; Harris v. Harris, 59 Cal. 620, 622; Bradley v. New York Life Insurance Co. (C.C.A.) 275 F. 657; John Hancock Mutual Life Insurance Co. v. McClure (C.C.A.) 218 F. 597; Hruska v. Prudential Insurance Co., 203 Iowa, 1165, 211 N.W. 858. Mere delay in acting on an application does not create a contract of insurance. Stewart v. Helvetia Swiss Fire Insurance Co., 102 Cal. 218, 219, 220, 36 P. 410; Leslie v. Brown Brothers Incorporation, 208 Cal. 606, 621, 283 P. 936; Giddings v. Northwestern Mutual Life Insurance Co., 102 U.S. 108, 111, 26 L.Ed. 92; Bradley v. Federal Life Ins. Co., 295 Ill. 381, 129 N.E. 171, 15 A.L.R. 1021.

[6] The issue of negligence is raised solely by reason of the delay in transmitting the information obtained on March 20th. The trial court found there was no negligence, and this finding is not attacked. As a matter of law, it is settled, with rare exceptions, that what is a reasonable lapse of time is within the sound discretion of the trial court. Hoppin v. Munsey, 185 Cal. 678, 684, 198 P. 398; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 657, 658, 67 P. 1086; Cambridge v. Ramser, 43 Cal.App. 722, 724, 185 P. 862; Winn v. John Hancock Mutual Life Ins. Co., 216 Iowa, 1249, 250 N.W. 459, 460.

Since these material issues are decisive of the case, it would serve no useful purpose to treat other questions raised, i. e., that there was no proof that the, or any,

policy of insurance could have been obtained by applicant; whether the cause of action on the theory of negligence survives; if there is a survival, who is the proper party plaintiff; even if negligence were found to exist, whether the agent or the company was liable; and, assuming negligence of the agent, was it the proximate cause of the alleged loss? We therefore express no opinion on these questions.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



14 Cal.App.2d 569

LAUMANN et al. v. CONNER (two cases).

Civ. 10113.

District Court of Appeal, Second District, Division 2, California.

June 15, 1936.

1. Appeal and error ⇐714(5)

In action for deficiency judgment where no report or transcript of proceedings in trial was presented to reviewing court and case came before it upon judgment roll alone, reviewing court could not consider matters set forth in supplement to appellants' brief, nor appellants' statement of facts (Code Civ.Proc. § 953a).

2. Appeal and error ⇐900

Every presumption is in favor of regularity of proceedings of court below.

3. Appeal and error ⇐529(1)

Entry of minute order by clerk upon granting of motion for nonsuit *held* to make order effective for all purposes, being in fact judgment of court dismissing action, and hence recitals in formal judgment, signed by court after entry of orders granting motions for nonsuit, formed no part of record and reviewing court was not required to consider their effect (Code Civ.Proc. § 581 as amended by St.1933, p. 1868).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Separate actions by W. B. Laumann and another against Nellie V. Conner, special administratrix of the estate of Charles D. Conner, deceased, and against Nellie V. Conner individually, which were consolidated for the purpose of trial. From adverse orders and an adverse judgment, the plaintiffs appeal.

Affirmed.

H. A. I. Wolch, of Los Angeles, for appellants.

James W. Bell, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Two actions entitled as above, consolidated for the purpose of trial, were brought to recover a deficiency upon a promissory note after foreclosure of a deed of trust; at the conclusion of plaintiffs' testimony the trial court granting defendants' motions for nonsuit as to both cases. Subsequent to the granting of such motions, the court signed a formal judgment "that plaintiffs take nothing," which judgment was preceded by a recital as to the facts of the trial, including a statement that as to one action the motion for nonsuit was made upon the grounds "(1) that the complaint did not state facts sufficient to constitute a cause of action, and (2) that the action did not conform to the provisions of section 580 of the Code of Civil Procedure"; and that "said motion for a nonsuit was granted." As to the other action the recital states that the motion for nonsuit was made upon the ground "that the complaint did not state facts sufficient to constitute a cause of action," and the court "granted defendant's motion for such nonsuit." The minute entries of the orders granting nonsuit consisted simply of the formal notation that the motions were granted, without specifying the grounds upon which they were made or the grounds of the court's decision.

[1] Plaintiffs appealed under section 953a of the Code of Civil Procedure both from the orders granting nonsuit and from the formal judgment thereafter entered. For reasons set forth in Laumann v. Conner (Cal.App.) 55 P.(2d) 1225, it became impossible for plaintiffs to have prepared and to present to this court a reporter's transcript of the proceedings at the trial, and the cases therefore come before us upon the judgment

roll alone. This being so, we cannot consider the matters set forth in the supplement to appellants' brief; and likewise, there being no authenticated record from the trial court as to the testimony and evidence, we must disregard appellants' "statement of facts."

[2, 3] Every presumption is in favor of the regularity of the proceedings in the court below. Richmond v. Julian, etc., Co., 176 Cal. 600, 169 P. 356. The entry of the minute order by the clerk upon granting of motion for nonsuit makes the order effective for all purposes, and is in fact the judgment of the court constituting a dismissal of the action. Section 581, Code Civ.Proc. (as amended by St. 1933, p. 1868); Bengel v. Traeger, 100 Cal. App. 526, 280 P. 538; Henry v. Lingsweiler, 81 Cal.App. 142, 253 P. 357. Hence the recitals in the formal judgment signed by the court after the entry of the orders granting the motions for nonsuit form no part of the record herein, and it becomes unnecessary to consider their effect.

Judgment and orders affirmed.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 664

CARPENTER v. SUPERIOR COURT, MARIN COUNTY, et al.

Civ. 10243.

District Court of Appeal, First District, Division 2, California.

June 19, 1936.

1. Courts ⇐176½

Appeal from small claims court to Superior Court was ineffectual, where appellant's undertaking was executed by only one surety, so that Superior Court had jurisdiction to dismiss appeal, but not to affirm judgment (Code Civ.Proc. § 978).

2. Courts ⇐176½

Superior Court had no jurisdiction to enter judgment on undertaking, given on appeal from small claims court, after affirming latter court's judgment, where single surety did not undertake to pay on dismissal of appeal for insufficiency of undertaking (Code Civ.Proc. § 978).

Appeal from Superior Court, Marin County.

Proceeding by C. W. Carpenter to review proceedings of the Superior Court of the state of California, Marin County, etc., leading to a judgment against petitioner on an undertaking given on appeal from a small claims court.

Judgment annulled.

Edward J. Dole, of Petaluma, for petitioner.

Theodore T. Daniels, of San Rafael, for respondents.

NOURSE, Presiding Justice.

Petitioner seeks a review of the proceedings of the Superior Court leading to a judgment against him on an undertaking given on an appeal from the small claims court. In a trial before the latter court a judgment was entered against the defendant named therein; he filed a notice of appeal to the Superior Court and an undertaking executed by this petitioner alone. The Superior Court affirmed the judgment and then gave judgment against this petitioner on the bond.

[1, 2] This undertaking did not meet the terms of section 978 of the Code of Civil Procedure in several respects, but particularly in that it was executed by but one surety. Since the undertaking was not executed by "two or more sureties," the appeal was "not effectual for any purpose." Section 978, Code Civ.Proc. The Superior Court, therefore, had jurisdiction to dismiss the appeal but not to affirm the judgment. The surety did not undertake to pay upon dismissal, as required by the Code section, hence, there was no jurisdiction to enter a judgment on the undertaking following the affirmance of the judgment.

The judgment against this petitioner is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

14 Cal.App.2d 710

MENDOZA et al. v. CASTIGLIONI et al.

Civ. 9900.

District Court of Appeal, First District, Division 1, California.

June 22, 1936.

1. Landlord and tenant ⊂=291(1)

Judgment in unlawful detainer would not be reversed because notices to pay rent or quit attached to complaint described land as being near "Point Reyes Station" instead of near "Point Reyes," where descriptions contained in notices were substantially same as those contained in written lease, and defendant testified that he understood what land was referred to.

2. Landlord and tenant ⊂=291(1)

Landlords could maintain unlawful detainer action after default in payment of rent on three days' notice to pay or quit without notice of forfeiture of lease, where they did not seek to obtain forfeiture (Code Civ.Proc. § 1174, as amended by St.1933, p. 1803).

3. Landlord and tenant ⊂=291(1)

Landlord was not required to give thirty days' notice of forfeiture before bringing unlawful detainer proceedings as to tract held under oral lease exceeding one year, on theory that lease was void under statute of frauds and tenancy at will was created which required thirty-day notice to terminate it, where proceedings were based on default in payment of rent (Civ.Code, § 789; Code Civ.Proc. § 1161, subds. 1, 2, as amended by St.1933, p. 1315).

4. Landlord and tenant ⊂=288

Principal object of unlawful detainer and relief which law intends to afford to it is to obtain speedy possession of premises without vexatious litigation or necessity of resorting to ejectment.

5. Landlord and tenant ⊂=290(3)

Alleged agreement of plaintiffs to accept mortgage on truck for unpaid rent *held* not a defense in unlawful detainer proceedings, where defendant did not own truck and was unable to mortgage it, and had never offered or tendered performance of any such agreement (Code Civ.Proc. § 1161, subd. 2, as amended by St.1933, p. 1315).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action in unlawful detainer by J. V. Mendoza and another against Louis Castiglioni and others. From a decree for plaintiffs, named defendant appeals.

Affirmed.

A. W. Hollingsworth, of Santa Rosa, and Benson Wright, of San Rafael, for appellant.

Martinelli & Gardiner, Jordan L. Martinelli and Samuel W. Gardiner, all of San Rafael, for respondents.

TYLER, Presiding Justice.

Action in unlawful detainer for rent and possession of property held in part by oral agreement and in part under a written lease. The complaint alleges that on February 8, 1935, notices to pay or vacate were served upon defendants. The land described in the notices is that certain real property situate in the county of Marin, state of California, and known as "Castiglioni Ranch," being a portion of "Mendoza Ranch." The complaint further alleges that the parcels of land referred to in the notices jointly comprise and are the whole of a 100-acre tract therein referred to and which is occupied by defendants and inclosed by a fence; that defendants occupied and used said premises pursuant to agreements made with plaintiffs for the use thereof; that by said agreements defendants promised to pay to plaintiffs the sum of $375 upon the 15th day of April, 1934, and a like amount upon the 15th day of November, 1934, as and for semiannual rent of the premises described in Exhibit A attached to the complaint, and by said agreements defendants further agreed to pay to plaintiffs the sum of $125 upon the 15th day of April, 1934, for the premises described in Exhibit B likewise attached to the complaint. The smaller tract of land was held under an oral agreement and was described in Exhibit B as being that property situate in the county of Marin, state of California, heretofore leased to Jess Ferreira in November, 1932, being 25 acres in extent and being a portion of a 100-acre tract inclosed by a wire fence, occupied by Louis Castiglioni, all of which is a portion of the "Mendoza Ranch" on Point Reyes, near Drake's Bay. Then follows an allegation that defendants have failed to pay the rent or any part thereof and have refused to comply with the notices to pay rent or deliver up possession. The complaint was demurred to and the demurrer was over-

ruled. Defendant Louis Castiglioni, answering, denied that the complaint stated a cause of action for unlawful detainer and alleged that the lease and the notices to quit did not sufficiently describe the premises. There was also set up in defense an alleged oral agreement by which the time for payment of rent was agreed to be extended in consideration of the payment of interest and the giving of security in the form of a chattel mortgage upon a Ford truck for the rent due; that defendants had relied upon this agreement and had purchased certain farm machinery and seed for the planting of the rented premises. As a further defense it was alleged that no notice of termination of tenancy of the smaller tract had been given as provided by section 789 of the Civil Code. The answer admits defendants were in possession of 100 acres of land under an agreement to pay $500 semi-annually, of which $375 was for the 75-acre tract held under a written lease, and $125 for 25 acres held under an oral lease, such rents to be paid as alleged in the complaint. It further admits, by failure to deny, that the rents were not paid.

It was proved at the trial that the descriptions of the property contained in the notices to pay rent or quit were substantially the same as those contained in the written lease, where the land was described as being near Point Reyes station instead of near Point Reyes. Appellant admitted at the trial that he never occupied any land at Point Reyes station, but the land was at Point Reyes, near Drake's Bay, on the Mendoza Ranch, as described in the "pay rent or quit" notices, and that he knew when the notices were served upon him what lands were referred to therein. Appellant also testified that when the notices were served he was in default in the rent claimed for the two parcels consisting of 100 acres. It also appeared in evidence that appellant had no title to the Ford truck on which he was to give a chattel mortgage for the security of the rent, the title being outstanding in others, for which reason the tentative agreement of forbearance was never entered into by plaintiffs. At the conclusion of the trial the court instructed the jury to find a verdict for plaintiffs in the sum of $500 and for the possession of the premises. Plaintiffs then waived the unearned portions of the judgment for rent, and a decree was entered in favor of plaintiffs for the sum of $395 and restitution of the premises.

As ground for reversal appellant first complains that the property involved is not sufficiently described in the complaint. He next contends that the oral lease of the smaller tract of 25 acres was void under the statute of frauds, it being for a longer period than one year, and this being so, a tenancy at will was created which required a thirty-day notice of forfeiture to terminate it and not a mere three-day "pay or quit" notice as provided for in unlawful detainer proceedings. A third objection is that section 1174 of the Code of Civil Procedure, as amended by St.1933, p. 1803, now provides for a notice of forfeiture in unlawful detainer proceedings, which was not here given, for which reason plaintiffs could not proceed at all. There is no merit in any of the contentions.

[1] With reference to the claimed insufficiency of the description of the lands, the lease contained a recital of the premises sufficient to enable appellant to enter upon the same and make avail thereof. Moreover, he testified that at all times he understood what land was referred to both by the lease and the notices to pay or surrender possession. The land was actually at Point Reyes and the addition of the word "Station" in the lease in no manner made the description doubtful or imperfect. The description contained in the lease and the notices was amply sufficient to describe the leased premises.

[2-4] Upon the question of the claimed insufficiency of the three-day notice to pay or vacate, as the foundation for an action of unlawful detainer, without notice of forfeiture of lease, it is sufficient to say that none of the parties were claiming a forfeiture. Defendants were seeking to remain in possession, and plaintiffs were endeavoring to collect their rent or obtain possession of the land. The notice to pay rent or quit did not mention anything concerning an intention on the part of plaintiffs to forfeit the lease as is now permitted under the new unlawful detainer provisions as found in section 1174 of the Code of Civil Procedure. It is still proper to take unlawful detainer proceedings without giving notice of or attempting to obtain a forfeiture, and the proceedings apply to all character of estates less than life, however created. Section 1174, Code of Civil Procedure, as amended, provides in substance that after default in the payment of rent the judgment in unlawful detainer proceedings shall declare the forfeiture of the

lease or agreement if the notice required by section 1161 of the same Code states the election of the landlord to declare a forfeiture thereof, but if such notice does not so state such election, the lease or agreement shall not be forfeited. Here the notices, as stated, said nothing concerning a forfeiture, nor did the judgment declare any, but was merely for rent and possession. The entry of the tenant with the consent of the lessor creates the relation of landlord and tenant, and unlawful detainer proceedings apply to all character of estates less than life, irrespective of their manner of creation, and when no attempt is made to terminate the estate under the proceedings, notice of termination is not a prerequisite to invoke the statutory proceedings. Possession may be demanded upon a three days' notice without seeking or obtaining any forfeiture of the lease. Security Realty Co. v. Kost, 96 Cal.App. 626, 274 P. 608. So far, therefore, as the verbal agreement in relation to the smaller tract is concerned, section 789 of the Civil Code requiring a thirty-day notice to terminate has no application to the present proceeding, there being no attempt to terminate the lease. The right to resort to unlawful detainer proceedings without the termination of the estate is recognized by the amendment concerning notice in the statute above referred to. It is obvious that the cases suggesting the necessity for a thirty-day notice to terminate, before the three-day notice, refer to situations where the landlord is attempting to proceed under subdivision 1 of section 1161 of the Code of Civil Procedure, as amended by St.1933, p. 1315, relating to the holding over by the tenant after expiration of his term, and do not refer at all to the proceeding under subdivision 2, based upon default in the payment of rent. There is no more sanctity in inferior estates than there is in tenancies created by written leases, and there is nothing in the statute which suggests or indicates it. Phillips-Hollman, Inc., v. Peerless Stages, 210 Cal. 253, 291 P. 178; St. Clair v. Joos, 90 Cal.App. 311, 265 P. 968. The principal object of unlawful detainer, and the relief which the law intends to afford through it, is to obtain speedy possession of the premises without vexatious litigation or the necessity of resorting to ejectment. 15 Cal.Jur. p. 849. The object is equally important to both character of estates.

[5] Upon the affirmative defense that plaintiffs had agreed to accept a mortgage upon a truck for the unpaid rent, there was evidence to show that this proposal by defendants was never accepted by plaintiffs for the reason that defendants had no title to the property. Thereafter plaintiffs objected to further testimony upon the subject upon the ground that it was an attempt to vary the terms of a written instrument by an unexecuted parol agreement. In this connection the court made findings to the effect that appellant did not own the truck and was therefore unable to give a mortgage upon the same, and had at no time offered or tendered performance of any such agreement.

We do not deem a further discussion of the case to be necessary. Judgment affirmed.

We concur: KNIGHT, J.; CASHIN, J.

KEY NUMBER SYSTEM

14 Cal.App.2d 729

LEE v. GUMP.

Civ. 9803.

District Court of Appeal, First District, Division 1, California.

June 24, 1936.

Rehearing Denied July 24, 1936.

Hearing Denied by Supreme Court Aug. 20, 1936.

1. Appeal and error ⇐1011(1)

In suit for attorneys' fees, conflicting evidence as to whether father promised to become primarily liable for attorneys' services in son's divorce action when new disclosures showed much more time, labor, and skill would be required than under original employment by son *held* for trial court.

2. Attorney and client ⇐143

Confidential relationship between attorney and client does not arise until contract between them is made, and in agreeing upon its terms parties deal at arm's length.

3. Attorney and client ⇐143

Where agreement between attorneys and husband in divorce action contemplated only nominal services, subsequent agreement between husband's father and attorneys on discovering new facts requiring additional services, providing for additional compen-

sation and father's becoming primarily liable, *held* supported by valid consideration.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by M. L. Lee against Abraham L. Gump. Judgment for the plaintiff, and defendant appeals.

Affirmed.

Charles A. Christin and Rowland R. King, both of San Francisco (Thomas J. Keegan, of San Francisco, of counsel), for appellant.

M. Mitchell Bourquin, of San Francisco, for respondent.

KNIGHT, Justice.

This is an action on an assigned claim for attorneys' fees. The amount sued for was $2,350, and the trial court, sitting without a jury, found the services to be of the reasonable value of $1,250, and gave judgment for that amount, from which judgment the defendant has appealed.

There is no controversy as to the legal services being rendered nor as to the reasonableness of the amount allowed therefor, but as will hereinafter appear, said services were performed in connection with the settlement of the marital difficulties of appellant's son and at the trial appellant claimed that any promise made by him to pay for such services amounted to no more than a collateral undertaking which admittedly was not in writing; and in any event that if any direct promise were made by him to pay therefor it was unsupported by a valid consideration for the reason, so he claimed, that respondent's assignors were already obligated under a prior engagement made by them with his son to render the services for the value of which he, the appellant, is now being sued.

[1] The trial court found specifically against appellant on the foregoing defenses, and as ground of appeal appellant contends that said findings are unsupported by the evidence. Manifestly, however, the evidence is conflicting on the controlling issues; and beyond question the testimony adduced on the part of respondent is more than ample to sustain the conclusions drawn therefrom by the trial court. The essential facts established thereby are as follows: Richard Gump, appellant's son, consulted W. B. Wright, an attorney then connected with the law offices of Leslie C. Rogers, concerning an action for divorce which Gump's wife contemplated instituting against him and which Gump stated he did not wish to contest, but, on the contrary, desired should be granted as speedily and with as little publicity as possible. Wright advised him that this could be accomplished by merely filing in his behalf a formal, unverified answer to his wife's complaint, but that if provision were to be made in the decree for the payment of alimony to Mrs. Gump and for the support of their infant child an agreement to that effect should be consummated before the case was heard in court. Negotiations to that end were opened by Wright, and shortly thereafter Mrs. Gump's attorney informed him that Mrs. Gump had altered her plans and intended to sue for separate maintenance instead of a divorce. Gump likewise had no defense to interpose to such an action, and consequently Wright stated that under the circumstances he would devote his efforts toward securing for him a more favorable settlement agreement than the burdensome one submitted by Mrs. Gump's attorney. While negotiations therefor were going on and on January 1, 1932, the said Leslie C. Rogers and Messrs. Clark and O'Brien formed a law partnership with which Wright became associated; the Gump matter was taken over as firm business, and during that month a bill for $150 was sent to Gump for services rendered to January 20, 1932. Shortly afterwards and while the bill remained unpaid Gump learned certain facts concerning his wife's conduct which admittedly entitled him to a divorce; and on February 9, 1932, Gump and Wright brought these new disclosures to the attention of Clark with the request that he take active charge of the case. After going over the matter with Gump, Clark stated that manifestly divorce charges based on the newly discovered facts should be pressed because as the matter then stood Gump was being literally forced, in the action for separate maintenance, to enter into an unreasonable and oppressive settlement agreement with his wife. Clark went on to say, however, that in order to obtain full advantage of the new disclosures and successfully prosecute a case based thereon, the attorney having charge thereof, whoever he was, would be compelled to devote the major portion of

his time exclusively to the case for an indefinite period, and that under the circumstances he was unwilling to proceed with the matter and would cause his firm to withdraw unless Gump's father personally employed the firm to take charge of the case and agreed personally to pay for the services thereafter to be rendered. Two days later, it appears, appellant called on Clark at his office and the matter of the new disclosures and the apparent effect thereof were gone over with him, and he was likewise advised that in order to secure for his son the full measure of the additional legal rights he would be entitled to receive as a result of said new disclosures would require much more time, labor, and skill on the part of the attorney having charge of the case than was called for by the original employment with his son; and that under the circumstances the firm intended to withdraw unless he personally agreed to pay for the services to be rendered; and according to the testimony given by Clark and Wright appellant then and there directed Clark to proceed with the case and promised to become primarily responsible for the payment of the services to be performed. The matter of hiring a private investigator to secure evidence substantiating the charges was then taken up, and according to the testimony of Clark and Wright appellant agreed also to pay for such services; and finally at the conclusion of the interview, at which appellant's two sons, Richard and Robert, were present, Clark said to appellant that inasmuch as he "was paying the bills" it was quite probable he would prefer to have his own private attorney handle the case, and that if so, his firm was perfectly willing to withdraw. But appellant replied in the negative, giving his reasons therefor, and insisted that Clark go ahead with the case; and Clark then stated that with such understanding he would take care of the case, which he did, and eventually, after devoting a great deal of time to the matter, brought about a settlement of the litigation which was entirely satisfactory to appellant and his son. True, much of the testimony given by Clark and Wright as to appellant's promise to become primarily responsible for the payment of the attorneys' fees was disputed by appellant and his two sons, but it is apparent that their testimony at most raised but a conflict on the material issues upon which the trial court found against appellant.

[2, 3] The legal principle of the cases cited by appellant to the effect that any ambiguity in a contract between attorney and client, because of the confidential relationship involved, must be resolved against the attorney, is not applicable here because no issue of ambiguity of contract is involved. The existence of the contract itself is challenged and as held in numerous cases the confidential relationship between attorney and client does not arise until the contract between them is made and that in agreeing upon its terms the parties deal at arm's length. Cooley v. Miller & Lux, 156 Cal. 510, 524, 105 P. 981; Boardman v. Crittenden, 52 Cal.App. 438, 450, 198 P. 1020. Inapplicable also is the doctrine of that group of cases holding that where a person has already entered into a contract with another whereby he becomes morally and legally bound to perform a particular service, any agreement made subsequent with him by a third party to pay for the same service is without consideration and cannot be legally enforced, for the reason that under the original employment with Richard Gump said firm was called upon to perform only the ordinary, nominal services connected with a noncontested proceeding; whereas subsequently new facts developed not contemplated and which could not be foreseen at the time of the original employment, which not only entitled Gump to a divorce from his wife, but in any event called for the performance of much additional service on the part of his attorneys and so changed the matter from its original aspect as to justify a demand for additional compensation or a withdrawal from the case (Lavenson v. Wise, 131 Cal. 369, 63 P. 622); and thereupon, as shown, after appellant had been made acquainted with the entire situation he entered into a new and separate contract of employment with the firm to proceed with the case, based on said new developments, and agreed to pay for the legal services to be thereafter rendered. It will be seen, therefore, that appellant's contract of employment called for the performance of legal services which were in their nature different from those which the firm had obligated itself to perform under the original contract of employment with appellant's son.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

14 Cal.App.2d 693

IBARRA v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA.

Civ. 10919.

District Court of Appeal, Second District, California.

June 19, 1936.

Master and servant ⊂=398

Claim of alleged wife for supplemental and amended award for employee's death, which was made more than year after employee's death and after award had been made to another woman, *held* not barred by limitation, which runs against claim or cause of action only and not against persons who are to receive award or any portion thereof (St.1931, p. 2372, § 11 (a).

Petition by Rosenda Ibarra to review an order of the Industrial Accident Commission of the State of California denying her application for supplemental and amended award for the death of her alleged husband, Eduardo C. Ibarra.

Reversed and remanded, with directions.

Samuel A. Miller and Samuel Reichler, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent.

CRAIL, Presiding Justice.

This is a review of an order of the Industrial Accident Commission entitled supplemental findings and award of January 28, 1936. Petitioner was the alleged wife of Eduardo C. Ybarra, also known as Eduardo C. Ibarra, who was killed on February 16, 1934, and the petitioner, if she was his widow, was entitled to death benefits; but she did not know of the death of said Ybarra and did not learn of the fact for twenty-one months. In the meantime, another woman petitioned the commission for the death benefits, claiming to be the widow of the decedent, and she was awarded the sum of $2,371.20 payable at the rate of $9.88 per week. Under this award the insurance carrier paid out the sum of $1,521.52. As soon as the petitioner became aware of the death of her husband, she made application to the commission for a supplemental and amended award. After hearing the evidence the commission, following Jones v. Industrial Accident Commission, 85 Cal. App. 201, 259 P. 73, made a finding that petitioner's application was barred by section 11 (a) of the Workmen's Compensation Act (St.1917, p. 841, as amended by St.1931, p. 2372) because not filed within one year.

This order of the commission, however, was made prior to the ruling of the Supreme Court in the case of Market Street Railway Co. v. Industrial Accident Commission, 57 P.(2d) 499, 500, in which the court reversed the Jones Case, supra, and said:

"In our opinion the commission had jurisdiction to make the order. The Workmen's Compensation Act, § 11 (a), St.1917, p. 841, provides for the tolling of the statute of limitations by the filing of an application for benefits under the act. The section declares that such an application renders inoperative the limitation provisions 'as to all further claims of *any person or persons* for compensation arising from the *same transaction*,' and the right to present such further claims is governed by the provisions of sections 20(d) and 65(b) of the act (St. 1917, pp. 850, 875). Section 17 (c), St.1917, p. 846, as amended by St.1919, p. 918, provides that there shall be 'but one cause of action for each transaction.' It is perfectly clear that under these sections there is but one claim or 'cause of action' for a compensable injury, and that when any person files an application for an award, the commission has jurisdiction over the cause, and for 245 weeks thereafter has power to determine dependency and amount of benefits, and to distribute or redistribute the same. This certainly includes the power to determine the rights of dependents who come in after a year from the death. The statute of limitations runs against the *claim* or cause of action, not against the *persons* who are to receive the award or any portion thereof. If the claim is filed in time, nothing more is necessary to give jurisdiction over a party who comes in later.

"* * * In view of the language and decision in the foregoing case, the case of Jones v. Industrial Accident Commission, 85 Cal.App. 201, 259 P. 73, in which our former decision was not discussed, cannot be regarded as controlling."

The commission itself joins with petitioner in requesting that the matters be remanded to the commission for further proceedings.

The supplemental findings and award of the commission of January 28, 1936, are annulled, and the case remanded to the commission for further proceedings to the end

that findings and an order be made upon the merits of the case.

We concur: WOOD, J.; GOULD, Justice pro tem.



14 Cal.App.2d 707

PEOPLE v. NIETO.

Cr. 1892.

District Court of Appeal, First District, Division 1, California.

June 20, 1936.

1. Kidnapping ⇨5
Rape ⇨51(1)

Evidence that defendant drove automobile into which his companion forced prosecutrix and in which she was taken to side road, and that he subsequently assisted in forcing her into automobile after she attempted to run away and then had intercourse with her, *held* to support conviction for rape and kidnapping.

2. Rape ⇨19

One may be guilty of rape as an aider and abettor without having had intercourse with person raped.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Esus Nieto was convicted of rape and kidnapping, and he appeals.

Affirmed.

Leo A. Sullivan, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellant Esus Nieto was jointly charged, with one Alec Frates, as having committed the offenses of rape and kidnaping. The information contained two counts, the first charging the rape and the second the kidnaping. Upon arraignment each defendant pleaded not guilty and waived a jury. Trial was had before the court and both were found guilty on each of the two counts charged. Motion for a new trial was made by each defendant and denied. Motions for probation followed, which motions were likewise denied, and the defendants were sentenced to San Quentin for the period prescribed by law, the sentences of each defendant to run concurrently. An appeal was filed by Nieto alone.

The sole point raised by appellant is that the evidence is insufficient to support his conviction on either count. In order to avoid repetition, we will discuss the evidence in the order in which the offenses occurred. Neither of the defendants took the stand and the evidence rests solely with the testimony produced by the prosecution. The evidence discloses that the prosecution witness was a girl twenty years of age. On December 8, 1935, accompanied by a young man, she visited the home of her sister. About 11 p. m. they left the sister's home and went to a restaurant. After remaining there for a while they took a taxicab and were driven to a café in Emeryville. At this place the young man drank several glasses of whisky. They danced, and left the café about 2 o'clock in the morning. The young man was intoxicated and started toward a group of men who were engaged in an argument. The prosecuting witness left him and proceeded to walk toward San Pablo avenue to go to the Santa Fé station to get a cab to go home. When about halfway to San Pablo avenue defendant Frates accosted her stating that her "boy friend" was in a fight, whereupon she started walking back to the café, when an automobile operated by appellant drove up along side of her. Frates pushed her against it and told her to keep her mouth shut. She was then shoved in the front seat of the car by Frates, who then entered, the three occupying the front seat. The prosecuting witness demanded that she be let out, but Frates refused to comply with her request. The party drove about Oakland, the prosecuting witness continually demanding that defendants release her, which they refused to do. She had never before met them. The prosecuting witness testified that she feared Frates, who informed her he was a prize fighter, and he threatened to knock her teeth out if she made any attempt to escape. Appellant then drove the car over the Foothill boulevard some distance and then turned into a dirt road. The victim began to

scream and was told by Frates that if she continued to do so he would beat her head off. She again begged defendants to take her home, but they refused. The car was stopped and the prosecuting witness was ordered to step out. This she did and attempted to run away. She was seized by Frates and ordered to get in the back seat, with the threat that if she refused she would be beaten up. Frates then shoved her into the car and told her to take off her clothes. She tried to get up but was pushed back by Frates, and against her consent he had sexual intercourse with her. She struggled and resisted Frates to the best of her ability but was weakened by fright and the fear that Frates would do her further bodily harm. The act caused her great pain and suffering and produced a hemorrhage. After completing his act Frates called appellant. The girl then left the car and started to run away. Frates caught her and again threatened to beat her. She again asked to be taken home, but Frates informed her she would have to have relations with appellant. Both defendants pushed her into the back seat of the car and appellant then had sexual intercourse with her. The girl was finally released and she immediately proceeded to her home and informed her relations of what had happened. Later she directed her brother and the authorities to the scene where the rape took place. At the time she reached home she was greatly excited and in a highly nervous condition and unable to relate her experience. She was taken to a physician and an examination disclosed that the labia was reddened and there had been bleeding; that the hymen had been recently ruptured and there were also bruises on her legs. Without further recital of the evidence it is clearly apparent that the evidence is amply sufficient to support both counts in the indictment.

[1, 2] Appellant claims that the evidence shows he did nothing to force her into the car and that the prosecuting witness did not sufficiently repel his advances. The evidence shows otherwise and is amply sufficient to establish the guilt of appellant as an independent principal. People v. Hollowwa, 138 Cal.App. 174, 31 P.(2d) 821. Moreover, aside from the evidence of forcible intercourse, there is ample evidence to sustain the conviction of appellant on the theory of aiding and abetting, for to be so convicted one need not have had intercourse with the person raped. People v. Macchiaroli, 54 Cal.App. 665, 202 P. 474; People v. Wood, 56 Cal.App. 431, 205 P. 698.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.



14 Cal.App.2d 690

BLANCHARD et ux. v. SHATTUCK et al.

Civ. 10897.

District Court of Appeal, Second District, Division 2, California.

June 19, 1936.

1. Appeal and error ⇐1004(1)

Verdict awarding damages for personal injuries cannot be set aside on appeal as excessive unless so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on part of trier of facts.

2. Damages ⇐132(2)

$5,000 *held* not excessive for injuries to married woman, although she suffered no broken bones and required no hospitalization, where she was severely shaken, dazed, bruised, rendered unconscious, had chills and nausea for two months, was in bed for most of such period, had dull, heavy pains which persisted to time of trial, lost weight, and was nervous, despondent, and frightened, and there was medical testimony that she would probably suffer for another year after trial and that some injuries might be permanent.

3. Appeal and error ⇐1013
Damages ⇐96

Question of amount of damages is peculiarly addressed to sound discretion of trial court, and reviewing court will not interfere in absence of clear showing of abuse of discretion.

4. Appeal and error ⇐1013

In automobile accident case wherein court assessed damages against owner of automobile only for negligence of missing person to whom owner's codefendant hus-

band lent automobile, remarks of court, in announcing its decision, criticizing owner's husband for not assisting in search for missing driver, *held* not to exhibit malice, passion, or prejudice in determining amount of verdict (St.1935, p. 153, § 402).

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by August Blanchard and wife against Ross Shattuck and others. From a judgment in favor of plaintiffs against defendant Margaret E. Shattuck, sued as Jane Doe Shattuck, she appeals.

Affirmed.

Syril S. Tipton and Mort L. Clopton, both of Los Angeles (W. H. Abrams, of Los Angeles, of counsel), for appellant.

Charles A. Thomasset, of Los Angeles, for respondents.

GOULD, Justice pro tem.

The judgment herein is attacked upon the grounds that the award of damages is excessive and that the trial court in making such award was actuated by malice, passion, and prejudice.

Plaintiffs were injured when their automobile was toppled over by another car, whose driver speeded away from the scene of the accident. The license number of the latter was observed by an eyewitness and the machine traced to the home of defendants Ross Shattuck and Margaret E. Shattuck, his wife. According to the story developed upon the trial, the car was owned by Mrs. Shattuck. At the solicitation of her husband, she permitted him to lend it to his friend, one Bob Fisk, who was driving it at the time of the accident. When he returned the car to the Shattucks' home after the accident, Fisk did not see them, did not notify them of the mishap, and they never saw or heard from him thereafter. The Shattucks testified they did not know how to locate him and were entirely ignorant of how or where he might be found. Fisk was sued by a fictitious name but was never served, and the trial proceeded against Mr. and Mrs. Shattuck, the court sitting without a jury. Upon the showing made the court found in favor of Shattuck but assessed damages against his wife as owner of the car, awarding to plaintiff August Blanchard $500 and to plaintiff Gladys Blanchard $5,000, the latter being the limit of the motor vehicle owner's liability in such case. Section 402, Vehicle Code (St.1935, p. 153), formerly section 1714¼, Civil Code. Defendant Margaret E. Shattuck appeals.

[1-3] It cannot be said that the judgment of $5,000 was "so plainly and outrageously excessive as to suggest at the first blush passion or prejudice or corruption," which is the test laid down on appeal before the findings of the trial court on the question of damages can be set aside. Duran v. Pickwick Stages System, 140 Cal.App. 103, 35 P.(2d) 148. Respondent Gladys Blanchard, although suffering no broken bones and requiring no hospitalization, was severely shaken, dazed, bruised, rendered unconscious, had chills and nausea for two months, was in bed most of the time for that period, had dull, heavy pains which persisted to the time of trial, lost weight, and was nervous, despondent, and frightened. Medical testimony was to the effect that she would probably continue to suffer for another year after the date of trial and that some of her injuries might be permanent. The question of the amount of damages is peculiarly addressed to the sound discretion of the trial court, and the appellate tribunal will not interfere in the absence of a clear showing of abuse of that discretion. Hamilton v. Hammond Lumber Co. (Cal.App.) 56 P.(2d) 1257. Such showing is not made in this case.

[4] As to appellant's second point, we perceive no merit. The remarks of the court in announcing its decision exhibited malice, passion, and prejudice, it is claimed. But the remarks were not addressed to appellant or to her part in the case. They related to her husband, and criticized him for not assisting in the search for the missing driver to whom he had loaned the vehicle. As to the party whom the court criticized, judgment went in his favor, and there is no indication whatsoever that the judgment against appellant was prompted in any degree by the trial judge's opinion, as evidenced by his remarks, concerning her husband. Furthermore, the court's remarks were entirely justified, were temperate and moderate judicial observations, wholly proper and appropriate, and not in any sense subject to disapproval. Least of all do they form any basis for interfering with the judgment herein, and do not warrant to any degree appellant's claim that they indicate passion, prejudice or malice on the part of the trial court in its determination of the

amount of damages to be assessed against her.

Judgment affirmed.

We concur: CRAIL, P. J., WOOD, J.



14 Cal.App.2d 669

In re ROHER'S ESTATE.

COLE v. RILEY et al.

Civ. 11006.

District Court of Appeal, Second District, Division 1, California.

June 19, 1936.

1. Statutes ⇐184

Laws must be construed with reference to their purpose and object intended to be accomplished, and, if susceptible of two interpretations, that one will be adopted which renders it fair and harmonious for purpose intended.

2. Executors and administrators ⇐67

Where appraiser testified that work in appraising estate varied from one hour to full day's work, adopting six-hour day as criterion of a day's work for appraiser, evidence *held* insufficient to support findings that appraisers actually used in service of estate the number of days for which compensation was allowed (Probate Code, § 609; Pol.Code, § 3259).

3. Executors and administrators ⇐67

Statute allowing appraisers of estates not to exceed $5 per "day" for services was not intended to permit appraisers to collect plurality of appraisal fees for same day's work nor to require appraisers to work from midnight to midnight to perform a day's service (Probate Code, § 609; Pol. Code, § 3259).

[Ed. Note.—For other definitions of "Day," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Proceeding in the matter of the estate of Jeanette Grieninger Roher, sometimes known as Jeanette M. Roher, deceased, wherein Flora M. Cole filed a petition to have the fees of the appraisers fixed, which was contested by Jack Riley and others. From an order fixing the appraisers' fees, petitioner appeals.

Reversed.

Louis N. Whealton and Raymond J. Kirkpatrick, both of Long Beach, for appellant.

Riley & Merrick and Irving M. Smith, of Long Beach, for respondents.

ROTH, Justice pro tem.

This appeal involves the construction of section 609 of the Probate Code prior to its amendment in 1933. It then read as follows: "Compensation of appraisers. Each appraiser is entitled to receive, from each estate he appraises, his actual and necessary expenses and compensation for his services not to exceed five dollars per day, to be allowed by the court; and he must file, with the inventory, a verified account of his services and disbursements."

The respondents Merrick and Riley claim that they devoted 118 and 116 days, respectively, to the work of appraising the estate here involved. The record shows nothing in so far as the particularized services of respondent Del Porte are concerned. The bill of exceptions shows that neither of the respondents Merrick or Riley devoted full days to their duties as appraisers. In this connection Merrick testified in substance as follows: "* * * I did not devote my time exclusively to the appraisal of the assets of said estate on those days. I carried on my regular work of appraising and as real estate broker on those days, answering the telephone, carrying on correspondence and interviewing clients. For example, on the third of March, 1932, my work consisted of approximately an hour's conference at the office of Jack Riley. My work in appraising the estate varied from one hour to a full day's work."

Riley admitted in substance: "During said 116 days I carried on my regular office work and on such days made appraisals on other estates for which I charged and received a full day's fee."

In a petition to have the fees of appraisers fixed, appellant alleged, among other things: "* * * petitioner is informed and believes * * * that said compen-

sation claimed is excessive and that said appraisers were not actually engaged in the appraising of said estate for one hundred days and that not to exceed ten days were actually expended by said appraisers in appraising said estate." Exceptions were filed by respondents to this petition, and the court after hearing the evidence acted upon the petition and the exceptions thereto, and made its order allowing $510.50 to Merrick, $517.50 to Riley, and $351 to Del Porte. The appeal is from that order, and involves, as above stated, the construction of the aforesaid Code section which, so far as we have been advised, has never been construed.

[1-3] The statute, except as to the meaning of a "day," is, in our opinion, bluntly clear on its face. It provides that an appraiser is to receive "for his services *not to exceed five dollars per day.*" (Italics ours.) A "day" is defined by section 3259 of the Political Code: "A day is the period of time between any midnight and the midnight following." City of Eureka v. Diaz, 89 Cal. 467, 26 P. 961; Hunt v. Hammel, 142 Cal. 456, 76 P. 378; Cosgriff v. Election Commissioners, 151 Cal. 407, 91 P. 98. It is apparent to us that the Legislature, when it enacted the statute under construction, did not mean that an appraiser would have to work from midnight to midnight in order to perform a day's service and earn "not to exceed five dollars." It is equally apparent to us that the Legislature did not mean that five minutes' work or an hour of one's time was equivalent to a day. Laws must be construed with reference to their purpose and the object intended to be accomplished, and if susceptible of two interpretations, that one will be adopted which renders it fair and harmonious for the purpose intended. Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783; Coulter v. Pool, 187 Cal. 181, 201 P. 120; Evans v. Selma Union High School District, 193 Cal. 54, 222 P. 801, 31 A.L.R. 1121; 23 Cal.Jur. 764. Webster's New International Dictionary, 2d ed., defines a "day" as follows: "Those hours, or the daily recurring period, allotted by usage or law for work, as, an eight-hour day." There was no evidence taken on what the usage in this state or locality is, as to what constitutes a day's work for an appraiser. The most generous proposals and discussions on the subject of a day's work at this period of our social development have fixed a minimum of six hours. Adopting for the purpose of argument a six-hour day as a criterion of a day's work for an appraiser, the evidence fails completely to show that respondents, or either of them, worked 118 or 116 six-hour days. We do not believe it was the purpose of the Legislature to permit appraisers to collect a plurality of appraisal fees for the same day's work, and still have abundant time within which to conduct their own businesses. If the statute were given that construction, it would be a prolific source of abuse. As appellant points out, an appraiser might be appointed to appraise eight separate estates, each of which could be readily appraised in one day of eight hours. Instead of taking one estate at a time and thus completing the appraisal of such estate within one day's service, the appraiser might spend one hour of each day on each estate; at the end of eight days all eight estates would have been appraised, and the appraiser under respondents' theory would be entitled to render a bill to each estate for $40, plus expenses, thus collecting fees from the eight estates involved to the amount of $320, plus expenses.

Whether or not compensation of $5 per day is fair is another matter. The Legislature at the time the statute was enacted evidently thought it was. It is apparent, however, that the Legislature changed its mind on this subject and amended section 609 of the Probate Code in 1933 (St. 1933 p. 852) said amendment being effective as of August 21 of that year. The appraisers in this estate were appointed in February, 1932, and completed their services in that year. They make no claim that they acquired any rights under the amended statute, and we are satisfied that they did not.

Since the evidence does not support the findings of the trial court that respondents actually used in the service of the estate the number of days for which they are allowed compensation, the judgment must be, and it is, hereby reversed.

We concur; HOUSER, P. J.; DORAN, J.

14 Cal.App.2d 723

PEOPLE v. BIGELOW et al.

Cr. 2883.

District Court of Appeal, Second District, Division 2, California.

June 23, 1936.

Criminal law ⇐1156(1)

Whether new trial should have been granted to accused convicted of robberies in first degree and assault with a deadly weapon was within sound discretion of trial court.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Harry Bigelow and another were convicted of two robberies in first degree and one assault with a deadly weapon, and they appeal.

Affirmed.

John S. Cooper, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from a judgment convicting the defendants of two robberies in the first degree and one assault with a deadly weapon. Only two points are made: (1) That the evidence is insufficient to sustain the verdict; and (2) that the trial court erred in denying a motion for new trial based upon the ground of newly discovered evidence.

We have read the record, and there is substantial evidence to support the verdict. Whether a new trial should have been granted was a matter within the sound discretion of the trial court. We are not prepared to say that the trial court abused its discretion in denying a new trial.

Defendants' able counsel makes an eloquent plea that this court should take the position of a thirteenth juror; that we should weigh the evidence and determine where the preponderance lies. He concludes with the following: "So, therefore, the Court itself can judge those witnesses and in judging those witnesses if the court is satisfied they have told an untruth and has found a motive for telling that untruth, the Court certainly would be justified in this case in granting a new trial." This we may not do. Louder than counsel's eloquence there comes ringing in our ears the admonition of the people as set forth in article 6, section 4½, of the Constitution.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.

KEY NUMBER SYSTEM

PEOPLE v. BARWICK.*

Cr. 2877.

District Court of Appeal, Second District, Division 2, California.

June 19, 1936.

Rehearing Granted July 16, 1936.

Criminal law ⇐589(1), 590(1)

Refusal to give defendant accused of perjury continuation when amended information charging him with prior conviction was filed *held* reversible error as depriving him of statutory right to one day to answer and five days after his plea to prepare for trial (Pen.Code, §§ 990, 1049).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Samuel Barwick was convicted of perjury, and he appeals.

Reversed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Defendant was charged with perjury, upon complaint that at the trial of his son for theft of an automobile he testified that his boy was in Quartzite, Ariz., on September 25, 1935, the same day and the same time, according to the testimony of police officers, that the latter committed the theft in Los Angeles. When the perjury case was called for trial at 10 o'clock a. m. the district attorney filed and handed to defendant an amended information, charging him with a prior conviction in that he was convicted in November, 1931, of possession of a still. Through his counsel de-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 62 P.2d 590.

fendant thereupon asked time to plead to the amended information, which request was refused by the court. Defendant was then arraigned upon the amended information, pleading not guilty, and the court over objection ordered the trial to proceed at once, denying a continuance even until 2 o'clock upon the afternoon of the same day to allow defendant and his attorneys to prepare to meet the additional charge. Upon trial defendant was found guilty of perjury and also guilty of the prior conviction. His motion for new trial was denied, and he was sentenced to prison. From the judgment of the court and order denying his motion for new trial, he appeals.

Section 990 of the Penal Code provides: "If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the indictment or information. He may, in answer to the arraignment, move to set aside, demur, or plead to the indictment or information."

Corpus Juris, volume 16, at page 389, lays down the general rule relating to a new or amended indictment, as follows: "The filing of an amended or new indictment or information is the beginning of a new case and the accused is always entitled to the statutory time within which to plead." In considering a similar problem, the Oklahoma Criminal Court of Appeals, in the case of Bohannan v. State, 11 Okl.Cr. 69, 142 P. 1092, 1093, made this observation: "In the case at bar the court went too far in permitting amendments and forcing the accused to proceed with the trial. The plain provisions of the law should be respected and when the court found that the information was insufficient, the jury should have been discharged, and the cause passed for trial to such time as the statute could be complied with. There is ample authority for the position that the filing of a new information makes a new case, and that the accused is entitled to the statutory time in which to plead. Turner v. State, 21 Tex.App. 198, 18 S.W. 96; Whitesides v. State, 44 Tex.Cr.R. 410, 71 S.W. 969." In our own state, in the case of People v. Moody, 69 Cal. 184, 10 P. 392, where the district attorney was allowed to amend the information after trial had commenced, the Supreme Court reversed the conviction, holding that "the information, when amended, charged an offense, and this information, so amended, could have been treated as an original information then for the first time presented." Similarly, in People v. Clement, 4 Cal.Unrep. 493, 35 P. 1022, the Supreme Court laid down the rule that there must be a new arraignment and plea to an amended information.

This being the case, it was error to compel appellant to enter his plea to the amended information herein without allowing him the one day's time provided by section 990 of the Penal Code. Obviously, by the procedure adopted by the trial court in this case, no time was given appellant's counsel to consider the amended indictment to determine whether or not a plea should be entered, or a demurrer presented, or motion made to set aside the information, all of which rights the accused is granted by law.

Not only was appellant compelled to plead instanter, but he was also deprived of the right granted by section 1049 of the Penal Code allowing him at least five days after his plea to prepare for trial. The situation is not remedied by the circumstances of the case, as indicated by the trial court's remark that the new matter in the information "is a matter of record and lies entirely within defendant's own knowledge." As was observed by the Colorado supreme court in Powers v. People, 53 Colo. 43, 123 P. 642, 643: "A defendant should always be afforded a reasonable opportunity to prepare for trial, and a failure to afford this right is neither consonant with a sense of justice nor a fair and impartial administration of the law." Certainly it cannot be said that a reasonable opportunity is afforded an accused to plead and prepare for trial if he is deprived of the minimum time allotted by law.

Appellant earnestly contends that the trial court committed prejudicial error in refusing to instruct the jury that the testimony given by himself at the trial of his son should be considered in its entirety, while at the same time instructing the jury that if any of the matters testified to were false the defendant should be convicted. Our conclusion that the judgment must be reversed for the reasons above set forth makes it unnecessary to discuss the instructions.

The judgment and order denying a new trial are reversed.

We concur: CRAIL, P. J.; WOOD, J.

14 Cal.App.2d 753

LONG v. SUPERIOR COURT IN AND FOR ORANGE COUNTY et al.

Civ. 1984.

District Court of Appeal, Fourth District, California.

June 24, 1936.

1. Trial ⇨164

Defendants' motion for nonsuit waived defendants' right to rely upon allegations seeking affirmative relief in defendants' answer, as preventing voluntary dismissal by plaintiff.

2. Judgment ⇨270

Dismissal by plaintiff on defendants' motion for nonsuit finally terminates case when filed with clerk, whether or not clerk makes proper entry.

3. Judgment ⇨197
Prohibition ⇨10(2)

Dismissal by plaintiff of suit to quiet title wherein some of defendants had asked that their title be quieted, after defendants made motion for nonsuit, *held* to finally terminate case so as to leave nothing before court, and prohibition would lie to restrain trial court from entering judgment for defendants quieting their title.

Original proceedings by Mary S. Long against the Superior Court of the State of California in and for the County of Orange, and the Honorable James L. Allen, as Judge thereof, for a writ of prohibition.

Writ issued.

Edgar L. Martin, of Los Angeles, George E. Bradley, of Santa Ana, for petitioner.

W. Maxwell Burke and John K. Colwell, both of Santa Ana, and Le Roy P. Anderson, of Costa Mesa, for respondent.

TURRENTINE, Justice.

It appears that petitioner filed an action against certain defendants to quiet title to real estate in Orange county, setting forth her claim to the property in detail and alleging that defendants had no title in the property. The answer denied the plaintiff's title and asserted title in certain of the defendants and asked that certain defendants' title be quieted. At the conclusion of plaintiff's evidence defendants moved the court for a nonsuit, and during argument thereon, plaintiff consented to the nonsuit being granted and filed a voluntary dismissal with the clerk of the court. Defendants then asked for a judgment quieting their title against plaintiff without producing or offering to produce any evidence. Respondent court ordered judgment for the defendants quieting their title and ordered defendants to prepare findings of fact and conclusions of law and judgment. Thereupon, petitioner herein (plaintiff below) sought and obtained an alternative writ of prohibition. By its return the respondent court declares it will sign the findings of fact and conclusions of law and judgment for defendants unless the writ herein is made peremptory.

[1-3] When the defendants made their motion for nonsuit, they waived their right to rely upon the allegations seeking affirmative relief in their answer as preventing a vountary dismissal by the plaintiff. In effect they were asking the same relief, to wit, dismissal, which the plaintiff voluntarily gave by filing the dismissal and consenting to the nonsuit being granted. "A nonsuit, granted on the motion of the defendant, is equivalent, in its operation on the action, to a dismissal with the consent of the defendant." Wood v. Ramond, 42 Cal. 643-645. It follows that where the act of the plaintiff gives the defendant the same relief which he seeks from the court the same result flows as if the relief asked were given by the court. While it is the duty of the clerk to enter the dismissal in his register, the dismissal finally terminates the case when filed with the clerk whether or not he makes the proper entries. Hopkins v. Superior Court, 136 Cal. 552, 69 P. 299; Huntington Park Improvement Company v. Superior Court, 17 Cal.App. 692, 121 P. 701, 702. "The effect of such act [filing dismissal] on his part is, ipso facto, to dismiss the case, even though the clerk fails to make entry thereof in the register." Huntington Park Improvement Company v. Superior Court, supra. There being nothing before the court, it was attempting, and is attempting, to proceed without jurisdiction and prohibition is the proper remedy. Los Angeles Gas & Electric Corporation v. Superior Court, 53 Cal.App. 701, 200 P. 811; King v. Superior Court (Cal.App.) 56 P.(2d) 268.

The demurrer is overruled, and it is ordered that the writ of prohibition issue prohibiting respondent from signing findings of fact, conclusions of law, and judgment in favor of defendants or any of them.

We concur: BARNARD, P. J.; MARKS, J.



RUDELL v. BOARD OF ADMINISTRATION OF STATE EMPLOYEES' RETIREMENT SYSTEM OF CALIFORNIA et al.*

Civ. 10088.

District Court of Appeal, First District, Division 2, California.

June 18, 1936.

Rehearing Denied July 18, 1936.

Hearing Granted by Supreme Court Aug. 17, 1936.

States ⇐57

Woman who, at time state employee executed certificate naming her beneficiary of any death benefits to become due upon his death as member of State Employees' Retirement System, was living in concubinage with him, *held* to have an "insurable interest" in his life within statute entitling her to receive death benefits, where she was actually, although not legally, dependent upon him for support and their relationship did not constitute public offense (St.1933, p. 1243, § 100; St.1935, p. 636, § 10110, subds. (b, c).

[Ed. Note.—For other definitions of "Insurable Interest," see Words & Phrases.]

NOURSE, P. J., dissenting.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Mandamus proceeding by Bertha Rose Rudell, also known as Bertha Rose Teberg, and Lillian Nash, as administratrix of the estate of Richard H. Teberg, deceased, against the Board of Administration of the State Employees' Retirement System of the State of California, etc. From a judgment for the first-named petitioner, the second-named petitioner appeals.

Affirmed.

Walker & Walker and Herman G. Walker, all of Oakland, for appellant.

Edwin G. Wilcox, of Oakland (Martin Tieburg, of San Francisco, of counsel), for respondent Rudell.

U. S. Webb, Atty. Gen., for the State.

SPENCE, Justice.

In a proceeding in mandamus, the trial court directed that the sum of $958.40, which became due as a death benefit under the State Employees' Retirement System upon the death of Richard H. Teberg, deceased, be paid to petitioner Bertha Rose Rudell, also known as Bertha Rose Teberg. This appeal is taken solely by petitioner Lillian Nash, as the administratrix of the estate of Richard H. Teberg, deceased.

On November 19, 1931, said Richard H. Teberg was an employee of the state and so remained until the time of his death. On that date, he executed a certificate naming "Bertha Rose Teberg * * * who is my wife as the beneficiary" of any benefits to become due upon death as a member of the State Employees' Retirement System. At the time of executing said certificate the deceased and petitioner Bertha Rose Rudell, also known as Bertha Rose Teberg, were engaged to be married and were living together as husband and wife. No marriage was ever consummated, but the relationship continued until the death of the deceased in 1934. Said petitioner was known as the wife of the deceased and had assumed the name of Bertha Rose Teberg. Both parties were unmarried persons during the entire time that their relationship continued.

Appellant states several questions in the briefs, but confines the argument solely to the contention that respondent Bertha Rose Rudell, also known as Bertha Rose Teberg, was not entitled to said benefits because of the relationship existing between said respondent and the deceased. We find no merit in this contention. Said respondent was the named beneficiary and she was entitled to the money if she had an "insurable interest" in the life of the deceased. Section 100, State Employees' Retirement Act, St.1931, p. 1456, as amended by St. 1933, c. 473, p. 1243. There is a conflict of authority in other jurisdictions as to what constitutes an "insurable interest" in the life of another person, but in this

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 66 P.2d 1203.

state, that term is defined by statute. Said respondent had an "insurable interest" in the life of the deceased if she depended upon him in whole or in part for her support. Subdivision (b), § 10110, Insurance Code (St.1935, p. 636), formerly subdivision 2, § 2763, Civ.Code. The evidence on this subject stands uncontradicted. There is no requirement in the statute that the dependency should result from a legal obligation to support, and we are of the opinion that the "insurable interest" mentioned in said subdivision (b) rests solely upon the fact of dependency. This view finds support in the reading of the entire section. Subdivision (c) of that section specifically requires that a "legal obligation" must exist but there is no similar wording found in subdivision (b) which is under consideration here.

Appellant cites and relies upon Keener v. Grand Lodge, 38 Mo.App. 543, 550, and other similar cases following that decision. We find none of these authorities in point. In each of said cases the deceased had a lawful wife living during the time that he cohabited with the named beneficiary. The holding that the named beneficiary was not a dependent was apparently based upon the fact that the entire relationship was adulterous and was denounced by statute as a public offense. As was said in the cited case: "I would not restrict dependents to those whom one may be legally bound to support, nor, yet, to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support." In the present case, it was not unlawful for the deceased to support said respondent. Neither of the parties was married and the statutes of this state did not denounce their relationship as a public offense. 1 Cal. Jur. 469. Their relationship may have been contrary to good morals, but that fact alone would not prevent respondent from recovering as the named beneficiary. Waring v. Wilcox, 8 Cal.App. 317, 96 P. 910; Lampkin v. Travelers' Insurance Company, 11 Colo.App. 249, 52 P. 1040.

The judgment is affirmed.

I concur: STURTEVANT, J.

NOURSE, Presiding Justice.

I dissent.

Section 100 of the retirement act provides: "Upon the death of a member * * * there shall be paid to his estate, or to such person having an insurable interest in his life as he nominates by written designation."

Section 2763 of the Civil Code, which was since carried into section 10110 of the Insurance Code of 1935, provided that: "Every person has an insurable interest in the life and health: * * * 2. Of any person on whom he depends wholly or in part for education or support." The retirement statute is what is commonly called a pension act. It provides for a payment from the state fund of a monthly pension on retirement, and for payment in a lump sum to the dependents of a deceased employee.

In his application for membership in the retirement system the deceased nominated "Bertha Rose Teberg * * * who is my wife as the beneficiary." The undisputed evidence is that there was no such person as Bertha Rose Teberg, that the deceased was an unmarried man from the time he entered the system until his death, but that for a period of four years he and the plaintiff had been living together under an indefinite promise of marriage. Upon these facts the appellant states the only question involved here to be: "Has a concubine an insurable interest in the life of her paramour?" Respondent defends upon the rule of other jurisdictions holding that a fiancée has an insurable interest in the life of her betrothed.

There is no real dispute as to the facts. The adulterous relation was known to some of the friends of the parties, but carefully concealed from the immediate family relations; there was no pretense of a marriage, no misunderstanding, and no fraud on the part of either participant. They knowingly and willingly entered into a void contract contrary to public policy and good morals. The whole story is told in the direct examination of the plaintiff reading:

"Q. And prior to, and up to the time of his death, was there any intention to discontinue this relation with the deceased? A. No sir.

"Q. And no separation contemplated? A. No sir.

"Q. And you, therefore, expected to live with him in the same capacity? A. Yes, because he had always promised marriage.

"Q. He had promised to marry you? A. He certainly did.

"Q. And I take it you expected to continue receiving his support as you had in the past? A. I did."

The theory upon which a fiancé or a fiancée may be held to have an insurable interest is that a legal obligation has been assumed by the promise of marriage to be followed by the marriage contract; but in the early case of Boigneres v. Boulon, 54 Cal. 146, 147, it was held that the promise of a mistress being "immoral, illegal, and against public policy" founded no consideration for a promise of marriage. Upon the same reasoning an immoral contract of cohabitation should not constitute a consideration for an obligation to support. If the consideration is void the contract itself must be void, hence when the statute referred to the obligation to support, it intended a legal obligation, not one denounced as a crime or one generally rejected as contrary to public policy, good morals and decency. The main opinion, in holding that a prostitute has an insurable interest in her customers because she *receives* support from them, overlooks one of the basic purposes of the retirement act which is to care for the *legitimate dependents* of the deceased. It was for this reason that the Legislature limited the employee's right to name a beneficiary to one who had an insurable interest. To hold that this puts a concubine or prostitute in the same class as a lawful wife and children is to defeat the very purpose for which the statute was to a large extent enacted.

The judgment should be reversed.



14 Cal.App.2d 446

PEOPLE v. MUNRO.

Cr. 1890.

District Court of Appeal, First District, Division 2, California.

June 4, 1936.

Hearing Denied by Supreme Court July 3, 1936.

1. Embezzlement ⇐44(1)

Evidence *held* to sustain conviction of secretary-treasurer of international labor union and treasurer of local union for grand theft in withdrawing sums from local union.

2. Criminal law ⇐434

In prosecution of secretary-treasurer of international labor union and treasurer of local union for grand theft in withdrawing sums from local union, refusal to admit in evidence international union's books to support defendant's contention that dues of local union were paid to international union with sums withdrawn *held* not error, since entries therein, having been made by defendant, were self-serving.

3. Criminal law ⇐1170(2)

In prosecution of secretary-treasurer of international labor union and treasurer of local union for grand theft in withdrawing sums from local union, error, if any, in refusing to admit in evidence international union's books in support of defendant's contention that dues of local union were paid to international union with sums withdrawn, *held* harmless, where defendant had testified as witness to all she sought to prove by the books.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Anna J. Munro was convicted on an information charging grand theft, and she appeals.

Affirmed.

Hearing denied by Supreme Court; NOURSE, J., pro tem, being disqualified did not participate herein.

Frank W. Creely and J. Raegen Talbot, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

Defendant was convicted on an information charging grand theft. On her appeal from the judgment and from the order denying a new trial she raises two points—the sufficiency of the evidence and the ruling on the offer in evidence of the books of account prepared by herself.

[1] For many years prior to 1933 the appellant was secretary of the San Francisco local of the Laundry Workers' Union. In 1933, she was elected treasurer. In August, 1933, she was elected secretary-treasurer of the International Laundry Workers' Union, but did not relinquish her position with the local union. In May, 1934, she withheld from the receipts of the local union $673.52

which she endeavored to cover by drawing checks on the account of the local in favor of the international which, after her indorsement, she deposited to the account of the local. The only conflict in the evidence is in the testimony of the appellant that she took the money from the local union to pay assessments due the international. This story was negatived by the evidence demonstrating that the money did not go to the international and by the inherent improbability of the weird account of these "wash transactions" made by the appellant.

[2, 3] There was no error in the ruling refusing to admit in evidence the books of the international. Appellant states that these books would show that the dues of the local union were paid to the international. The ruling was made upon the ground that the entries were made by appellant and were self-serving. The ruling was based upon People v. Hemple, 4 Cal.App. 120, 127, 87 P. 227, and was correct. It was also harmless because the appellant testified as a witness to all that she had sought to prove by the books.

The judgment and order are both affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



14 Cal.App.2d 666

PEOPLE v. RICO.

Cr. 2860.

District Court of Appeal, Second District, Division 1, California.

June 19, 1936.

1. Automobiles ⇐355(8)

Evidence *held* to support conviction of motorist for failure to stop at scene of accident resulting in death and to give information and render assistance to injured persons on ground that motorist was not rendered unconscious by accident and thereby precluded from complying with statute (St.1935, pp. 170, 171, §§ 480, 482a).

2. Criminal law ⇐1023(1, 8)

Defendant *held* not entitled to appeal from order denying motion in arrest of judgment and from sentence.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Charles G. Rico was convicted of violating Statute 1935, page 170, § 480, by failing to stop at scene of automobile accident resulting in injuries or death and fulfill requirement of Statute 1935, page 171, § 482a, and from the judgment of conviction, and from orders of the trial court denying a new trial, and denying a motion in arrest of judgment, he appeals.

Attempted appeal from order denying motion in arrest of judgment sentence dismissed, and judgment and order denying motion for new trial affirmed.

Anna Zacsek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

Appellant was found guilty by a jury of violating section 480, Vehicle Code (St. 1935, p. 170), and sentenced to twelve months' imprisonment in jail. He appeals from the judgment and from an order of the trial court denying him a new trial; also from order denying motion in arrest of judgment.

In the early morning of January 8, 1936, appellant was driving his Ford easterly over the East Sixth street bridge that spans the Los Angeles river in the city of Los Angeles. When approximately half-way across the bridge, at about 1:15 a. m., he had a head-on collision with a Chevrolet car driven by Gilbert Verdugo, accompanied by Ruby Dowling. The Chevrolet stopped at the point of collision, the Ford proceeding easterly and stopping 150 feet away. Appellant was accompanied by his brother-in-law, Charles Larez. Mr. Verdugo was killed in this accident and died at the scene thereof. Mrs. Dowling was injured and rendered unconscious, recovering her senses a short time later, as she was placed in a police car. There was no evidence that appellant or Larez approached the Chevrolet or made any inquiry concerning the welfare of the occupants of that car; on the contrary, Larez testified that as soon as the Ford stopped he jumped out and saw appellant slumped under the wheel, bleeding profusely and apparently unconscious; that after a minute or two he hailed

an automobile that was passing, and went to a restaurant at the easterly end of the bridge, where he asked a waitress to telephone for an ambulance, then went to a house in the immediate neighborhood, aroused another brother-in-law, one Loya, and accompanied by other relatives, including appellant's wife, returned to the scene of the accident in Loya's car; that finding appellant still apparently unconscious and in the same position, namely, "right under the steeling wheel," he and Loya carried him from the Ford to Loya's car, and before the radio officers or ambulance arrived, started with him for Georgia Street Receiving Hospital for treatment. Appellant testified that he remembered nothing after the collision until he heard his wife questioning him before reaching the hospital. Other relatives of appellant gave testimony tending to corroborate that of Larez and appellant. James Vickery, a witness produced by the people, testified that as he was driving east on the bridge he heard the impact of the collision, immediately stopped and backed up about 50 feet to a point across from the Ford, where he stopped again, meantime watching that automobile and failing to see any one get out of it. After looking at the Ford and seeing no one in it, he went to the Chevrolet and found Mrs. Dowling and Verdugo in the wreckage. Not less than ten minutes later he came back to the Ford and found it unoccupied. Norman Gilmore testified that he arrived at the scene of the accident before the officers from the radio car and before the ambulance; that he saw three cars there and the witness Vickery. Archie Allum, a radio car officer, stated that he with his partner arrived at the scene of the accident within three minutes after he received a call at 1:17 a. m., stopping on the way to get specific directions from the waitress who had telephoned for help. It appeared from records of the hospital that appellant walked in there accompanied by his wife at 1:47 a. m., thirty minutes after the radio officer received his call, according to his testimony. The hospital is located at Figueroa and Pico streets, approximately three miles distant from the East Sixth street bridge.

On these facts, appellant's counsel argues that there is no evidence to sustain the verdict reached by the jury that section 480 of the Vehicle Code was violated. That section requires the driver of any vehicle involved in an accident resulting in injury or death of any person to stop at the scene of the accident and to fulfill the requirements of section 482 (a) of the Vehicle Code. The latter section requires such driver to give his name and address, together with the vehicle's registration number and owner's name to the driver or occupants of any vehicle collided with, or to an officer at the scene of the accident; also requires the driver to render to any person injured in such accident reasonable assistance, specifying certain particulars thereof. St.1935, p. 93, at page 171.

[1] It is apparent that no requirement of section 482 of the Vehicle Code was met by this appellant, and his counsel contends that he was excused by reason of his being rendered unconscious. It may be conceded that such an excuse is valid; therefore, the real question here is whether the jury had any evidence before it which would cast a reasonable doubt upon the statement of appellant and his witnesses that he was unconscious from the time of the collision until after his removal from the scene of the accident. One of the exhibits was a photograph of the Ford V8, appellant's car. The jurors, having heard Mr. Vickery's testimony that he looked at this automobile when he brought his car to a stop beside it, and saw no one in it, and having also heard Larez's testimony that he jumped out of the Ford and left appellant in an unconscious condition, slumped "right under the steering wheel," was called upon to consider whether a man could be so far hidden beneath the wheel of the Ford as to be invisible to Mr. Vickery from his point of observation. It is evident that they did not believe that was possible, thus deciding a question, upon conflicting evidence, against the appellant. Because we consider that Mr. Vickery's evidence on this point was direct and positive and not "negative evidence," such as is mentioned in People v. Scofield, 203 Cal. 703, at page 707, 265 P. 914, we believe the reasoning of that case is inapplicable here.

[2] Upon examination of the instructions given by the court, we find appellant's claim of error in regard thereto is not sustained by the record. The attempted appeals from the order of the trial court denying motion in arrest of judgment and from the sentence, not being sanctioned under our procedure, are ordered dismissed. Judgment and order denying motion for a new trial are both affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

NELSON v. SOUTHERN PAC. CO. et al.*

Civ. 9698.

District Court of Appeal, First District, Division 1, California.

June 18, 1936.

Rehearing Denied July 15, 1936.

Hearing Granted by Supreme Court Aug. 17, 1936.

1. Appeal and error ⇐1068(3)

If motorist suing for injuries sustained in collision at railroad crossing was contributorily negligent as matter of law, alleged erroneous instructions would not be prejudicial, since she could not in any event recover.

2. Appeal and error ⇐1056(6)

If motorist suing for injuries sustained in collision at railroad crossing was contributorily negligent as matter of law, alleged error in exclusion of evidence relating to defendant's negligence would be harmless, since such error could not have affected the result.

3. Railroads ⇐317

Operation of train across public street at speed in excess of rate specified in ordinance constituted negligence as matter of law, as respects liability of railroad company and its engineer and fireman for injuries sustained by motorist in crossing collision.

4. Evidence ⇐586(3, 4)

Testimony of motorist suing for injuries sustained in collision at railroad crossing that she heard neither bell nor whistle *held* sufficient to raise conflict with positive testimony that bell and whistle were used, and to support jury's finding that neither bell nor whistle was sounded (Civ.Code, § 486).

5. Railroads ⇐313

Failure to ring bell on train as required by statute *held* prima facie negligence on part of railroad company, as respects railroad company's liability for injuries sustained by motorist in crossing collision (Civ. Code, § 486).

6. Appeal and error ⇐989

In determining, on appeal from judgment for defendant, whether motorist suing for injuries sustained in crossing collision was contributorily negligent as matter of law, defendant's evidence contradicting motorist's testimony would be ignored except in so far as it related to facts as to which her testimony was silent, and that version most favorable to plaintiff would be chosen.

7. Railroads ⇐327(2)

Motorist who failed to see train which would have been visible if she had used ordinary care in making observation *held* contributorily negligent as matter of law, precluding her recovery for injuries sustained in crossing collision.

8. New trial ⇐140(1)

Affidavit in support of motion for new trial which was based on information and belief *held* not competent proof of facts stated therein and was unavailing for any purpose.

9. Appeal and error ⇐1069(1)

Action of court in privately communicating with jury *held* harmless error where no prejudice resulted therefrom.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by Gertrude C. Nelson against the Southern Pacific Company and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Aram & Wretman, of San Jose, and George Olshausen and John K. Hagopian, both of San Francisco, for appellant.

Louis Oneal and Arthur G. Shoup, both of San Jose, for respondents.

GRAY, Justice pro tem.

Plaintiff was seriously injured in a collision between her automobile, which she was driving on Stockton avenue in the outskirts of the city of San Jose across the tracks of the defendant Southern Pacific Company, and its passenger train operated by its engineer and fireman, also named as defendants. Her complaint charged that the collision was caused by the defendants' negligence in operating the train at an excessive speed, in violation of a city ordinance, and without sounding a bell or whistle as required by section 486 of the Civil Code. The answer denied such negligence and affirmatively alleged that plaintiff was negligent and that her negligence proximately contributed to the collision. After trial upon these issues, the jury returned a general verdict in favor of defendants and also a special verdict find-

ing that plaintiff was negligent and that her negligence contributed to the accident. Her motion for a new trial having been denied, plaintiff appeals from the judgment in favor of defendants, entered in accordance with the verdict.

[1, 2] Plaintiff argues that the judgment should be reversed because erroneous instructions proposed by defendants were given, proper instructions proposed by her were refused, evidence offered by her on the issue of defendants' negligence was erroneously excluded, and the court instructed the jury without the presence of her counsel. In reply, the defendants principally urge that the judgment should be affirmed, because plaintiff's own testimony conclusively shows that she was guilty of contributory negligence as a matter of law. If the defendants are correct in this contention, the judgment must be affirmed, because, even conceding the court erred in its instructions, plaintiff was not prejudiced thereby, for she was not entitled to recover. Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 P. 1109; Dougherty v. Union Traction Co., 23 Cal. App. 17, 136 P. 722. Any error in the exclusion of evidence bearing upon the question of defendants' negligence is likewise harmless if plaintiff was guilty of contributory negligence as a matter of law, since it could not have affected the result. Fraser v. California Street, etc., Co., 146 Cal. 714, 81 P. 29; Meredith v. Key System Transit Co., 91 Cal.App. 448, 267 P. 164.

At the time of the accident Stockton avenue was a public street in the city of San Jose, running roughly north and south and was crossed diagonally by five sets of tracks running approximately east and west. On either side of the crossing it was unpaved and considerably wider than at the crossing. The traveled or paved portion of the avenue acrosss the tracks was 33 feet in width measured parallel with the tracks, and 22 feet in width measured at right angles to the road. The tracks were of standard gauge, that is, the distance between the rails of each track was 4 feet 8½ inches, and the width of each rail was 3 inches. The distance between each track was 13 feet center to center. In crossing from north to south, as plaintiff did, a person would pass over first two freight tracks, next, the westbound passenger tracks, then the eastbound passenger tracks, and, lastly, a third freight track. Except in crossing public streets, the tracks were located on a private right of way. The tracks were straight for 6,500 feet westerly of the crossing.

[3] A city ordinance prohibited the operation of a train at more than 12 miles per hour across a public street, unless such crossing were protected by a flagman, gates, or other mechanical device. It was stipulated that the Southern Pacific Company had not so protected this crossing. All estimates of the train's speed over the crossing exceeded the limit fixed by the ordinance. The engineer of the train involved in the accident estimated such speed at between 25 and 30 miles per hour; a witness for the plaintiff at between 25 and 30 miles per hour; two railroad employees at between 40 and 45 miles per hour; and two former employees at between 35 and 40 miles per hour. The operation of the train at a speed in excess of the rate specified in the ordinance constituted negligence as a matter of law. Lininger v. San Francisco, etc., R. Co., 18 Cal.App. 411, 418, 123 P. 235; Simoneau v. Pacific Electric Ry. Co., 166 Cal. 264, 136 P. 544, 49 L.R.A.(N.S.) 737; Switzler v. Atchison, etc., Ry. Co., 104 Cal.App. 138, 285 P. 918.

[4, 5] The testimony as to ringing of a bell or the blowing of a whistle, as required by section 486 of the Civil Code, by the passenger train, is in conflict. The plaintiff testified she heard neither its bell nor whistle. Such negative testimony was sufficient to raise a conflict with the following positive testimony, and to support a finding by the jury that neither the bell nor the whistle was sounded. Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Keena v. United Railroads, etc., 197 Cal. 148, 239 P. 1061. Several witnesses for the railroad stated that they heard a crossing whistle, but since none could locate the train at that time it is uncertain whether the blowing of the whistle occurred at the distance from the crossing specified in the Code section. But this section, by its express terms, does not require that a whistle be sounded in cities. Jones v. Southern Pacific Co., 74 Cal.App. 10, 239 P. 429. The fireman of the train stated positively that the bell had been ringing continuously after the last stop, which was admittedly for a greater distance than 80 rods from the crossing. A railroad plumber said he did not know whether the bell was ringing. The conflict as to the ringing of the bell presented to the jury a question of fact as to whether the Code section had been violated. Failure to ring the bell as required by the section was prima facie negligence on the part of the railroad. Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622.

[6, 7] Defendants do not seriously dispute the sufficiency of the evidence to establish their negligence, but they strenuously argue that plaintiff's own testimony convicts her of negligence proximately contributing to the accident. Her description of her conduct immediately preceding the collision follows: The accident occurred in the early afternoon of a sunny spring day. As she, in driving her automobile southerly, came to the crossing, she saw a freight train on the first, or nearest track, backing up in an easterly direction over the crossing. She stopped her automobile with its front 8 feet from the first rail, so that, as seated, she was 12 feet northerly of those tracks, and remained stationary for probably two or three seconds. Looking to her left or easterly, she saw the freight train standing still. She next looked to her right, or westerly, and saw no train in sight, although she could see down the tracks for a quarter mile. She never thereafter looked to her right. Then she started across the tracks in second gear at about 4 or 6 miles per hour. As she crossed the first tracks, she observed the freight locomotive less than 100 feet easterly of the crossing and another locomotive on the second tracks possibly 130 feet easterly of the crossing. As she reached the second tracks, she heard a succession of shrill whistles and some puffing of engines, letting off steam. It seemed to her that there was immediate danger so she hesitated slightly and looked intently to her left. She could not tell whether the engine on the second track was coming towards her, but thought the whistling meant for her to get out of its way and that it was coming towards her. She continued to cross as she wished to get out of the crossing. She remembered nothing thereafter.

Defendants' evidence contradicted plaintiff's testimony in all details, but such conflicts will be ignored. However, that evidence must be considered for additional facts as to which her testimony is silent. Where statements as to such facts differ, that version which is most favorable to her will be chosen. It is undisputed that the front of the automobile was struck by the left side of the forward part of the engine of the passenger train, which was traveling easterly on the fourth track. This train came from her right and the automobile collided with the side of the engine which was nearest to her. The distance from the outside edge of the first rail of the first track to the point of collision was approximately 65 feet. She testified that she stopped her automobile so that its front was 8 feet northerly of this first rail. Hence the distance she traveled, from the point of her observation to the right to the collision, was 73 feet. Her lowest estimate of her speed in crossing the tracks was 4 miles per hour and her highest estimate of the time she waited to make her observations was 3 seconds. Since, at a speed of 4 miles per hour, she would travel 5.86 feet per second, it would take 12.45 seconds to cover the 73 feet. Adding 3 seconds thereto, it is seen that 15.45 seconds was the longest time which could have elapsed between the time she looked down the track for a quarter of a mile and the time she was struck. The highest estimate of the fastest speed ever attained by the passenger train was given by its engineer, who stated that it was traveling at between 45 and 50 miles per hour before he applied the emergency brakes at the fireman's warning of danger. Since at a rate of 50 miles per hour the train covered 80.66 feet per second, 16.36 seconds was the shortest time required for it to traverse the distance of the quarter mile which was within plaintiff's range of vision. Obviously the train must have been visible if she had used ordinary care in making her observation. Her positive statement that she did not see the train must therefore be disregarded. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. She was as much negligent in failing to see the train as she would have been had she failed to look. Bibby v. Pacific Electric Ry. Co., 58 Cal.App. 658, 209 P. 387.

Plaintiff seeks to escape this conclusion by arguing that her attention was diverted to the engine on the second track by the whistling and the escape of steam, which she heard as she passed in front of it. Such confusion and her fear of immediate danger, engendered thereby, might have excused her failure to then look to her right, and thus presented a question of fact as to whether she was negligent then in failing so to do. 52 C.J. 323, 493. But such conditions, occurring subsequently, did not affect her in looking to the right at the time she stopped, nor did such distraction prevent her from looking to her right during the next 5 seconds, in which she went at least 30 feet to strike the engine on the fourth track. Since plaintiff was guilty of contributory negligence as a matter of law, it becomes unnecessary to determine whether the court erred in its instructions or in the exclusion of evidence.

[8, 9] In support of her motion for a new trial, plaintiff filed an affidavit by one of her attorneys, in which he alleged upon information and belief that the jury, after retiring for deliberation, had requested, through the bailiff in charge of them, further instructions upon contributory negligence, and that the court had conveyed such instructions orally through the bailiff without bringing them into open court. Such affidavit based upon information and belief was not competent proof of the facts stated and was unavailing for any purposes. Gay v. Torrance, 145 Cal. 144, 78 P. 540. At the argument the court stated that the "bailiff brought to me the request of the jury while I was sitting on another case, and I instructed the bailiff to inform the jury that they must find both the special and general verdict." Conceding that the action of court in communicating privately with the jury was an irregularity in procedure, no prejudice resulted and therefore such error was harmless. Soukoian v. Cadillac Taxi Co., 68 Cal.App. 604, 229 P. 1015.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.



14 Cal.App.2d 650

SNOFFER v. CITY OF LOS ANGELES.

Civ. 10719.

District Court of Appeal, Second District, Division 1, California.

June 18, 1936.

Rehearing Denied July 15, 1936.

Hearing Denied by Supreme Court Aug. 17, 1936.

1. Appeal and error ⇐1097(1), 1195(1)

Decision on former appeal based on question of law *held* "law of case" binding not only on trial court, but also on appellate court on subsequent appeal, such as appeal from order granting plaintiff new trial after entry of judgment for defendant pursuant to remittitur.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Appeal and error ⇐1207(1)

Where cause is remanded, not for retrial, but to give effect to decision on appeal, trial court can take no proceedings except those necessary to give effect to appellate court's judgment.

3. Appeal and error ⇐1207(1)

Where cause is remanded with directions to enter particular judgment, trial court must enter judgment in conformity with appellate court's order, which is decisive of character of judgment to which appellant is entitled.

4. Appeal and error ⇐1199

Where cause is remanded with directions to enter particular judgment, trial court cannot reopen case on facts, allow filing of amended or supplemental pleadings, nor retry case, and if it should do so, its judgment is void.

5. Appeal and error ⇐1097(1)

Decision on appeal, on becoming final, establishes "law of case," and, even though erroneous, is conclusive on second appeal, where there have been no changes in pleadings or findings and no retrial.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Otto S. Snoffer against the City of Los Angeles. The trial court entered judgment for defendant as directed by the Court of Appeal [43 P.(2d) 852], and from a subsequent order granting plaintiff a new trial, defendant appeals.

Reversed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Leonard Husar and Arthur Loveland, Deputy City Attys., all of Los Angeles, for appellant.

E. H. Delore, of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an appeal by the defendant city from an order made by the superior court granting plaintiff a new trial.

Plaintiff and respondent is the owner of a parcel of land fronting upon La Brea avenue in the city of Los Angeles. He brought this action in the lower court against the defendant and appellant, city of Los Angeles, for $2,369 damages alleged to have been suffered by reason of the improvement of said La Brea avenue.

The case was tried before a jury, which rendered a verdict for the plaintiff in the sum of $300. Respondent then made a motion for a new trial, which was granted. Defendant city appealed from the judgment rendered by the superior court upon said verdict and from the order granting respondent a new trial.

This court reversed the order granting respondent a new trial and the judgment rendered therein, and further directed the trial court to enter judgment for the appellant city. Snoffer v. City of Los Angeles, 6 Cal.App. (2d) 14, 43 P.(2d) 852. Following the decision of this court, respondent petitioned us for a rehearing, which was denied; and a subsequent petition to the Supreme Court for a hearing met the same fate.

Upon the going down of the remittitur from this court, judgment was entered for defendant city and against respondent, as ordered; whereupon respondent again made a motion for a new trial, which the trial court granted. On the ground that the trial court erred in granting the motion for a new trial, defendant city prosecutes this appeal. In the aforesaid decision this court held that the respondent herein, having failed to file objections to the proposed municipal improvements within the time fixed by the ordinance of intention in connection with such improvements, was barred by reason of his failure from prosecuting an action to obtain damages for an alleged injury to his property.

Respondent contends that the lower court was justified in granting the motion for a new trial on the authority of the case of Cottle v. City of Los Angeles (Cal.App.) 43 P.(2d) 861, decided some two weeks subsequent to our decision (6 Cal.App. (2d) 14, 43 P.(2d) 852) in this case; in the Cottle Case the facts were identical with the facts in the instant case, except that the procedure was as to two different streets. In the Cottle Case the District Court of Appeal decided that notice to property owners similar to that given in the instant case was not sufficient, and that failure to protest within the time allotted in the ordinance of intention was not fatal to the prosecution of the property owner's claim for damages. However, the Supreme Court took over the Cottle Case, 53 P.(2d) 361, and reversed the judgment of the superior court awarding damages, citing this court's opinion in the instant case (6 Cal.App.(2d) 14, 43 P.(2d) 852) with approval.

Respondent also cites the case of Ambassador Holding Corporation v. City of Los Angeles (Cal.App.) 51 P.(2d) 899. In this latter case a hearing has been granted by the Supreme Court, and the matter is now pending therein. For that reason the law stated in that case may not be accepted as final.

[1-4] However, aside from respondent's attack upon the decision of this court in this case upon the previous appeal, we are of the opinion that the decision in that case, based as it was upon a question of law, becomes, by reason of our decision, the law of this particular case, and was and is thereafter, in all subsequent stages of the case, binding not only upon the trial court, but upon this court when again brought before us. When a cause is remanded, as in this case, not for retrial, but to give effect to the decision on appeal, the trial court can take no further proceedings except such as are necessary to give effect to the judgment of the appellate court. Soule v. Dawes, 14 Cal. 247; 2 Cal.Jur. 1052. When a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.

[5] A decision on appeal, upon becoming final, establishes the law of the case, and where, as in this case, there were no changes in the pleadings or findings, and no retrial of the case, on a second appeal such decision is conclusive, and that is so even though the appellate court should have reached a different conclusion on the former appeal. Gordon v. Green, 66 Cal.App. 303, 306, 225 P. 872.

Respondent contends that on a new trial of this case there may be certain amendments allowed to the complaint, and several new theories set forth as to plaintiff's right of recovery, but we fail to see what amendments could be made, in view of plaintiff's stipulation in the original trial of this cause in the lower court that he failed to file his objections or protest within the legally constituted time, and our holding that such failure constituted a bar to his claim for damages. On a question of law this court decided that respondent was not entitled to

damages, and that his claim, therefore, was barred. That order of this court, as contained in the remittitur, is conclusive upon the trial court, and determines decisively the nature and character of the judgment to be entered. The trial court, therefore, was in error in granting respondent's motion for a new trial.

For the foregoing reasons, the order by which respondent's motion for a new trial was granted is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

2. Action ⇐1

"Action" is right or power to enforce "obligation" which constitutes "cause of action."

[Ed. Note.—For other definitions of "Action; Action at Law," "Cause of Action" and "Obligation," see Words & Phrases.]

3. Appeal and error ⇐1041(2)

In automobile collision case permitting plaintiff, at close of plaintiff's evidence, to amend complaint alleging that defendant employee of codefendants was driving codefendant's truck at time of accident by insertion of allegation that employee was driving with permission of codefendants, *held* not reversible error under evidence (Civ. Code, § 1714¼; Code Civ.Proc. § 475).

4. Appeal and error ⇐959(3)
Pleading ⇐236(5)

Allowance of amendment to pleading to conform to proof rests in discretion of trial court, and utmost liberality is allowed in upholding orders made by trial court permitting amendments for such purpose (Code Civ.Proc. § 475).

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Lloyd E. Woods and another against George J. Cook and another, copartners doing business under the fictitious name and style of Cook's Auto Supply Company, and another. Judgment for plaintiff, and the named defendants appeal.

Affirmed.

Benjamin P. Riskin, of Los Angeles, for appellants.

John R. Barta and Henry Cohen, both of Los Angeles, for respondents.

14 Cal.App.2d 560

WOODS et ux. v. COOK et al.

Civ. 10874.

District Court of Appeal, Second District, Division 2, California.

June 12, 1936.

As Modified on Denial of Rehearing July 2, 1936.

Hearing Denied by Supreme Court Aug. 10, 1936.

1. Appeal and error ⇐1010(1)

Finding of trial court in automobile collision case that plaintiff was not contributorily negligent and that defendant was driving truck with permission of codefendant *held* controlling on reviewing court where supported by evidence.

WOOD, Justice.

A judgment in the sum of $1,138 was recovered by plaintiffs against G. H. Grace and George J. Cook and Connie Cook, copartners, doing business under the fictitious name and style of Cook's Auto Supply Company. From the judgment an appeal is prosecuted by the defendants Cook. Plaintiff Mrs. Woods was driving an automobile on August 12, 1933, at the intersection of Slauson avenue and San Pedro street in the city of Los Angeles, at which

time an autotruck owned by defendants Cook and operated by defendant Grace collided with the automobile of plaintiffs. The judgment was for damages sustained by plaintiffs which were caused by the negligent operation of the autotruck. The action was tried before the court without a jury.

[1] Appellants contend that Mrs. Woods was guilty of contributory negligence as a matter of law, and consequently the judgment cannot be sustained; also that the evidence was insufficient to support the finding that defendant Grace was driving the truck with permission express or implied of defendants Cook. An examination of the record discloses sufficient evidence to sustain the findings of the court on these issues, and the findings are therefore controlling upon this court. A detailed statement of the evidence at this time would be inappropriate. Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104.

[2, 3] The trial was conducted in June, 1935. Upon the termination of the presentation of plaintiffs' evidence the court granted a motion to amend the complaint and appellants now contend that this ruling permitted plaintiffs to introduce an entirely new cause of action which had been barred by the statute of limitations. In the original complaint plaintiffs alleged that plaintiff Mrs. Woods was operating an automobile at the intersection in question "when the defendant G. H. Cook, an employee of the defendants George J. Cook and Connie Cook, was driving and operating an auto truck, the property of the said defendants, George J. Cook and Connie Cook, so carelessly and negligently, etc." By the ruling of the court plaintiffs were allowed to amend by inserting after the words "was driving" the following: "With the express or implied permission of said defendants." It will be noted that in the original complaint it was charged defendant Grace was an employee of the other defendants and that he was driving a truck which was their property. It was not alleged that he was driving in the course of his employment. Neither was it alleged in the original complaint that he was driving with their permission. Under the circumstances shown, it was proper for the court at the close of plaintiffs' case to permit them to amend by alleging the capacity in which Grace was driving the truck. By permitting the amendment the court did not prejudice the rights of defendants. It was shown by the evidence that Grace had purchased merchandise from defendants Cook. Proof that Grace was delivering the merchandise in the course of his employment would have sustained a judgment upon the theory of principal and agent, and no additional evidence would have been necessary to sustain a judgment based on the statutory liability provided by section 1714¼ of the Civil Code as it was in force at the time of the collision.

It was held in Frost v. Witter, 132 Cal. 421, 64 P. 705, 706, 84 Am.St.Rep. 53, that an action is the right or power to enforce an obligation; that the obligation constitutes the cause of action. The obligation in the present case was to compensate for the damages sustained by reason of the negligent operation of the car by defendant Grace which was chargeable to defendants Cook. When the evidence disclosed the true relation of defendant Grace to defendants Cook, the court properly permitted the amendment of the complaint to set forth the facts developed by the evidence. As was stated in Doolittle v. McConnell, 178 Cal. 697, 174 P. 305, the amendment provided "merely the addition of matters, essential to make the original cause of action complete." The amendment took effect as if it had been originally incorporated in the pleading. Rauer's Law, etc., Co. v. Leffingwell, 11 Cal.App. 494, 105 P. 427.

A comprehensive discussion of the right of a plaintiff to amend his complaint is found in Frost v. Witter, supra, in which plaintiff sued upon a promissory note and after the lapse of the statutory period he was allowed to amend by alleging the execution of a mortgage. In sustaining the action of the trial court permitting the amendment the Supreme Court said: "The question will be regarded, therefore, as relating generally to the limit or extent to which the complaint may be amended under sections 472, 473, Code Civ.Proc. On this point I find no general rule laid down by the decisions in this state. All that is said is that great liberality should be used by the courts in allowing amendments (Burns v. Scooffy, 98 Cal. [271] 276, 33 P. 86, and cases cited); and that the allowance of amendments is a matter within the discretion of the courts (Coubrough v. Adams, 70 Cal. [374] 378, 11 P. 634; Lestrade v. Barth, 17 Cal. [285] 288). And in practice the courts have been extremely liberal,—as, e. g., in Heilbron v. Heinlen, 72 Cal. 376, 14 P. 24, where the complaint was amended so as to describe a differ-

ent tract of land from that described in the original complaint; or in Walsh v. McKeen, 75 Cal. 519, 17 P. 673, where the case was changed from an action at law to a case in equity; or in Cox v. McLaughlin, 76 Cal. 60, 18 P. 100 [9 Am.St.Rep. 164], where the change allowed was from an action on a special contract to an action on a quantum meruit; or as in Castagnino v. Balletta, 82 Cal. [250] 256, 23 P. 127, where the change was from an action on a mechanic's lien to an action on the special contract, or in assumpsit. * * * And it is obvious that the unqualified way in which the rule is sometimes stated—i. e. that a new or different cause of action cannot be introduced by amendment—cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that 'a wholly different cause of action' shall not be introduced; or, as said by the court in Shields v. Barrow, supra [17 How. 130, 15 L.Ed. 158], that 'a complainant (is not) at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment,' or 'to strike out the entire substance and prayer of his bill, and insert a new case by way of amendment'; or, as expressed by this court in an early case, the matter of the amendment must not be 'entirely foreign to the original complaint.' Nevada County, etc., Canal Co. v. Kidd, 28 Cal. [673] 681. On the other hand, under statutory provisions similar to ours, the rule has been entirely repudiated by the court of appeals of New York, and it is there held to be immaterial whether the cause of action set out in the amended complaint is new or otherwise." Although the court was discussing amendments under section 473 of the Code of Civil Procedure, no reason appears why the same principles should not be applied to the situation presented by the circumstances of the case before us. Born v. Castle, 22 Cal.App. 282, 134 P. 347; McClure v. Alberti, 190 Cal. 348, 212 P. 204; Ennis Brown Co. v. W. S. Hurst & Co., 1 Cal.App. 752, 82 P. 1056.

[4] The allowance of amendments to conform to the proof rests in the discretion of the trial court and the utmost liberality is allowed in upholding orders made by the trial court permitting amendments for this purpose. 21 Cal.Jur., p. 209, and cases there cited. In section 475 of the Code of Civil Procedure it is provided that no judgment shall be reversed by reason of any error unless the party appealing suffers substantial injury. The appellants herein have suffered no injury and have not been misled by the ruling of the court. A reversal of the judgment would result in a miscarriage of justice.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

KEY NUMBER SYSTEM

14 Cal.App.2d 660

PEOPLE v. OKADA.

Cr. 2857.

District Court of Appeal, Second District, Division 2, California.

June 18, 1936.

1. Automobiles ⇐357

Instructions to find defendant guilty of negligent homicide, if death resulted from commission of unlawful act not amounting to felony, *held* prejudicially erroneous as outside scope of information, charging only negligent operation of automobile, causing death of named person (St.1935, p. 174, § 500).

2. Automobiles ⇐357

Instructions in trial for negligent homicide under information charging only operation of automobile in negligent manner, causing named person's death, that evidence showed that defendant was licensed as automobile operator on condition that he wear eyeglasses and that he should be convicted if he operated automobile in violation of restricted operator's license, thereby proximately causing deceased's injuries, *held* improper as implying unproved facts as to contents of restricted license and authorizing conviction for doing of unlawful act not amounting to felony (St.1935, pp. 133, 174, §§ 273, 500).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Automobiles ⇐357

Instructions in trial for negligent homicide by automobile as to speed limits in business and residential districts *held* improper, in absence of evidence that district in which accident happened was sign-posted as either business or residential district (St.1935, pp. 166, 174, 243, §§ 468, 500, 758).

4. Automobiles ⇐357

Erroneous instructions, authorizing conviction of negligent homicide by automobile, if death resulted from unlawful act not amounting to felony or violation of restricted operator's license, and instructions, not supported by evidence, as to speed limits in business and residential districts, *held* to require reversal of conviction, in view of sharply conflicting evidence and plausible defense of unavoidable accident (St.1935, pp. 133, 166, 174, 243, §§ 273, 468, 500, 758).

5. Criminal law ⇐1023(8)

Order in arrest of judgment on conviction of crime is not appealable.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Sueo H. Okada was convicted of negligent homicide, and he appeals.

Reversed.

J. Marion Wright, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

In 1935 the California state Legislature added to the category of crimes a felony denominated "negligent homicide," in these words: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the State prison for not more than three years." St.1935, p. 174, § 500, as added by St.1935, p. 2141, c. 764, § 500, Vehicle Code.

Defendant herein was accused by information of "the crime of negligent homicide in violation of section 500, Vehicle Code, a felony, committed as follows: That the said S. H. Okada on or about the 18th day of December, 1935, * * * did willfully, unlawfully and feloniously operate a vehicle, to wit, an automobile, in a negligent and unlawful manner, causing the death of one Clifford Merrill Rippie, a human being." Upon trial a jury found him guilty and he was sentenced to serve one year in the Los Angeles county jail. From the court's judgment and orders denying motions for new trial and in arrest of judgment, defendant appeals.

[1] It is to be noted that the statute is phrased in the alternative, having to do with death resulting from injuries "caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony." In the information filed herein appellant was charged only under the first alternative, i. e., with "operating a vehicle to wit, an automobile, in a negligent and unlawful manner". Nevertheless, the court instructed the jury concerning the "commission of an unlawful act not amounting to a felony," and further told the jurors: "It is not necessary that there be proof of both a driving of a vehicle in a negligent manner and the doing of another unlawful act not amounting to a felony. If you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant was driving the vehicle in question in a negligent manner and while so driving caused the injury which proximately resulted in the death of Clifford Merrill Rippie, then you should find the defendant guilty as charged. Or, if you are satisfied to a moral certainty and beyond a reasonable doubt that at the time the injuries proximately resulting in the death of Clifford Merrill Rippie were inflicted the defendant was driving the vehicle in question and while so driving committed an unlawful act not amounting to a felony, which act was the proximate cause of the death of said Rippie, then you should find the defendant guilty as charged." Two other instructions also treated of the same subject.

By these charges the jurors were instructed to find appellant guilty if death resulted from the commission of an unlawful act not amounting to a felony, when this phase of the offense was not charged in the information. Such instructions, going outside the scope of the formal charge as

set forth in the information, were erroneous and prejudicial to appellant's rights.

[2] Error was also committed in instructing the jury as to the matter of appellant's "restricted" automobile operator's license. As a witness in his own behalf, he testified that he had a "restricted license," that he did not know it prohibited his driving unless he wore glasses, that he was not wearing glasses at the time of the accident, that his eyesight was good, and that he did not know the conditions of the restriction in his license until after the accident. An eye specialist testified that appellant's vision was good and that at the time of the accident it was not necessary for him to wear glasses in order to see properly while driving an automobile. Nothing was offered by respondent to contradict this testimony, and there was no evidence, either of a primary nature, by introduction of the operator's license, or of a secondary nature, by photostatic copy or otherwise, to show what were the exact terms of the restriction.

Section 273 of the Vehicle Code (St. 1935, p. 133) provides that a special restricted license may be issued or that restrictions may be set forth upon the usual license form, and that the vehicle department whenever good cause appears shall have authority "to impose restrictions suitable to the licensee's driving ability with respect to the type of, or special mechanical control devices required on, a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee as the department may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee." Nowhere in the record does it appear what the terms or conditions of appellant's restricted license were. Nevertheless the court told the jurors that "the evidence shows that the defendant was licensed as an operator of an automobile upon condition that he wear eyeglasses at all times while operating an automobile," and further instructed that if the jurors believed appellant operated his automobile "in violation of a restricted operator's license and that such driving * * * was the proximate cause of the injuries received" by the deceased, they should find him guilty of negligent homicide. Such instructions, implying as they did the unproved facts as to the contents of the restricted license, were improper in the absence of evidentiary showing as to the actual terms and conditions of such license. Moreover, as conceded by respondent, the violation of the provisions of a restricted license would be the "doing of an unlawful act not amounting to a felony," which was not charged in the information herein, thus constituting an additional ground why instructions relating thereto were improper.

[3] Instructions were given as to speed limits in business and residential districts. There had been testimony that the accident happened in a district built up with business establishments, in an attempt to show that such locality came within the Vehicle Code definition of a "business district." But there was no evidence whatever that the district was sign-posted either as a business or residential district. The Vehicle Code, § 758 (St. 1935, p. 243), states that "every highway shall be conclusively presumed to be outside of a business or residence district" unless such district is duly sign-posted as required by the Code, and section 468 (St.1935, p. 166) details the method of such sign-posting. Instructions as to speed in a business district were therefore improper herein without proof from which the jurors might infer that the district where the accident occurred was in fact a business district.

[4] Many other points relating to instructions are made in the briefs, but we deem it unnecessary to discuss them in detail. Enough has been said to indicate that with the sharp conflict in evidence and with appellant's plausible defense of an unavoidable accident the errors complained of must result in a reversal of the case.

[5] The order in arrest of judgment being nonappealable, the attempted appeal therefrom is dismissed. The judgment and order denying motion for new trial are reversed.

We concur: CRAIL, P. J.; WOOD, J.

14 Cal.App.2d 513

PEOPLE v. SHEPHERD et al.

Cr. 2734.

District Court of Appeal, Second District, Division 1, California.

June 9, 1936.

1. Criminal law ⇐939(1), 945(1)

Party seeking new trial because of newly discovered evidence must have made reasonable effort to produce all his evidence at trial, and he will not be allowed a new trial for purpose of introducing evidence known to him and obtainable at time of trial, or which would have been known to him had he exercised reasonable effort to present his defense, and, in addition to due diligence, evidence must be material and such as to render a different verdict reasonably probable upon retrial (Pen.Code, § 1181, subd. 7).

2. Criminal law ⇐945(1)

That newly discovered evidence is merely cumulative is not necessarily determinative as to whether new trial should be granted, since if evidence is such that different result upon retrial is reasonably probable as result of such new evidence, and if showing made by applicant is sufficient in other respects, new trial should be granted (Pen. Code, § 1181, subd. 7).

3. Criminal law ⇐939(1), 945(2)

Denial of motion for new trial on ground of newly discovered evidence, in prosecution for assault, *held* error, where accused's diligence in marshaling evidence for trial was affirmatively shown, as was their inability to obtain newly discovered evidence until codefendant confessed in county jail, after verdict had been returned, that he and two others other than accused committed assault, district attorney did not oppose motion for new trial, and victim indicated doubt as to identity of accused (Pen. Code, § 1181, subd. 7).

4. Criminal law ⇐1186(4)

While order consolidating two informations against different defendants for trial is erroneous, error is one of procedure, and not jurisdictional (Pen.Code, §§ 954, 1098).

5. Criminal law ⇐1166(1)

Error in ordering consolidation of two informations against separate defendants *held* not to authorize new trial or reversal, where error did not result in prejudice to substantial rights of defendants (Pen.Code, §§ 954, 1098).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Willis W. Shepherd, Howard J. Streich, and W. F. Wiggington were convicted of assault by means of force likely to produce great bodily injury, and the two last-named defendants appeal.

Reversed.

See, also, (Cal.App.) 55 P.(2d) 923.

Entenza & Gramer, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

WHITE, Justice.

Appellant Streich and one Willis W. Shepherd were jointly charged in an information with the crime of assault by means of force likely to produce great bodily injury, a felony, committed on the person of one Leo G. Hubbert on or about December 14, 1934.

Appellant Wiggington was charged in a separate information with the same offense, alleged to have been by him committed upon the same victim and on or about the same day.

After a trial before a jury, appellants and the defendant Shepherd were found guilty of the offense charged. The trial court did not pronounce judgment against appellants, but suspended the proceedings and placed appellants on probation, requiring as a condition of probation that appellants serve six months in the county jail.

As grounds for reversal, appellants urge that the trial court abused its discretion in denying the motion for a new trial on the ground of newly discovered evidence; that by its rulings the trial court erroneously admitted evidence prejudicial to appellants; that the court committed error in the giving of instructions to the jury, and also by consolidating two separate informations for trial.

The evidence indicates that on the night of December 14, 1934, at about the hour of 9:30 p. m., the complaining witness, Hubbert, was employed as a driver of a motor coach for the Los Angeles Motor Coach Company, on the Silver Lake boulevard route in the city of Los Angeles.

That since November, 1934, and up to and including the date of the alleged offense, the employees of the Los Angeles Railway and the Los Angeles Motor Coach Company were out on strike. That all three of the defendants were striking employees of the Los Angeles Motor Coach Company. The complaining witness testified that he stopped his bus on Silver Lake boulevard, near Moreno drive, to pick up a passenger; that the defendant Shepherd boarded the bus and inquired if the bus went to Riverside drive; that in the meantime the other two defendants boarded the bus, and appellant Wiggington said, "Let him have it," whereupon the defendant Shepherd struck him over the head with a wooden club. Hubbert further testified that the blow knocked him out of his seat to the floor of the bus, and as he lay there appellant Wiggington attempted to stomp on his face, but Hubbert kicked him away. About this time, according to the complaining witness, appellant Streich grabbed the box used to collect fares in the bus and threw it at the complaining witness, who blocked it with his hands. As a result of this assault, the complaining witness testified, he received a cut over his right eye, requiring six stitches to close, and also a bruised hand, all of which required his hospitalization for a period of twelve days.

The only other witness to the incident was Jane Parmele, a passenger on the bus, but she could not identify appellants as being the assailants.

The evidence also indicates that although the complaining witness identified the three defendants at their trial, he had, shortly after the alleged assault, identified one O. L. Watson as one of the three men who assaulted him, but later withdrew his identification of Watson, who was released.

Appellants took the witness stand at the trial, and each denied any complicity with or participation in the assault in question. They also produced numerous alibi witnesses, who testified that appellants were not at or near the scene of the assault.

On the hearing of the motion for a new trial appellants produced an affidavit from one Harvey P. Anderson, who swore that the assault in question here was committed by the affiant, Anderson, Willis W. Shepherd, one of the defendants, but not an appellant herein, and one Adolph Couzens. In addition to Anderson's affidavit, he was sworn as a witness during the hearing on the motion for a new trial and testified before the trial judge that appellants did not participate in the assault, and that the same was committed by himself, Shepherd, and Couzens. On the hearing of the motion for a new trial the complaining witness was sworn and was asked the question: "When you see this other man here now (referring to Anderson) does that in any way cause you to change your mind with reference to the identification of Mr. Streich?" To which the complaining witness answered: "Well, it causes a doubt, yes, sir."

Further, on the hearing of the motion for a new trial, the deputy district attorney who tried the case stated to the court: "In view of the inherent weakness in identification of the original case, and newly discovered evidence, I have consulted my superiors in the district attorney's office, and we are prepared *not to oppose* a motion for a new trial."

Appellants also caused to be filed on the motion for new trial affidavits setting forth the fact that they did not know any of the facts contained in Anderson's affidavit until after their conviction and while confined in the county jail with their codefendant, Shepherd, when the latter imparted to them the information that he (Shepherd), together with Anderson and Couzens, committed the offense of which appellants stood convicted; that they immediately thereafter communicated this information to their attorneys, resulting in the production of Anderson's affidavit and the testimony from Anderson at the hearing of the motion for a new trial. It might also be noted that the record discloses the fact that Anderson pleaded guilty to the offense for which these defendants were convicted, and was sentenced therefor.

No counter affidavits were presented to rebut the showing made by appellants on their motion for a new trial, nor was any attempt made by counter affidavits to discredit the newly discovered witness, Anderson, or dispute the alleged facts contained in the affidavit and testified to by the new witness, Anderson, although this course was open to the district attorney and such procedure was proper. People v. Sing Yow, 145 Cal. 1, 78 P. 235, 236.

The main contention of appellants is that a new trial should have been granted upon the ground of newly discovered evidence. This claim is presented with great earnestness by counsel, who are apparently convinced of the innocence of appellants.

[1, 2] We are not unmindful that the claim of newly discovered evidence as a ground for, or warranting, a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence. People v. Freeman, 92 Cal. 359, 366, 28 P. 261. It is recognized, however, that despite the exercise of such effort, cases will sometimes occur where, after trial, new evidence most material to the issues and which would probably have produced a different result, is discovered. For such cases the remedy of a motion for a new trial on the ground of newly discovered evidence has been given. People v. Byrne, 160 Cal. 217, 225, 116 P. 521. As declared by subdivision 7 of section 1181 of our Penal Code, the court may grant a new trial "when new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." It is well settled that a party who relies upon this ground must have made reasonable effort to produce all his evidence at the trial, and that he will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of the trial, or which would have been known to him had he simply exercised reasonable effort to present his defense. People v. Freeman, 92 Cal. 359, 28 P. 261; People v. Rushing, 130 Cal. 449, 454, 62 P. 742, 80 Am.St.Rep. 141.

In addition to due diligence, it is further required that the evidence be material and such as to render a different verdict reasonably probable upon a retrial. Respondent contends in the instant case that the newly discovered evidence is merely cumulative to the alibi evidence offered at the trial of these appellants; but, conceding such to be the case, that is not necessarily determinative as to whether a new trial should be granted, because, assuming that the evidence may be cumulative, still, if it is such that a different result upon a retrial is reasonably probable as the result of such new evidence, and the showing made by the applicant is sufficient in other respects, the new trial should be granted. In the case of People v. Sing Yow, supra, the duty and power of the trial court in the determination of a motion for new trial on this ground, and the functions of an appellate court in reviewing the action of the trial court, were defined as follows: "The question as to the effect upon the case of the newly discovered evidence is, from its nature, peculiarly one that is addressed to the discretion of the trial court, and, of course, *should be determined by that court with a full realization of the responsibility involved; and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits,* and that by reason of the newly discovered evidence the result would probably be or should be different on a retrial. But, unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed." (Italics ours.)

[3] In the light of what has been said, we nevertheless feel that the facts in the instant case are such as to warrant a reversal of the order of the trial court. The diligence of appellants in marshaling evidence for the trial is affirmatively shown in their affidavits, as was their inability to obtain the newly discovered evidence until Shepherd's confession in the county jail after the verdict imparted it to them. The materiality of this newly discovered evidence cannot be questioned. The newly discovered evidence in this case consisted of the affidavit and oral testimony before the trial court of a witness who not only testified he knew who committed the offense, and that the appellants did not, but who testified that he, defendant Shepherd (who, with these appellants, formerly had been convicted of the offense), and one Couzens, were the guilty parties; that he pleaded guilty to the identical charge and a judgment was pronounced against him thereon. Added to this is the testimony of the complaining witness given on the hearing of the motion for new trial that upon being confronted with the aforesaid witness, Anderson, the complaining witness was doubtful as to the verity of his previous testimony identifying one of the appellants. Also, we have the fact that the complaining witness had previously retracted his identi-

fication of one O. L. Watson. Further, we have the statement of the deputy district attorney who prosecuted appellants that by reason of the "inherent weakness in identification of the original case, and newly discovered evidence," the district attorney would not oppose a motion for a new trial. In the face of these facts, we are of the opinion that the showing made on the motion for a new trial was of such a character as to make it manifest that these appellants, without fault on their part, did not have a fair trial on the merits, and that by reason of the newly discovered evidence the result could reasonably and probably be different on a retrial. For this reason, the order denying the motion for a new trial must be reversed.

Although the order must be reversed, by reason whereof a new trial may ensue, we feel impelled, for the guidance of the court below, to consider another ground advanced on this appeal, wherein appellants urge that the trial court fell into error by consolidating for trial the information against defendants Shepherd and Streich with a separate information filed against defendant Wiggington. Neither information in any way referred to the other, although it may be readily inferred from the identical date and the similar name of the person alleged to be assaulted that the three defendants were charged with the commission of the same crime. The order consolidating the cases for trial was made without objection by any of the defendants, and the jury returned separate verdicts against each appellant. It is urged that although the appellants did not object to the consolidation of the cases for trial, still they cannot be deemed to have waived the objection, because the error is jurisdictional. In support of this claim appellants cite the case of People v. Foward, 134 Cal.App. 723, 26 P.(2d) 532. It is difficult for us to see how the order now under consideration, consolidating the two cases for the purpose of trial, affected the jurisdiction of the court. The offense was committed in Los Angeles county. It was a felony, of which the superior court of that county had exclusive original jurisdiction. It also had jurisdiction of the persons of the defendants, who were present in court at all stages of the proceedings, and represented by counsel. Every element requisite to give the superior court jurisdiction was present and proved.

In the cases of People v. O'Connor, 81 Cal.App. 506, 254 P. 630, and People v. Foward, supra, it was held that such a consolidation was erroneous. It was also held in both cases that the error was not cured by section 4½ of article 6 of the Constitution. It does not appear that hearings in the Supreme Court were asked in either of these cases.

[4] While we agree with the holdings in these cases that the consolidation of the two informations for the purpose of trial constituted error, we find ourselves unable to concur in the conclusions there reached that the error was not one of procedure. We are in accord with the holding of the District Court of Appeal of the Fourth District, in the case of People v. Aguinaldo, 3 Cal.App.(2d) 254, 39 P.(2d) 505, that while the order consolidating two separate informations against different defendants for trial is erroneous, it is an error of procedure, and not jurisdictional.

It is true there is no authority in sections 954 or 1098 of the Penal Code for consolidating separate informations against separate and distinct defendants, and until the lawmaking power, by appropriate legislation, provides that it may be done, it should not be resorted to; but such an order must result in prejudice to the substantial rights of the defendant before it can become a ground for reversal.

[5] In the O'Connor Case, supra, it appears that the court limited the peremptory challenges of the defendants to the number provided in section 1098 of the Penal Code, and refused to give them the number to which they were entitled under this and section 1070 of that Code. By reason of such rulings, they were required to accept a juror not satisfactory to them and whom they were lawfully entitled to peremptorily challenge. In the case before us there is no claim, either that appellants objected to the consolidation, or that by reason thereof they suffered any prejudice. There is no claim that the evidence before the trial court was not amply sufficient to support the verdict. The sole ground here urged is that the question is jurisdictional; but we are of the opinion that it is procedural, and unless it results in prejudice to the defendants' substantial rights we cannot on that ground reverse a judgment or order a new trial.

No other points raised on this appeal require discussion.

The attempted appeal from the purported order of April 10, 1935, denying motions for a new trial, having heretofore been by this court dismissed [People v. Shepherd (Cal.App.) 55 P.(2d) 923], it becomes unnecessary for us to pass thereon.

For the reasons herein stated, the order of March 11, 1935, by which appellants' motions for new trial were denied, is reversed.

We concur: HOUSER, P. J.; YORK, J.



14 Cal.App.2d 750

CLARKE v. ANGELUS MEMORIAL ASS'N et al.

Civ. 10852.

District Court of Appeal, Second District, Division 2, California.

June 24, 1936.

Hearing Denied by Supreme Court Aug. 20, 1936.

1. Appeal and error ⇐162(1)

Acceptance of amount adjudged due *held* not to preclude plaintiff from maintaining appeal to establish his claim to greater sum.

2. Corporations ⇐225

Stockholder *held* liable to pay portion of indebtedness of corporation which number of shares of stock which she owned bore to whole of subscribed capital stock of corporation, under law in force when indebtedness was incurred.

3. Appeal and error ⇐1008(1)
Attorney and client ⇐140

In action to recover for legal services, where trial court had before it detailed statement as to extent of services rendered, it was court's province to use its own experience and judgment as to reasonable value thereof, and its findings on such question would not be disturbed on appeal.

4. Appeal and error ⇐1151(3)

In action against corporation and stockholders for legal services rendered to corporation, where trial court found amount of indebtedness of corporation but adjudged recovery against stockholder for less than proportionate amount of her stock ownership, which was measure of her liability under law in force when indebtedness was incurred, Appellate Court would find amount of stockholder's liability and order modification of judgment, without ordering new trial (Code Civ.Proc. § 956a; Const. art. 6, § 4¾).

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Action by R. D. Clarke against the Angelus Memorial Association and others. From an insufficient portion of a judgment, plaintiff appeals.

Remanded in part, with order to enter modified judgment in accord with opinion; appeal dismissed in part.

Bernard Potter and Lynden Bowring, both of Los Angeles, for appellant.

Willedd Andrews and Jacob Moidel, both of Los Angeles, for respondent Aimee Semple McPherson Hutton.

McCOMB, Justice pro tem.

This is an appeal from the portion of a judgment in favor of plaintiff after trial before the court without a jury awarding only the sum of $1,067.97 against the defendants Aimee Semple McPherson Hutton and David L. Hutton.

The facts are these:

Plaintiff's assignor, an attorney at law, rendered legal services to the defendant corporation, Angelus Memorial Association, of which defendant Aimee Semple McPherson owned 440/1000ths of the issued capital stock. The court found defendant corporation indebted to plaintiff in the sum of (a) $5,490.84 for services rendered prior to July 2, 1929, upon an account stated, but that defendant Aimee Semple McPherson was liable only for $765.97 of said sum; (b) $500 as the reasonable value of services rendered between July 2, 1929, and February 21, 1930; and (c) $250 as the reasonable value of services rendered between February 21, 1930, and August 1, 1931. Defendants have paid plaintiff the amount awarded by the trial court.

These questions are presented for our determination:

First. Does the acceptance of an amount adjudged due preclude plaintiff from maintaining an appeal for the purpose of establishing his claim to a greater sum?

Second. When a corporation incurs an indebtedness, does a stockholder become

liable for payment thereof in the proportion which the number of shares of stock which he owns bears to the whole of the subscribed capital stock of the corporation?

Third. Is there sufficient evidence to sustain the findings of fact of the trial court as to the reasonable value of the legal services rendered to defendant corporation as set forth under subdivisions (b) and (c), supra?

[1] The first question must be answered in the negative. The law is settled that, where the only question on appeal is whether the recovery should be greater than that allowed by the trial court, the acceptance of the amount adjudged due is not inconsistent with the claim that the judgment is not large enough and the appeal may be maintained. In re Estate of Ayers, 175 Cal. 187, 190, 165 P. 528; County of San Bernardino v. County of Riverside, 135 Cal. 618, 620, 67 P. 1047; Wold v. League of Cross, 107 Cal.App. 344, 347, 290 P. 460.

[2] The second question must be answered in the affirmative under the law in force when the indebtedness was incurred. At the time this obligation arose, the law was settled that, when a corporation incurred a debt, each stockholder became a party to the indebtedness and liable for payment thereof in the proportion that the number of shares which he owned bore to the whole of the subscribed capital stock of the corporation. Thomas v. Matthiessen, 232 U.S. 221, 235, 34 S.Ct. 312, 58 L. Ed. 577; Knowles v. Sandercock, 107 Cal. 629, 638, 40 P. 1047.

[3] The final question must be answered in the affirmative. The trial court had before it a detailed statement as to the extent of the legal services rendered and it was the province of the trial court to use its own experience and judgment as to the reasonable value thereof. It having done so, the findings will not be disturbed upon appeal. Elconin v. Yalen, 208 Cal. 546, 550, 282 P. 791; Libby v. Kipp, 87 Cal. App. 538, 548, 262 P. 68.

[4] Under section 4¾, article 6, of the Constitution of this state and section 956a of the Code of Civil Procedure, it is unnecessary to order a new trial of the case. We find that defendant Aimee Semple McPherson was liable for 440/1000ths of $5,490.84 or $2,415.97 with interest thereon at the rate of 7 per cent. per annum from July 2, 1929, to this day, of which sum $765.97 has been paid by defendants to plaintiff, leaving a balance due plaintiff from said defendant of $1,650, together with costs incurred by plaintiff in the superior court in the sum of $———.

The trial court is ordered to enter a modified judgment in accord with this opinion and the foregoing finding and to permit plaintiff to file a cost bill.

There is no evidence to support a judgment against defendant David L. Hutton. Therefore the appeal as to said defendant is dismissed.

It is so ordered.

We concur: CRAIL, P. J.; WOOD, J.



14 Cal.App.2d 628

DARNELL v. WOODRUFF.

Civ. 10563.

District Court of Appeal, Second District, Division 1, California.

June 17, 1936.

Rehearing Denied July 14, 1936.

1. Attorney and client ⇨152

Attorney, employed to represent client in income tax matter "as in the past," during which he was paid traveling, hotel, and other incidental expenses, as well as for services in similar case before Internal Revenue Department, *held* entitled to recover hotel and traveling expenses, incidental to preparation and presentation of case, from client.

2. Attorney and client ⇨141

Judgment awarding attorney $24,000 for services performed and expenses incurred in preparing and presenting income tax case of client, for whom he obtained promise by Internal Revenue Department to recommend compromise settlement of claim for delinquent taxes, penalties, and interest, originally amounting to over $450,000, for $80,000, in addition to saving client from civil penalty and possible criminal prosecution for willful failure to make returns, *held* not excessive (Revenue Act 1926, § 1114(a), 26 U.S.C.A. § 145(a) and note).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by James L. Darnell against Leonard J. Woodruff, who filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Francis B. Cobb, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

From a judgment secured by plaintiff in a trial without a jury, defendant appeals upon the grounds that the court erred in ruling upon points of law occurring in the course of the trial and in making certain findings upon which the judgment rests, which are contrary to or not justified by the evidence. Despite the formidable presentation of this appeal by means of a voluminous transcript and a book of exhibits exceeding 500 printed pages, we find, upon analysis, a comparatively simple case.

The defendant struck oil in Oklahoma in 1919 and before the close of 1922 had received income from that source amounting to more than a million dollars. In 1927 he employed plaintiff, an income tax specialist, to represent him before the Department of Internal Revenue at Washington; his property having been attached for a claimed failure in respect to his income tax return, five years previously, in the year 1922. Plaintiff, at the time of this employment, was a consultant in tax matters for Standard Oil Company of New Jersey, and also for the company to which defendant had leased his oil land on a 50 per cent. royalty basis; namely, Carter Oil Company, owned by the Standard Oil Company of New Jersey. By reason of this connection, plaintiff, having access to production figures and other data, was in position to present to the government claims for depletion in behalf of defendant and his wife. For this he rendered a bill "for services, traveling and hotel expenses, telegrams and telephone", amounting to $2,619.53, which was paid without demur. Defendant testified, as to the year 1923, that he would estimate his gross income at $200,000; as to 1925, $75,000 less—$125,000. "I couldn't give an approximation of within a hundred thousand dollars. I don't think I kept any books or records showing those facts in 1925; I did in 1926 and 1927. I employed Mr. Gardenhire in the latter part of the year 1926 and all of 1927 and he quit in the spring of 1928. He was my private secretary and bookkeeper. I don't know whether he destroyed those books or not." Notwithstanding that he engaged in business on a large scale during 1925 and in subsequent years, holding a great many oil leases in Oklahoma, owning ranches and homes in several different states, having accounts in a goodly number of banks, buying and selling stocks and bonds, and, as a side line, carrying on a business dealing in antiques, having during at least a part of the time the assistance of a secretary-bookkeeper, and having had prior direct contact with the Internal Revenue Department, this defendant failed to file an income tax return for the years 1925, 1926, 1927, 1928, 1929, and 1930. The department in 1931 endeavored, by every reasonable means, to get him to make a report on this matter, forwarding its communications by registered mail and having a representative interview him, all to no avail. At last, the final notice, advising him of impending distraint proceedings, bringing no response, the defendant claiming to be ill then and on other occasions, the Internal Revenue Collector for Southern California district in early December attached his property, including an active account with a stockbroker, running into many thousands of dollars. Defendant immediately, on December 7, 1931, wired the plaintiff at his New York office telling him of his predicament and closing with the words: "I want to employ you immediately to represent me in this matter as in the past." The plaintiff undertook the employment asking for and receiving a retaining fee of $500, and on December 9th, left New York for Washington. Two days later he advised defendant by wire as follows: "I have done the best I could in the department, and on my assurance that the matter of the determination of your tax would be gone into at once so that your true liability could be determined, they are wiring the Collector this morning asking him to try to arrange things so that you can at least turn around." Immediately afterward the government representative called upon defendant and arranged for a brief postponement of action which, upon the posting of a bond, as suggested by plaintiff, became an indefinite postponement; the result being that distraint proceedings were abandoned and a settlement ultimately effected with the government.

The distraint action was based upon income calculations made by the government

for the years 1923 to 1929, both inclusive, which amounted to $278,155.71, plus penalties of $69,538.93, and interest approximating $110,564, a total of $458,258.64. To this might be added a fraud penalty of 50 per cent. of the basic tax.

Following his successful work in Washington, the plaintiff came to Los Angeles and there, absenting himself entirely from his New York office, spent a period of several months on various occasions in the succeeding year in going over a ten years' accumulation of correspondence, checks, and documents of all kinds in an endeavor to reconstruct a set of books that would reflect as well and completely as possible the business done by defendant in the questioned years. Plaintiff was assisted by an examining agent of the Internal Revenue Department, and these two men spent many weeks sorting and checking the papers and making records thereof. Most of the work was done at defendant's house, under circumstances described by plaintiff in a letter addressed to the Commissioner of Internal Revenue on January 19, 1933, as follows: "As might be expected, the man's financial affairs are, or rather were, in unbelievable confusion. He has never kept books. At intervals he has had an employee or two who has tried to get his business into some kind of order, but he has been distrustful and suspicious and not much was ever accomplished. He has never checked a bank statement, and many of his checks, some for considerable amounts are untraceable. Fortunately he has never destroyed a paper of any kind, but there has never been any systematic filing. Armloads of documents of all kinds, some valuable, many worthless, were found in all sorts of unexpected places all over the house and the store."

In this same letter, plaintiff sought to satisfy the government that, notwithstanding appearances, defendant was essentially honest, stating "he knew at the end of each year that he had less money that he had at the beginning, and as a consequence had no taxable income and hence owed no taxes. He honestly and sincerely believed that inasmuch as he owed nothing, there was no obligation on his part to file a return. When the liens and attachments on his property were filed in December, 1931, he was astonished and dismayed." Plaintiff actually secured from the Department of Internal Revenue abatement of the 50 per cent. penalty recommended by the examining agent for fraud practiced upon the government by defendant. His success in having this civil penalty waived "on the ground that there is no fraud or fraudulent intent" takes on special significance when we consider the criminal action that may result from fraudulent failure to make a return. "Any person required * * * to make a return * * * who willfully fails to * * * make such return * * * at the time or times required by law * * * shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution." Revenue Act 1926, § 1114(a), 44 Stat. 116, 26 U.S.C.A. § 1265 (see 26 U.S.C.A. § 145(a) and note).

[1] In addition to saving his client from a civil penalty and a possible criminal prosecution, plaintiff so successfully handled the business intrusted to him in December, 1931, that by early spring of 1934, he was able to advise defendant that, "Owing to my efforts the total amount of tax assessed stands now at $45,532.60. To this there will be added a mandatory penalty of $11,383.15, and the Government, if it so wishes, may add a further penalty of $22,766.30." The mandatory penalty represented 25 per cent. of the basic tax for negligence; the possible additional penalty, 50 per cent. for fraud. Estimating $25,000, as the amount of interest due, plaintiff notified defendant that he had been told by the department that "an offer in compromise of $80,000 would be entertained and recommended." Thus disposing of any claim for fraud penalties, plaintiff advised defendant to make the offer of compromise. This defendant declined to do. Instead, he went from Los Angeles to his former home in Ardmore, Okl., there engaged his one-time secretary and bookkeeper, an accountant and an attorney, and with them proceeded to Washington and secured further consideration of the matters at issue in the Internal Revenue Department. Witnesses that were never made available to plaintiff were produced before the officials of that department, and in due course, the basic tax against defendant was reduced from $43,232.08, the figure attained by plaintiff, to the amount of $25,765.49. Without a thought of minimizing the effective service rendered by the Oklahoma attorney for which he received as a fee a portion of the sum of $13,100, incurred for services and expenses, we think it is apparent that his work performed in a few weeks had as its groundwork the set of books, reconstructed with painstaking care and great skill by

plaintiff over a period of many months, and data assembled in the period December, 1931, to February, 1934, all of which was placed at the disposal of the attorney when defendant summoned plaintiff from New York to Washington to attend a conference preparatory to a new or further presentation of the case. On March 1, 1934, plaintiff presented his first bill for services and expenses, figuring the amount due for services $58,130.78, as 25 per cent. of the difference between the original basic tax assessment and the final basic tax assessment which he had secured. In this suit upon quantum meruit he testified that this was only one method of estimating the value of his services, calling particular attention to the time spent upon the case away from his New York office, shown by an exhibit as 246 days in the year 1932, 64 days in 1933, and 9 days in 1934. In addition, he charged against this case 97 days in his office. Various income tax experts were called at the trial by both parties, some evaluating the services of plaintiff at more than the amount charged, some at less, and one, for the defendant, at less than nothing. There was evidence that plaintiff, prior to 1920, had been head of the Natural Resources Division of the Treasury Department of the United States; that he then resigned, built up a remunerative practice which brought him for the period 1920 to 1927 averaged earned fees of more than $50,000 per year, and thereafter to 1931 more than $25,000 annually. Other considerations bearing upon the reasonableness of the fees charged were called to the attention of the court; also the fact that during the time the case was handled by plaintiff, he had received on account the sum of $8,257.35. From all the facts and from the conflicting evidence before him, the trial judge found that there was due plaintiff from defendant for services performed a balance of $24,000, and entered judgment for that amount; by this decision recognizing the right of plaintiff to charge defendant with amounts which he had received in advance for hotel and traveling expenses incidental to the preparation and presentation of the income tax case. Appellant complains of this allowance, citing the case of Tasker v. Cochrane, 94 Cal. App. 361, 271 P. 503, to the effect that an attorney is bound to bear his own traveling expenses in the absence of a special agreement to the contrary. Respondent answers this complaint effectively by calling attention to the terms of employment proposed by appellant to respondent, "to employ you immediately to represent me in this matter as in the past," then showing that in the past respondent had rendered and appellant had paid a bill not merely for services performed in a case before the Internal Revenue Department, but also for traveling, hotel, and other expenses incidental to the work. We notice, too, that appellant in the early days of the employment forwarded $500 to respondent for expenses and shortly thereafter $1,000 on the report that, "If you want me to do all this you should send me a check for one thousand dollars ($1,000) to cover my expenses, as the five hundred dollars ($500) already sent has been pretty much used up in my three trips to Washington, telephone, telegrams, etc." Incidentally, it may be pertinent to note that in the performance of his work, respondent made four trips from New York to California and return, several via Oklahoma, and seven trips to Washington.

[2] We have failed to state that when this suit was instituted defendant filed a cross-complaint charging plaintiff with negligence, itemized as to many particulars in his handling of the income tax case; also, charging him in counterclaim with various faults, deficiencies, delinquencies, and even conversion of personal property. The trial court made findings favorable to respondent on all material issues before it, including one that at the time of employment no sum was specified or agreed upon as a charge to be made by plaintiff for his services. We have examined with care these findings having in mind the specifications of error charged in relation to them and, considering the evidence adduced and the right and duty of the court to decide questions where a conflict in evidence arises, we find no error. Neither do we find any error in the rulings on law points arising during the trial. We note appellant's claim that the amount awarded respondent by the trial court is grossly excessive, and while we realize that a large part of the reduction claimed arose from returns that may have been filed in error in the Baltimore office of the Department of Internal Revenue, still, noticing the conduct of the case in other particulars, we cannot say that this judgment is excessive in amount. Under the circumstances, we do not feel that the action of the trial court in denying a new trial is subject to criticism.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

14 Cal.App.2d 684

DUNBAR et al. v. OSBUN et al.

Civ. 10508.

District Court of Appeal, Second District, Division 1, California.

June 19, 1936.

1. Compromise and settlement ⇐23(3)

Discharge of receiver of trust after hearing authorized no recovery on bond conditioned on payment to trustees of costs and damages sustained by virtue of receivership if it were finally determined that unit holders were not entitled to appointment, where action for appointment of receiver was dismissed under stipulation which evidence indicated, followed settlement on basis that excluded future liability of any one concerned.

2. Appeal and error ⇐1011(1)

Findings made by trial court on conflicting evidence cannot be disturbed on appeal.

3. Evidence ⇐386(1)

Testimony as to conversations between parties and their attorneys resulting in oral agreement effected before written stipulation for dismissal of action was signed *held* admissible, over objection that it altered or enlarged terms of dismissal by parol.

4. New trial ⇐106

New trial for newly discovered testimony which would only intensify existing conflict in evidence *held* properly denied.

5. Appeal and error ⇐110

Order denying motion for new trial in civil action is not appealable.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Hooper C. Dunbar and others, as trustees of the Bell View Oil Syndicate, an unincorporated trust estate, and another against A. Osbun and others. From a judgment in favor of defendant the Fidelity & Deposit Company of Maryland, and from an order denying their motion for a new trial, plaintiffs appeal.

Judgment affirmed, and appeal from order dismissed.

Haight, Trippet & Syvertson, of Los Angeles, for appellants.

Joe Crider, C. B. Runkle, and W. R. Law, all of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Appellants, unsuccessful as plaintiffs in an action upon a surety company bond, claim errors by the court in ruling upon points of law and in entering judgment upon findings unsupported by competent evidence. The case at bar was filed in 1934. To consider intelligently the appeal herein, we must refer to another action brought two years previously. On January 23, 1932, Messrs. Osbun, Cox, and Brenneman, unit holders in a trust known as Bell View Oil Syndicate, had filed a suit against the trustees of that organization, charging conspiracy and various derelictions against them, seeking injunctions and praying for the appointment of a receiver to take over and administer all the assets and business of the syndicate. The application for a receiver was acted upon ex parte, the plaintiffs in that case posting a bond of $10,000 required by the court, and the receiver qualifying on the same day suit was filed. An inquiry upon a show cause order, as to whether the order appointing the receiver should continue in force until the termination of the action, was decided on February 11, 1932, when the court discharged the receiver and required him to account, at the same time placing the trustees under mandatory instructions in regard to methods of handling the syndicate business, and impounding certain moneys and securities which the trustees had placed in a safe deposit box. On March 25, 1932, the receiver's account, containing various items of expense incurred by him, was approved, with the exception of a single item, by the trial court at a hearing attended by counsel for all parties. An appeal from this order of approval was dismissed by the Supreme Court under date of May 10, 1932, following a dismissal of the action itself in the superior court on May 2, 1932, upon a stipulation entered into by counsel reading as follows:

"In the Superior Court of the State of California in and for the County of Los Angeles. A. Osbun, R. L. Cox and R. S. Brenneman, Plaintiffs, v. Bell View Syndicate, an unincorporated association, et al., Defendants. No. 334,121. Stipulation. It is Hereby Stipulated and Agreed that the above entitled action shall be dismissed, each of the parties thereto to pay its and their own costs and disbursements herein, and the clerk of said court is hereby

authorized and directed to enter such dismissal.

"It is Hereby Further Stipulated and Agreed that said Superior Court may forthwith make an order releasing all funds and property heretofore impounded in said action.

"Dated this 29th day of April, 1932.

"[Signed] W. R. Law, Attorney for Plaintiffs.

"Walter F. Haas, Attorney for Defendants heretofore appearing."

The trustees of the Bell View Oil Syndicate, who were sued in the 1932 case, are Messrs. Dunbar, Horton, and Morris, plaintiffs and appellants in this case. They sought to recover from Fidelity & Deposit Company of Maryland the sum of $9,462.06 claimed as damages resulting from expense incurred in connection with the receivership business. The undertaking furnished at the institution of the 1932 action was written by respondent, and bound the company "in the sum of Ten Thousand ($10,000.00) Dollars, lawful money of the United States, to the effect that said plaintiffs will pay to the defendants all costs and damages which they may sustain by reason of the appointment of said receiver and the entering by him upon the performance of his duties, if it shall be finally determined that the said plaintiffs were not entitled to said order."

[1, 2] Appellants contend, and cite various cases in support of their theory, that since the receiver was discharged upon a hearing after holding office for 20 days, that the liability for all expense arising from the appointment and services of the receiver became fixed upon the respondent under the $10,000 bond. We think it proper to consider in this connection the fact that the court made no order vacating the appointment order, but approved the various items of expense shown in the receiver's account, including one for $500 for the receiver's attorney, and another for $750 for the receiver's own services, minus a deduction of $270, the single item that was disallowed. And more important than the approval of the account is the fact that the appeal taken from the order of approval was dismissed almost coincidentally with the dismissal of the action itself. This appeal questioned the correctness and propriety of the court's order that the receiver be paid $480 net for his services and his attorney $500, yet the complaint in the present action shows these two items were paid by appellants on the very day dismissal of this case was filed, May 2, 1932. All this gives color and substance to the testimony of Cox, Osbun, and Brenneman to the effect that prior to the signing of the stipulation the parties had compromised and settled their differences on a basis that excluded future liability on the part of any one concerned. Mr. Cox testified that "there were to be no kick-backs against anybody, and no claims against the bonding company or stockholders or unit holders or anybody else." Mr. Brenneman: "Then there was a matter of—yes, each side should pay all of its own expenses, and there would be no further contention." Mr. Osbun: "The substance was that we would settle on certain terms * * * of each party paying their portion of the expenses; in other words, they to pay their costs, and we to pay ours, and that there would be no kick-backs." There was other testimony of a similar nature upon which the court could readily conclude that the payment by these defendants of the two items mentioned constituted a recognition on their part of their obligation under the agreement to pay as their own expenses these and the other items sued for. We note in the record some testimony tending to contradict the unit holders, but upon appeal we have no power, even if we had the inclination, to disturb findings made by the court upon conflicting evidence. Stewart v. Crowley, 213 Cal. 694, 3 P.(2d) 562.

[3] Counsel for appellants believe that the court erred in receiving testimony of conversations had between the parties and their attorneys before the stipulation for dismissal was signed, claiming that this was an attempt to alter or enlarge by parol testimony the terms of a written instrument, to wit, the dismissal. We do not so understand it. A situation of strife existed between the parties. They decided to terminate this condition of affairs according to certain terms which they agreed upon. Concerning these terms, the court took testimony and found that the respondent was exonerated by them. This important agreement having been reached, the dismissal followed as a matter of course.

[4] Appellants feel aggrieved by the failure of the trial court to grant a new trial on affidavits filed by two witnesses,

who would have contradicted the testimony of Mr. Cox or Mr. Osbun, or both. But such testimony, if received, would only intensify the conflict in the evidence, and the court was within its rights in deciding not to receive it.

[5] The judgment is affirmed. The appeal from the order denying motion for a new trial, not being authorized in a civil action, is ordered dismissed.

We concur: YORK, Acting P. J.; DORAN, J.



15 Cal.App.2d 5

PITTLER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. PITTLER.

Civ. 10097.

District Court of Appeal, First District, Division 2, California.

June 25, 1936.

Hearing Denied by Supreme Court Aug. 24, 1936.

1. Specific performance ⇐123

In specific performance action, findings that there was no agreement to convey, that plaintiff did not perform terms of alleged agreement, and that alleged agreement was not fair contract, *held* not contradictory, where findings were responsive to allegations in complaint.

2. Specific performance ⇐123

In specific performance action, finding that alleged agreement to convey was not fair contract and that consideration was not fair or adequate *held* not objectionable as being unsupported by evidence, even though neither party introduced evidence as to unfairness, since finding was in response to allegations in complaint, and plaintiff had burden of proof.

3. Specific performance ⇐119

Plaintiff seeking specific performance had burden of proving allegations that agreement to convey was fair contract and that consideration was fair and adequate.

4. Courts ⇐99(1)

Where defendant in unlawful detainer action pleaded equitable defense setting out entry under plaintiff's oral agreement to convey, and court, after trying equitable issues, found adversely to defendant, refusal to allow defendant to prove at jury trial of law issues that she entered under such agreement *held* not error; subject-matter being no longer in issue.

5. Appeal and error ⇐197(3)

In unlawful detainer action, contention that notices served on defendant and introduced without objection did not coincide with allegations of complaint could not be first raised on appeal.

6. Evidence ⇐186(6)

Where plaintiff in unlawful detainer action, in support of its theory that defendant was its employee, offered canceled checks which, when mailed to defendant, were attached to salary vouchers which defendant separated and retained but, according to her counsel's statement, failed to preserve, receiving carbon copies of checks and vouchers as originals were when mailed *held* not prejudicial error.

7. Appeal and error ⇐1010(1)

Finding supported by some evidence may not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Actions by Lillian Pittler against the Bank of America National Trust & Savings Association, and by the Bank against Lillian Pittler, were consolidated and tried together by stipulation. From a judgment for the bank in each case, Lillian Pittler appeals.

Affirmed.

Almon Byron McCallum, Bernard B. Stimmel, Morris M. Grupp, and Boyd Oliver, all of San Francisco, for appellant.

Louis Ferrari and Keyes & Erskine, all of San Francisco, for respondent.

STURTEVANT, Justice.

The Bank of America commenced an action in unlawful detainer against Lillian Pittler. The complaint was in the ordinary form. She answered the complaint and in her answer she pleaded many denials and

set forth certain new matter as an equitable defense. She also commenced an action in specific performance and prayed that a conveyance of the property in controversy be ordered made to her. That complaint the Bank of America answered by pleading many denials. Later, on the motion of the Bank of America, the parties stipulated that the latter action be consolidated and tried with the former action. On March 13, 1934, the trial court made an order on the motion of the Bank of America that the equitable defense raised by the answer in the action first mentioned be tried by the court and that the issues at law be tried before a jury. The equitable defense so pleaded in the first action was, in legal effect, the same as the cause of action pleaded in the complaint in the second action, and was as follows:

"In this regard defendant alleges that on or about the 1st day of August, 1932, plaintiff and defendant entered into a certain oral contract and agreement wherein and whereby, and under the terms of which, plaintiff promised and agreed to transfer and convey the legal title to the property described and referred to in said complaint to the defendant, the description of the property referred to, which is situated in the City and County of San Francisco, State of California, is as follows: (describing property).

"On or about said 1st day of August, 1932, and pursuant to said agreement, defendant, with the consent and approval of the plaintiff, went into possession of the property hereinabove described and referred to, as the purchased thereof, and ever since has been and now is in possession of said property, pursuant to and in accordance with the terms of the said agreement of sale between plaintiff and defendant. Defendant has performed all of the terms and conditions of said contract and agreement on her part to be performed, and has done and performed all other things incumbent upon her to do and perform under the terms thereof, and defendant is ready, able and willing to continue to perform and carry out the terms and conditions of said agreement, and to do the things incumbent upon her to be done under the terms thereof.

"Defendant has made demand upon the plaintiff that plaintiff transfer and convey the above described property to plaintiff in accordance with the contract and agreement referred to and that the plaintiff otherwise perform its agreement. Said plaintiff has refused and still refuses to execute the necessary deed of conveyance to said property, and has refused and still refuses otherwise to carry out the said contract and agreement.

"Said contract and agreement of August 1st, 1932, was and is a fair, just and equitable contract between plaintiff and defendant, and the consideration to be paid by defendant to plaintiff in exchange for the premises was and is fair, reasonable and adequate."

After the trial of the equitable issues the court made findings as follows:

"That there was no agreement between the plaintiff and defendant whereby plaintiff promised and agreed to transfer the legal title to the property described and referred to in the complaint to the defendant as alleged in paragraph III of said answer.

"That the defendant did not go into the possession of the property described in said complaint and said answer under the agreement alleged in paragraph III of said answer, and the possession of the property by the defendant was not referable to any such alleged agreement, and defendant has not been and is not now in possession of said property pursuant to and in accordance with the terms of the said alleged agreement.

"That the defendant did not perform all of the terms and conditions of said alleged agreement on her part to be performed but failed to perform all the terms and conditions of the said alleged agreement.

"That the alleged agreement was and is not a fair and equitable contract between the plaintiff and defendant, and that the alleged consideration to be paid by the defendant to the plaintiff in exchange for the said premises referred to in said complaint was and is not fair, reasonable or adequate."

Still later the issues of law were tried before the court sitting with a jury. The latter returned a verdict in favor of the Bank of America, and on that verdict a judgment in favor of the bank was entered. In the action for specific performance the same findings were adopted and a judgment thereon was entered in favor of the Bank of America. From each judgment Lillian Pittler has appealed.

Lillian Pittler v. Bank of America.

Appellant contends that an oral contract to convey real estate, if partly performed, will be enforced by a court of equity when the alleged vendee brings himself within

the rules of equity governing such transactions. The point is briefed with great care. However, we do not understand the Bank of America as contending to the contrary. Its contention is that in the instant case there was never an oral contract to convey.

[1-3] The appellant quotes the last three paragraphs of the findings which we have set forth above, and contends that they are contradictory. We think such is not the fact. They are in direct response to the allegations contained in her complaint. In legal effect they are that there was no oral agreement; that if there was, it was not performed; and if there was, it was not fair and equitable. The court also found: "That the alleged agreement, was not and is not a fair and equitable contract between the plaintiff and defendant, and the alleged consideration to be paid by the plaintiff to the defendant in exchange for the said premises referred to in said complaint was not and is not fair, reasonable, or adequate." The appellant contends that said finding is not supported by the evidence. The appellant argues that there was no evidence introduced before the court below by the defendant to the effect that there was anything unfair, or inequitable concerning the contract, or that the consideration therefor was unfair, unreasonable, or inadequate. That statement is not sufficient. The finding under attack was in response to affirmative allegations set forth in appellant's pleadings. The burden of proving those allegations rested on her. She introduced no proof regarding any one of the allegations. Assuming, as she contends, that the Bank of America did not do so, it follows that it may not be said the negative finding was not supported by the evidence.

Bank of America v. Lillian Pittler.

[4] The appellant contends that the trial court erred in refusing to allow her to prove that she entered under an oral agreement to convey. But we see no error in that ruling. Whether she entered under an oral agreement to convey arose in the presentation of her equitable issues. When presenting those issues the appellant was allowed to introduce any evidence going to prove that she entered under an agreement to convey. 15 Cal.Jur. 337. On that issue the trial court made findings against her. When it came to presenting issues of law, the subject-matter under discussion was not in issue and the trial court committed no error in refusing to hear such testimony.

[5] Some objections to rulings on the admission or rejection of evidence are made by the appellant. The Bank of America offered, and there was received in evidence, the notices which it had served on the appellant. She now asserts that they do not coincide with the allegations of the complaint in the unlawful detainer suit. But when they were offered in evidence no objection was made to them and it is now too late to object for the first time. Furthermore, we find no variance between the notices offered in evidence and the allegations of the bank's complaint.

[6] The bank's theory of the case was that Miss Pittler was, before the service of the above-mentioned notices, its employee. As proof of such fact it offered a lot of cancelled checks showing payments made to her. When the checks were mailed there was attached to each one a "salary" voucher. When received Miss Pittler separated the voucher from the check, retained the former, and cashed the latter. When asked in open court for the vouchers, her counsel stated his client did not preserve them. The attorney for the bank then offered carbon copies of the checks and vouchers as the originals were when mailed. The offer was admitted in evidence. Under all of the foregoing facts we see no prejudicial error in the ruling.

[7] We have thus taken up and discussed the several points made by the appellant in her opening brief. In her closing brief under certain headings the appellant contends that other findings were not sustained by the evidence. In this behalf we understand her to contend that the trier of the facts did not properly weigh the evidence. We do not understand her to contend that any single finding was not supported by at least some evidence, although such evidence might be conflicting. But it is the settled rule that a finding may not be disturbed by a court of review if there is some evidence to support it, and here there was an abundance of evidence to support all of the findings.

The judgments appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

14 Cal.App.2d 654

BENJAMIN FRANKLIN LIFE ASSUR. CO. v. MITCHELL, Insurance Com'r.

Civ. 10206.

District Court of Appeal, Second District, Division 1, California.

June 18, 1936.

Hearing Denied by Supreme Court Aug. 17, 1936.

1. Physicians and surgeons ⇐4

Neither a corporation nor any other unlicensed person or entity may engage directly or indirectly in the practice of the medical or dental professions.

2. Insurance ⇐10
Physicians and surgeons ⇐4

Proposed policy providing that insurer would reimburse insured for actual expenditures made for medical services performed by physicians approved by policyholders' committee, which was actually a committee of the insurer, *held* invalid, justifying insurance commissioner's denial of approval of insurer's form of application for and policy of insurance, since issuance of such policy would result in insurer's engaging in unlawful practice of medicine (Civ.Code, § 453d et seq.; St.1913, p. 722, as amended).

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by the Benjamin Franklin Life Assurance Company against E. Forrest Mitchell, Insurance Commissioner of the State of California. From an adverse judgment, the defendant appeals.

Reversed.

U. S. Webb, Atty. Gen., and John L. Flynn and Paul D. McCormick, Deputies Atty. Gen., for appellant.

Carlos S. Hardy, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of petitioner, the Benjamin Franklin Life Assurance Company, and against respondent E. Forrest Mitchell, insurance commissioner of the state of California, in a mandamus proceeding wherein the judgment ordered respondent commissioner to approve petitioner's "certain form of application for and policy of indemnity against loss. * * *"

Respondent company's petition for a writ of mandate alleged that it was and is authorized to engage in the business "of life, health, accident, annuity and endowment insurance on the assessment plan as provided for by Chapter VI, Title 2, Part 4, Division 1 of the Civil Code of the State of California [section 453d et seq.]."

It appears from the record herein that petitioner submitted for respondent commissioner's approval a certain form of an application for, and a policy of indemnity against loss by reason of medical and hospital expenses occasioned by disease or injury suffered by the insured. Said application and policy in addition to its general clauses provided, quoting from the policy, that the insurance company "Hereby agrees to reimburse the Insured for actual expenditures made or obligations incurred for any of the services, hereinafter set forth (paragraphs A to K inclusive) to be and only when rendered by, while the Insured is wholly under the care of, legally qualified Doctors of Medicine and Surgery, Optometrists, Hospitals, Ambulances, Pharmacies and X-Ray Medical Laboratories, approved and designated by the Policyholders Committee of the Company for the benefit of the Insured. * * *"

The application for a policy bound the applicant to the performance of a certain condition which, quoting from the application, was as follows: "I hereby appoint and empower the Policy-Holders Committee of the Company, duly elected at each regular annual meeting of policyholders on first Monday in January of each year as per the By-laws of the Company, my true and lawful attorney in fact and my proxy for a period of seven years to represent me and to vote for me in my stead, should I be absent or fail to revoke this proxy in writing, in all regular and special meetings of policy-holders, and to approve and designate for me, during the life of the policy, the renderers of the services under the terms of the policy for which I am applying. * * *"

The insurance policy contained the following provision: "If the Insured places himself under the treatment or care of any person other than a regularly licensed M. D. (Doctor of Medicine and Surgery) ap-

proved and designated by the Policyholders Committee of the Company, all right to reimbursement for the expenses of any services for any condition arising out of or in connection with such treatment or care shall be forfeited hereunder."

[1] It is contended by appellant that the insurance policy in question violates the Medical Practice Act of the state of California (St.1913, p. 722, as amended), and that therefore mandamus will not lie to compel the insurance commissioner of the state of California to approve an insurance policy, the terms of which are unlawful. It appears to be well settled "that neither a corporation nor any other unlicensed person or entity may engage, directly or indirectly, in the practice of certain learned professions including the legal, medical, and dental professions" [Pacific Employers Insurance Company v. Samuel L. Carpenter, Jr., (Cal.App.) 52 P.(2d) 992, 993], and it is urged by appellant that respondent company, by reason of the terms of the policy, engages indirectly in the practice of medicine.

[2] It is argued by petitioner that the instant case is not analogous to the authority above quoted because petitioner is a mutual assessment company, and that the contract of insurance herein is different in that by its terms it binds the company to "reimburse the insured for actual expenditures made or obligations incurred for any of the services" rendered by legally qualified doctors of medicine, surgery, etc., "approved and designated by the policyholders committee of the company for the benefit of the insured," the insured having previously designated the policyholders' committee, composed of members like himself, to select the doctors. Moreover, urges the petitioner, the company, "by the contract in question, does not undertake or agree to furnish any medical or other services to its members nor does it undertake or agree to employ anyone to furnish such services nor does it undertake nor agree to pay to any person any compensation who may furnish medical or other services." It is further claimed that, "At most it undertakes to reimburse its policyholder the cost and expenses incurred by him for medical and other services designated in the policy and such reimbursement is payable directly to the policyholder only."

This is literally true, but that which the company as such cannot do lawfully, it requires its members, by means of a contract with such members as individuals, to accomplish for it through the medium of a so-called "policyholders committee," the creation of which is evidently provided for in the by-laws of the company. It should be noted, however, that the so-called policyholders' committee is not a committee of the policyholders, but a committee of the company. The selection and designation of doctors by said policyholders' committee is therefore, after all, but a selection and designation by the company. The creation of the committee is not a voluntary contribution of the members for mutual benefit, but is a condition contained in the policy at the time of the sale thereof. The company thereby undertakes to do indirectly what it cannot lawfully do directly.

If, in its inception, it was not the plan of the company to circumvent the Medical Practice Act, it is a coincidence that the doctors designated by the committee were so well protected, for in that connection it is significant that the policy does not provide that the insured shall be compensated for losses covered by the policy, but that the insured shall be reimbursed; in other words, the insured gets nothing until the doctor is paid. The policyholder is not accorded the privilege of presenting his claim, collecting the amount thereof and then paying the doctor. Under such circumstances it is evident that the doctors designated by the "committee of the company" receive equal, if not first, consideration in the dispensing of benefits. Petitioner's plan, which is designated insurance, plainly provides for the sale of medical services, which is the practice of medicine. The claim of petitioner, therefore, that respondent commissioner's refusal to approve said application and policy of indemnity forms, was arbitrary, unjust, and unlawful, lacks support in the record; on the contrary, the contention of appellant that respondent company under the guise of an insurance company engages in the practice of medicine must be sustained.

Respondent company's brief contains an able and enlightening discussion of the subject of health insurance as applied to the questions herein involved, and in connection with this subject, quoting from its brief, urges that "there are and have been from the very beginning of this state, fraternal orders and lodges, religious organizations, benevolent associa-

tions, hospitals, hospital associations, labor unions and other employee associations, which have been engaged in collecting periodic dues from their members for the purpose of furnishing them medical services to be rendered by doctors employed on a salary basis by such organizations, and in any event, by doctors chosen by the executives of the said organizations, and in whose selection the patient-member has no choice. Noteworthy examples are the hospitals and homes owned and operated by Masonic bodies, the Foresters, Woodmen, Knights of Pythias, and similar societies. Are they practicing medicine? Hardly will appellant say yes, but where the difference in principle? During the course of eighty-five years no one has ever challenged the legality of the operations of the organizations just mentioned. However, if this court should decide this case in favor of appellant, it must logically follow that all of the organizations referred to will be put in the category of violators of the law; in short, they will be outlawed."

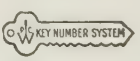
Thus by analogy petitioner seeks to impel the conclusion that what is lawful for the above-mentioned associations is lawful for petitioner, and vice versa. Generally speaking, by "analogy" is meant any resemblance between things which allows the belief of one from what is known of the other, and the logical value of the conclusion, based upon the comparison, depends upon the degree of resemblance between the things compared. Relying on common knowledge, it is at once evident that respondent insurance association bears no resemblance to the above-mentioned fraternal organizations, hence the conclusion from such comparison, urged by petitioner, is of no probative value. The respondent association is primarily engaged in the sale of medical services—by whatever name it may be called—sold through the medium of insurance. None of the features that are prominently characteristic of the above-mentioned benevolent societies are included in respondent's so-called "mutual association."

In Pacific Employers Insurance Company v. Samuel L. Carpenter, Jr., supra, a case somewhat analogous to the instant case, the court on that subject made the following observation: "It is a matter of common knowledge that the general subject of health insurance has provoked much discussion in recent years and it is also a matter of common knowledge that there is a great diversity of opinion concerning this subject. There are those who believe that the time has come when the rules so firmly established by the authorities above cited should be changed or modified in certain respects. We do not feel called upon, however, to discuss this question, for if the established rules are to be changed or modified, we deem it to be the province of the Legislature rather than the courts to determine when, to what extent, and under what conditions and restrictions, the change or modification should be made." The conclusion just quoted is consistent with the fundamental rules of construction.

The judgment is reversed.

I concur: YORK, J.

I dissent: HOUSER, P. J.



14 Cal.App.2d 647

PEOPLE v. ILDERTON.

Cr. 1893.

District Court of Appeal, First District, Division 2, California.

June 18, 1936.

Rehearing Denied July 16, 1936.

1. Indictment and Information ⇐57

Statute making allegation that defendant unlawfully took another's labor or property sufficient in charging theft *held* not unconstitutional because not informing defendant whether he is charged with larceny, embezzlement, false pretenses, or other unlawful means of taking another's property (Pen.Code, § 952).

2. Witnesses ⇐372(2)

In prosecution for grand theft by defrauding purchaser under land contract, defendant's question asking purchaser's father on cross-examination if defendant had not brought action against purchaser's parents for malicious prosecution *held* improperly excluded; cross-examiner being entitled to

show father's interest in conviction and his prejudice against defendant.

3. Criminal law ⊂=1170(2)

In prosecution for grand theft, error in excluding question seeking to show witness' prejudice against defendant *held* harmless where such prejudice appeared throughout testimony.

4. Criminal law ⊂=829(1)

Refusing instructions on matters covered by instructions given *held* not error.

5. False pretenses ⊂=49(1)

Evidence that defendant appropriated money paid to him by purchaser under land contract on defendant's representation that he would procure clear deed through influence with state officials, and that, after foreclosure, when demand was made for restitution, defendant relied on his alleged influence and threatened to "break" counsel *held* to sustain conviction for grand theft.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

S. H. Ilderton was convicted on an information charging grand theft, and he appeals.

Affirmed.

Vincent W. Hallinan and William F. Herron, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Justice.

Defendant was convicted on an information charging grand theft under section 952 of the Penal Code. He made a motion for a new trial and for probation. The former motion was denied and the latter is still pending. Defendant appealed from the order denying a new trial and entry of the judgment on the verdict was thereby suspended. He raises four grounds for reversal of the order.

[1] That section 952 is unconstitutional because it does not require a full statement of the particular of the offense so that the defendant may know whether he is charged with larceny, embezzlement, obtaining money by false pretenses, or with any of the other unlawful means of taking the property of another. The constitutionality of the section has been sustained repeatedly, and the question is no longer debatable. See People v. Robinson, 107 Cal. App. 211, 217, 290 P. 470.

[2, 3] The restriction of the cross-examination of the witness Johnson was error. The defendant was charged with having defrauded Althea Buck in a real estate transaction. Mrs. Buck did not appear at the trial, but the chief witnesses for the state were her father and mother, Mr. and Mrs. Johnson. On cross-examination Mr. Johnson was asked if he and his wife were not defendants in an action brought by Ilderton for malicious prosecution. The objection was sustained and this was error because the defendant was entitled to show by this cross-examination the witness' interest in a conviction in this case as well as his bias or prejudice against the defendant. People v. Fleming, 166 Cal. 357, 365, 136 P. 291, Ann.Cas.1915B, 881; People v. Pantages, 212 Cal. 237, 258, 297 P. 890. But the ruling, though error, was not shown to be prejudicial, but, to the contrary, an examination of the transcript indicates that no prejudice resulted. The prejudice and bias of this witness against the defendant appears throughout his testimony and the jury could not have been more impressed with that fact if the witness had answered the question objected to.

[4] Appellant complains of the refusal to give the proposed instructions relating to the necessity of proof of the corpus delicti and the presumption of innocence. All the matter proposed was covered by instructions given, and no error is present here.

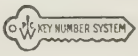
[5] The sufficiency of the evidence. The absence of prejudice in the rulings mentioned in the last two paragraphs is emphasized by the conclusiveness of the evidence of appellant's guilt. Mrs. Buck was purchasing a summer cabin and lot of land in Tuolumne county on installments. Her father had paid some of the purchase price and was in part interested in the purchase. When a balance of about $500 remained unpaid the appellant promised them that for $332.63 he would procure a clear deed through his influence with the Governor and other state officials. The money was paid to the appellant, and he appropriated the whole sum to his own use. The property was foreclosed, and, when demand was made upon appellant for restitution,

the appellant relied upon his "influence" and threatened to "break" counsel for Mrs. Buck. At the trial the appellant did not take the stand, and offered no excuse or explanation for his conduct.

No other point merits consideration.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



14 Cal.App.2d 493

ADRIAN et al. v. GUYETTE et al.

Civ. 1776.

District Court of Appeal, Fourth District, California.

June 8, 1936.

As Modified June 19, 1936.

1. Automobiles ⇐244(35, 36)

Evidence sustained finding that motorist, who collided with one of two preceding automobiles at intersection so as allegedly to cause preceding automobile making left turn to collide with on-coming automobile, did not have automobile under proper control, and was driving at speed greater than "reasonable and proper" within statute, and that his negligence concurring with negligence of preceding motorist was proximate cause of accident (St.1931, p. 2120, § 113(a).

2. Trial ⇐133(6)

In automobile collision case, wherein counsel had stated that it might develop that certain attorneys in action represent local business firms or organizations, and asked jurors if any one of them was employed by designated corporation, question *held* improper but not prejudicial where such corporation was not connected with case, especially where jurors were instructed to disregard question.

3. Automobiles ⇐168(2)

Use and occupancy of territory contiguous to public highway is controlling factor in fixing nature of district as "residence" or "business" within speed statute (St.1929, p. 510, § 28½(b).

4. Automobiles ⇐168(2)

Where front doors of dwelling and garage located on lot bounded by street on which automobile accident occurred and by two other streets, faced one of other such streets and were connected therewith by walk and driveway, property fronted on such street and not on street on which accident occurred and hence, latter street was not within "residence district" within statute where street had only fifteen separate dwellings or business houses fronting on one-fourth mile in question (St.1929, p. 510, § 28½).

5. Trial ⇐141

Where there is no conflict in evidence on which determination of question of law rests, decision is for trial court and not for jury.

6. Automobiles ⇐245(40)

Where evidence as to number of separate dwellings or business houses fronting on street at place of automobile accident was not conflicting, submission of issues whether street was in residence district and permissible speed thereon *held* error (St. 1929, p. 510, § 28½).

7. Appeal and error ⇐1064(1)

Where motorist was driving outside business or residence district at time of accident and hence was not negligent per se unless exceeding forty-five miles per hour, erroneous submission of issues whether portion of street was in "residence district" as to which twenty-five miles per hour was maximum permissible speed *held* prejudicial (St.1929, p. 510, § 28½; St.1931, p. 2120, §§ 113(a), 113, subd. b(6, 7) and subd. d; Const. art. 6, § 4½).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Sarah Adrian and Hilda Adrian, minors, by their guardian ad litem, B. P. Adrian, against Elbert Ray Guyette, A. E. Guyette, and Alice C. Guyette, and another. From a judgment for plaintiffs, named defendants appeal.

Reversed in part and affirmed in part.

W. H. Stammer and Galen McKnight, both of Fresno, for appellants.

Edmond A. Chevalier and Rae B. Carter, both of Fresno, for respondents.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

MARKS, Justice.

This is an appeal from a judgment rendered in favor of plaintiffs against Elbert Ray Guyette, A. E. Guyette, Alice C. Guyette, whom we will refer to as the defendants, and Allen Remy who did not appeal. The action grew out of a collision in which four automobiles were involved, in the intersection of East avenue and Eleventh street in the city of Reedley at about noon on Sunday, March 5, 1935. The day was clear and the streets were dry.

East avenue runs north and south, and Eleventh street runs from northeast to southwest. For convenience, we will assume it runs east and west. Eleventh street has a paved strip in its center 20 feet in width with oiled shoulders 6 feet wide. The intersection is not an obstructed one as defined in section 113 of the California Vehicle Act (St.1923, p. 553, § 113, as amended by St.1931, p. 2120) in force at the time of the accident.

Elbert Ray Guyette and Allen Remy were both minors. The automobile driven by Elbert, with the consent of his father, the owner, who with Alice C. Guyette, his mother, had signed Elbert's application for an operator's license. These facts occasion the liability of Mr. and Mrs. Guyette:

Defendants state the following questions involved in this appeal: "(1) Are appellants responsible for respondents' injuries when their automobile never collided with that of respondents, or with any automobile that did collide with that of respondents, and when appellants never came within 20 feet of the collision, or affected the operation of the colliding automobiles in any way? (2) Was counsel for respondents guilty of prejudicial misconduct in examining the jury and did the trial court err in refusing a mistrial? (3) Does the evidence sustain the judgment against appellants? (4) Did the trial court erroneously admit evidence over appellants' objections? (5) Did the trial court erroneously deny appellants' motion to strike evidence from the record? (6) Did the trial court erroneously instruct the jury?" The first and third questions are directed at the sufficiency of the evidence to sustain the judgment and will be considered together.

At about noon on Sunday, March 5, 1935, plaintiffs, the minor daughters of B. P. Adrian; were riding with him in his automobile which was proceeding east on Eleventh street. As they approached the East avenue intersection from the west, an automobile driven by Mrs. Margaret Chadwick approached and entered the intersection from the east. This automobile was followed by two others, the first driven by Allen Remy, and the second by Elbert Ray Guyette. Mrs. Chadwick entered the intersection at a very slow speed and either stopped, or practically stopped, near its center, in order to permit the Adrian car to pass, before making a left turn. Adrian saw the Chadwick car and the two automobiles following it. As the latter were traveling rapidly, he turned his car to his right and off the pavement onto the shoulder of the highway in order to permit the other automobiles to pass between it and the Chadwick car in a clear space which was probably at least 10 feet wide. Upon seeing that the Chadwick car was about to stop, Remy turned onto the left side of the pavement and crashed into the Adrian automobile. When the Remy car turned to its left, young Guyette for the first time saw the Chadwick automobile stopping in front of him. He turned to his right and the left front fender and perhaps the hub cap of the left front wheel of his automobile came into contact with the left rear of the Chadwick car. The Guyette car came to rest at the northwest corner of the intersection. It was never closer than 20 feet to the Adrian car and did not come into contact with it.

It is defendants' theory that the negligence of Mrs. Chadwick in failing to give a proper signal of her intention to slow down or to stop in the intersection was the proximate cause of the accident as Remy and young Guyette had to avoid crashing into her car as best they could and could not be blamed for the courses they followed in the sudden emergency. They argue that young Guyette did not know of the presence of the Chadwick car on the road in front of him until the Remy automobile had turned to its left and cleared his line of vision; that he was confronted with a sudden emergency and chose the only rational course open to him; namely, turning to his right as the balance of the road was occupied by the other cars; that the evidence shows no negligence on his part; that if he were guilty of any negligence it was neither a proximate nor a concurring cause of the collision between the Remy and Adrian cars; that as the Guyette car did not come within 20 feet of the Adrian car and as it did not affect the operation of the Remy car, the judgment against defendants cannot be supported under any reasonable hypothesis.

Plaintiffs present quite a different theory of the cause of the accident. They argue that Remy and young Guyette raced west on Eleventh street driving their cars side by side at a speed of 50 or more miles an hour; that when they realized that Mrs. Chadwick was about to make a left turn or stop they both applied their brakes, Remy turning to his left and Guyette to his right in an endeavor to go around the Chadwick car; that in passing, the left front of the Guyette car struck the right rear fender and wheel of the Remy automobile, throwing it out of control and into the Adrian car.

The argument that the two automobiles were racing side by side depends on the testimony of Harriet McCracken and Roy Toreson.

Mrs. McCracken lived on the north side of Eleventh street east of East avenue. She was in the living room of her home and saw the two cars as they passed an open door and window of that room. She testified they were proceeding side by side. She at no time saw them closer than 327 feet to the point of the collision.

Roy Toreson saw the two cars when they were about 300 feet east of the point of impact. He testified that they "were going neck and neck." By this expression it is evident that he referred to the speed of the two cars because he immediately explained it as follows: "Yes, one going and the other one following right behind, very close," and, "They were right back of one another * * * It was right back of one another."

It is thoroughly established by all the evidence in the record that the Remy and the Guyette cars were not traveling side by side for the last 300 feet before the collision. Both drivers and other witnesses so testified. The Remy car left a skidmark on the pavement 70 feet long. It led to the right rear wheel of that car. The Guyette car left a skidmark 132 feet long which led to its left wheel. The Guyette skidmark commenced 62 feet east of the one caused by the Remy car. The two skidmarks were parallel for about 40 feet and between 3 and 4 feet apart. The skidmark made by the Remy car was at the right of the other. This would indicate that the right of the Guyette car was closer to its right-hand edge of the pavement than the right of the Remy car instead of being on its left and attempting to pass it as urged by plaintiffs.

The right rear fender of the Remy car was bent inward, the hub of the right rear wheel was bruised, and one or more of the wire spokes were broken from the hub at the point of the bruise. It is evident that this damage was caused by the wheel and fender coming into sharp contact with some other object. It is not suggested that the Remy car came into contact with the Chadwick car or that its rear came into contact with the Adrian automobile. As there were only four cars in the proximity of the accident, this leaves only the Guyette car which could have caused the damage. Its left front hub cap was missing, but it is admitted that the left front of that car came into contact with the right rear of the Chadwick automobile.

Both Remy and young Guyette testified positively that their two cars did not come into contact. In this they were supported by the testimony of a passenger in the Remy car. However, it is not suggested that the damage to the wheel and fender of the Remy car was caused at a prior time. It was not caused by either the Chadwick or Adrian automobiles which leaves the Guyette car as the sole remaining probable cause. From this the jury might draw the inference that the Guyette automobile came into contact with the rear of the Remy car when the paths of the two cars crossed.

The testimony of Remy given at the trial, that the two cars did not come into contact, was impeached by a statement which he made shortly after the accident, when he told a witness, "There was room enough but Guyette's car struck my car and I lost control over my car."

Defendants urge that from the appearance of the injury to the right rear fender and wheel of the Remy car the damage was caused by another automobile traveling in the same direction or converging on its course; that as the courses of the Remy and Guyette cars were diverging the damage could not have been caused by the latter car. This is a strong argument to have addressed to a jury. As that body evidently rejected it, we cannot disturb its implied finding on a question of fact, although we might consider that the greater probabilities were in favor of the correctness of the defendants' contention.

Defendants point to evidence to the effect that a Mrs. Jack Ward drove her automobile past the Remy car after the accident and in so doing brushed its right rear fender. From this they urge that the injuries to the right rear fender and wheel of the Remy car were caused by Mrs. Ward's car. A witness for plaintiffs testified that

the fender was bent and the wheel bruised before Mrs. Ward's car passed.

[1] After carefully studying the evidence, we have reached the conclusion that it is sufficient to support the implied finding of the jury that young Guyette did not have his car under proper control, and did, at the time of the accident, drive it at a speed greater than was "reasonable and proper, having due regard to the traffic, surface and width of the highway" (subdivision (a), § 113, California Vehicle Act), and that his negligence concurring with the negligence of Remy was a proximate cause of the accident and injury of plaintiffs. Smith v. Schwartz (Cal.App.) 57 P.(2d) 1386.

[2] Defendants urge that counsel for plaintiffs committed prejudicial error in their examination of prospective jurors and that the trial judge erred in refusing a motion for mistrial because of such error.

Counsel for plaintiffs were allowed considerable latitude in their examination of jurors on their possible interest in or connection with insurance companies. We do not understand that counsel for defendants maintain there was any misconduct in any of these questions asked. The alleged misconduct is based on the following: "Mr. Carter: I'd like to address this question to all of you in the jury box. Now, during the course of the trial it may develop, incidentally, that certain of the attorneys representing parties to this action, represent business firms or organizations locally. I want to ask if there is any member in the jury box now, anyone in the jury box now who is an employee of the Southern Pacific corporation? (No response.) Mr. Carter: Thank you. That is all. Mr. Stammer: If the Court please, I'd like to assign that remark of counsel as error, prejudicial to the rights of this defendant and I ask the Court in view of that situation and the obvious intent of that question, to declare a mistrial in this action. * * * The Court: All those who were in the box previously are now in their places. The Court will deny the motion for mistrial asked by Mr. Stammer but does instruct the jury to disregard the last question that was asked—the last two questions that were asked, and to draw no inference at all from the asking of the question. You may proceed. Mr. Stammer: In order that there may be no question about it, if the Court please, we would like to note a specific exception to the Court's ruling."

The quoted question asked by counsel for plaintiffs was improper. The Southern Pacific corporation had no possible connection with the case and it was unnecessary to bring its name into it. This was recognized by the trial judge when he instructed the jurors to disregard the question. While we are of the opinion the question should not have been asked, we are at a loss to discover prejudice in it, especially in view of the admonition to disregard it. We cannot see why the intimation that counsel for defendants might "represent business firms or organizations locally," or even the "Southern Pacific corporation," could prejudice the rights of defendants in the eyes of the jurors. The mere fact that a busy and able practicing attorney might have been employed in his professional capacity to represent business interests, large or small, should not of itself cast aspersions upon him or prejudice the cause of other clients whom he might represent.

Defendants' next assignments of error revolve around the question of whether or not the portion of Eleventh street which was the scene of the accident was within or without a "residence district" as defined by subdivision (b) of section 28½ of the California Vehicle Act (St.1923, p. 517, § 28½ (b), as added by St.1929, p. 510) in effect at the time of the accident. This subdivision provided as follows: "A 'residence district' for the purpose of this act shall mean the territory contiguous to a public highway, not comprising a business district as herein defined, when the property fronting on one side of said highway for a distance of at least a quarter of a mile is occupied by thirteen or more separate dwelling houses or business structures, or where the property fronting on both sides collectively of said highway for at least a quarter of a mile is occupied by sixteen or more separate dwelling houses or business structures."

On this phase of the case counsel direct their arguments to two questions: (1) Were there sixteen or more separate dwelling houses or business structures on the property fronting on both sides of Eleventh street for a quarter of a mile which included the scene of the accident? (2) Was the scene of the accident properly sign-posted as required by section 116 of the California Vehicle Act (St.1923, p. 555, § 116, as amended by St.1931, p. 2122)? The conclusions we have reached on the first make consideration of the second unnecessary. The answer to the first question rests upon

the construction to be placed on the phrase "where the property fronting on both sides collectively of said highway for at least a quarter of a mile." We must determine when property fronts on a highway, and, where it is bounded by three public streets, whether it fronts on one or more of them.

The evidence on the question is not in conflict. It is admitted that there were fifteen separate dwellings or business houses fronting on the quarter of a mile of Eleventh street in question here. The problem is presented by the question of the frontage of a "lot twelve" which was occupied by a single dwelling and a garage. The map on which this lot appears, Plaintiffs' Exhibit No. 5, is a photograph of a portion of an official map of the city of Reedley upon which no directions appear. Further, the names of the streets with which we are concerned here are omitted. There appear on it several lots bearing the number "twelve." If we have correctly oriented this map with Plaintiffs' Exhibit 4 and understand it in connection with the evidence of the witnesses, the lot 12 in question is bounded on the east by East avenue and on the south by North avenue with its southeast corner cut off by Eleventh street. It is a large lot and while neither a scale nor the dimensions of the lot appear on the map, from dimensions of other lots we estimate its east and west dimension at about 300 feet and its north and south dimension at several hundred feet. It is contiguous to North avenue for about 150 feet, to Eleventh street for about 170 feet, and to East avenue for several hundred feet. It is occupied by a single dwelling and a garage. The front door of the dwelling opens towards North avenue, with which it is connected by a walk. The garage also opens towards North avenue and is connected with it by a driveway. A wire fence is built along the Eleventh street side of the lot. It is clear that the dwelling and garage front on North avenue and not on Eleventh street or East avenue.

It should be observed that subdivision (b) of section 28½ of the California Vehicle Act concerns itself with three requirements which must be met in order to constitute a residence district. We need not concern ourselves with one of these for it is admitted that there were not "at least * * * thirteen * * * separate dwelling houses or business structures" on one side of Eleventh street within a distance of one-quarter of a mile. First, we have the reference to the territory "contiguous to a public highway." There is no doubt that this means the territory with its land lying along and adjoining a public highway. Next, the parcels of land fronting on both sides of a highway must have standing upon them not less than sixteen dwellings or business structures within a distance of one-quarter of a mile.

[3] The word "property" in its broad sense includes that which is subject to ownership by one to the exclusion of others. Sections 654, 655, Civ.Code. Of course, it is apparent that the Legislature could not have intended to give it any such broad meaning when used in section 28½ of the California Vehicle Act. It is evident that what was in the legislative mind was equivalent to the more restricted use of the words "real property" which includes the land and the buildings and other fixtures erected upon it. It is evident from the section that the occupancy of the land is the determining factor in fixing the character of the district. The required number of buildings used for business purposes in a given distance is sufficient for the establishment of a "business district." The same is true of "separate dwelling houses or business structures" in establishing a "residence district." It follows that the use and occupancy of the territory contiguous to a public highway is the determining factor in fixing the nature of the district. It is only important that the land exclusive of the improvements be contiguous to the highway. It is important that the "property," the land and the buildings, front on the highway.

It is clear that a building fronts on a highway when its principal means of ingress and egress with the connecting walks lead to that highway. May it be said that a property, the land and buildings, front on more than one highway? Of course, this might be true where a building had more than one principal entrance. It would also be true where there were several buildings on one parcel of land, the principal entrances of which were approached from different highways. But where there is a single structure on a lot with but one principal entrance to but one of two contiguous highways, can the property be said to front on both highways?

The rules governing the construction of statutes in cases of this kind are well summarized in 23 California Jurisprudence 763, as follows: "In construing a statute of

doubtful meaning, the probable intent of the legislature may be ascertained from the attending circumstances, that is, the occasion and necessity for the enactment. The court may look behind the law itself to discover its true meaning from the motive or reason which inspired the enactment,—from the object in view and purpose, as well as the evils sought to be remedied. The court will keep in view the subject-matter of the law, as well as its scope. And if the language is vague or susceptible of a more or less extensive sense, an intention in accordance with reason and equity is to be presumed, and for that purpose it is necessary to pay attention to the nature of the subject to which the statute relates. In so doing a court may take judicial notice of the evils preceding the enactment of a statute, and of the mischiefs intended to be prevented thereby, the character and importance of the interests which may be affected thereby, and the usual course of business. Every statute and code section should be construed with reference to its purpose and the objects intended to be accomplished by it. The language will be so interpreted, if possible, as to aid the design and intent of the legislature, and to effectuate the evident objects and purposes of the law."

It is clear from the provisions of the California Vehicle Act that the Legislature intended to impose upon motorists the duty of traveling at a low rate of speed in districts devoted principally to business where considerable congestion of vehicular traffic and pedestrians is to be expected. A slightly higher rate of speed was intended in populous residence districts. Thus it appears that the motivating impulse of the Legislature was to provide for the safety of the traveling and pedestrian public and of children at play.

This being true, it should follow that the Legislature imposed restrictions on the speed of vehicular traffic in order to promote the safety of those entering and leaving structures built on property abutting on highways. There can be no business or residence district without buildings on property abutting on a highway. The safety of those entering or leaving those buildings was one concern of the Legislature in enacting speed regulations. Therefore, the frontage of the buildings and the use made of the structures erected on the land should determine the frontage of the entire property.

[4] In the instant case there was but one dwelling on lot 12 with its single entrance from North avenue. As the property in question consisted of both the land and the buildings, the use made of the property and the established entrance to the building should determine the front. It follows that the property fronted on North avenue and not on Eleventh street. This left but fifteen "separate dwelling houses or business structures" on the one-quarter of a mile of Eleventh street with which we are concerned which was an insufficient number to constitute a "residence district."

At plaintiffs' request the trial judge read to the jury portions of sections 28½, 113, and 116 of the California Vehicle Act. By these instructions there were submitted to the jury for its consideration the questions (1) whether the portion of Eleventh street in question was a residence district, and (2) the permissible speed of young Guyette before such speed would become prima facie negligence, depending upon the jurors' conclusion of whether the portion of the street was within or without a residence district.

[5, 6] As we have seen, there was an entire lack of any conflict in the evidence as to the number of separate dwelling houses or business structures fronting on this portion of Eleventh street. It follows that there was no issue of fact on this question to be submitted to or decided by the jury. The question was solely one of law addressed to the trial judge and to be decided by him. In cases of this kind where there is no conflict in the evidence upon which the determination of a question of law rests the decision is for the court and it should not be submitted to the jury. Vicino v. Amador, 71 Cal.App. 604, 236 P. 369; Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 15 P.(2d) 217. It follows that the trial court committed error when these questions were submitted to the jury for decision.

Having reached the conclusion that there was error in the instructions given to the jury, the sole remaining question necessary for our decision is whether or not, under the provisions of section 4½ of article 6 of the Constitution, such error was sufficiently prejudicial to require a reversal of the judgment.

In the recent case of People v. Taber (Cal.App.) 55 P.(2d) 1189, 1193, this court had occasion to review numerous cases on the effect of that constitutional provision

on errors committed in the trial of a case. It was there said: "In People v. Salaz, 66 Cal.App. 173, 225 P. 777, 781, the court said: 'While it is true that section 4½ of article 6 of the Constitution confers upon this court the power to weigh, to a limited extent, the entire evidence upon which a conviction was had, still "we are not substituted for the jury. We are not to determine, as an original inquiry, the question of defendant's guilt or innocence." We are to "decide whether, in our judgment, any error committed has led to the verdict which was reached." People v. O'Bryan, 165 Cal. 55, 130 P. 1042. (Italics ours.) And whenever we are unable to determine whether the defendant would have been convicted had erroneously admitted testimony been withheld from the jury's consideration, this section of the Constitution cannot be applied to uphold the judgment.' In Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 973, the court said: 'Whether the error found to be present "has resulted in a miscarriage of justice" presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies.'"

[7] In the instant case the evidence was conflicting on the speed at which young Guyette was proceeding west on Eleventh street just prior to the accident. It was variously estimated at between about 35 and 50 miles an hour. According to his own testimony, if he were driving in a residence district, he was guilty of prima facie negligence in driving faster than 25 miles an hour and the jury might have concluded that he was actually guilty of negligence per se. Section 113, subd. (b), pars. 6, 7, and subd. (d), California Vehicle Acts. As he was driving outside a business or residence district, this result could not have followed unless the jury concluded that his speed was in excess of 45 miles an hour. The majority of the witnesses placed his speed at the latter figure or less. The verdict of the jury might easily have been based on the erroneous assumption that the portion of Eleventh street was in a residence district and that the speed of from 35 to 40 miles an hour, which young Guyette admitted, was negligence per se which was in itself sufficient to make him responsible for the injuries to plaintiffs. Under these circumstances, we regard the instructions to which we have referred as prejudicially erroneous requiring reversal of the judgment.

Defendants moved for a judgment notwithstanding the verdict and have appealed from the order denying that motion. We believe the case should be tried again and for that reason that order should be affirmed.

The order denying defendants' motion for judgment notwithstanding the verdict is affirmed. The judgment against Elbert Ray Guyette, A. E. Guyette, and Alice C. Guyette, is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



14 Cal.App.2d 695

WHITE v. CASCADE OIL CO.

OIL TOOL EXCHANGE, Inc., v. CASCADE OIL CO. et al.

Civ. 1778.

District Court of Appeal, Fourth District, California.

June 19, 1936.

1. Mines and minerals ⇐74

Instrument purporting to be outright assignment of interest in land belonging to oil and gas lessee *held* required to be construed in light of covenants of drilling contract pursuant to which assignment was made.

2. Contracts ⇐153, 154

Instrument or transaction, of which language or facts are such as to leave in doubt intent of parties, must not be so construed as to lead to absurdity or to render it invalid if reasonably susceptible of construction that would render it valid.

3. Mines and minerals ⇐87

Statute relating to licensing of oil drilling contractors *held* for protection of public (Gen.Laws 1931, Act 1660).

4. Mines and minerals ⇐87

Under transaction whereby oil and gas lessee assigned lease and assignee agreed to advance cost of oil drilling and to assign 20 per cent. participating interest in well to be drilled, lessee *held* to reserve 20 per cent. interest in production of well to be drilled so that contract was not unenforceable on ground that assignor was not licensed contractor (Gen.Laws 1931, Act 1660, § 2).

5. Landlord and tenant ⇐208(1)

Privity of contract between landlord and tenant or landlord and assignee of tenant cannot be terminated by assignment by tenant with consent of landlord, but effect of assignment is to make assignor surety to lessor for assignee who as between himself and lessor is principal bound to pay rent and perform covenants.

6. Evidence ⇐155(1)

In action on oil drilling contract, exclusion of defendant's evidence to show intention of parties at time contract was excuted *held* not error on ground that court had permitted plaintiff to inquire into intention of parties, where record showed that no evidence was developed by plaintiff with respect thereto.

7. Mines and minerals ⇐74

Contract pursuant to which oil and gas lessee assigned lease in consideration of his employment to drill well for stipulated amount of money and assignment of interest in well *held* not contract for "turnkey job" as defined as job wherein driller of oil well undertakes to furnish everything and does all work required to complete well, place it on production, and turn it over ready to turn the key and start oil running into tank.

8. Evidence ⇐450(4)

Oil well drilling contract, whereunder lessee of oil lease assigned lease in consideration of assignee's employment of him to drill well for stipulated amount of money and interest in oil well produced, *held* unambiguous, and hence not susceptible of explanation by parol evidence.

9. Action ⇐69

In action against assignee of oil lease for determination of participating royalty interest assigned to plaintiff by assignor who was to receive 20 per cent. interest in well pursuant to oil drilling contract, refusal of continuance on motion of defendant until determination of action on oil drilling contract on ground that defendant might be caught on two judgments *held* not abuse of discretion, where both cases were heard before same judge on same evidence.

10. Mines and minerals ⇐74

Five per cent. interest in oil well out of 20 per cent. interest which was to be assigned to assignor of oil lease as part consideration under oil drilling contract *held* assignable for use of tools in drilling well, as against assignee of lease which had knowledge of assignment at time of development of well, notwithstanding that, at time of assignment of such 5 per cent. interest, assignor of oil lease had not received assignment of his interest in oil well (Gen. Laws 1931, Act 1660).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Two actions, by L. L. White against the Cascade Oil Company, and by the Oil Tool Exchange, Incorporated, against the Cascade Oil Company and others. Judgment for the plaintiffs, and the defendant Cascade Oil Company appeals.

Affirmed.

Hazlett & Plummer and Robert J. Sullivan, all of Los Angeles, for appellant.

Borton & Petrini, of Bakersfield, for respondent White.

R. Dechter, of Los Angeles, for respondent Oil Tool Exchange, Inc.

MUNDO, Justice pro tem.

On May 25, 1932, appellant Cascade Oil Company entered into a contract in writing with respondent White. This contract was, on July 21, 1932, superseded by a novation which eliminated one of the parties of the first part. No other changes of consequence were made. The contract in part recites:

"That whereas, the party of the first part (White) is the owner of, or has under his control, oil and gas mining leases covering a certain five-acre tract of land * * * (description of land) and has arrived at an agreement with said party of the second part (Cascade Oil Company) whereby first party is to assign, or cause to be assigned, to said party of the second part all of the acreage held by said first party * * * in consideration that par-

ty of the second part shall employ said party of the first part for an agreed price of $17,500 to drill an oil well on said land.

"Now therefore, in consideration of the sum of $1.00 * * * and the mutual convenants and agreements between the parties as hereinafter set forth, it is agreed as follows:

"1. Within 10 days from the date of this agreement first party shall * * * deliver * * * to second party proper assignments in writing, assigning to said party certain oil and gas mining leases on the following described lands * * * (same land described).

"2. In consideration of the assignment of the above-described acreage to second party, second party hereby agrees, contracts and engages first party to drill a test well for oil and gas on the acreage so assigned * * *.

"5. In consideration of said services to be performed by first party, second party agrees to pay first party the sum of $17,500. for their services, said sum to be paid at regular intervals as bills for labor and material and all other expenses necessary and incident to the drilling of said well become due; * * * and it is understood and agreed that second party shall not be obligated to and will not pay to or on account of first party any sum in excess of said $17,500. In the event the costs and expense of the drilling of said well shall exceed $17,500. such excess cost and expense shall be borne by first party.

"Party of the second part further agrees, in consideration of the services to be performed by first party in drilling the said well * * * to execute a good and sufficient assignment of a 10% participating interest in and to said * * * well and to deliver the same upon the commencement of drilling activities, and further agrees that when first party turns over to second party a completed successful producing well it will assign a further 10% interest in and to said well to first party; * * *

"12. * * * that if said well shall not cost the sum of $17,500. that any saving therefrom shall be paid to first party in cash upon the completion of said well * * *."

In accordance with this drilling contract, White executed an assignment to appellant conveying all his right, title, and interest in and to said lease. White rented equipment from the Oil Tool Exchange, Inc., for which he made an assignment of a 5 per cent. participating interest in the well to the Oil Tool Exchange. This 5 per cent. was of his 20 per cent. participating interest.

On or about October 17, 1932, White completed and placed on production a well upon the leasehold estate. On December 30, 1932, White filed an action against appellant to recover an unpaid balance of the contract price and damages, and the 20 per cent. participating interest in the well. On February 11, 1933, respondent Oil Tool Exchange filed an action against appellant for declaratory relief and determination of its 5 per cent. participating royalty interest assigned to it by respondent White. The cases were not consolidated but were heard together so that any evidence material in the one case should be considered without the necessity of repetition in the other. Plaintiffs in both cases recovered judgments, White for $3,969.85 and fifteen one per cent. participating interests in the well, and Oil Tool Exchange for a 5 per cent. participating interest in the well and $616.35 earned by such interest. From these judgments this appeal is taken. Herein the cases will be referred to as the "White case" and the "Exchange case."

It is contended first in the White case that White had no standing in court and appellant's motions to dismiss and for a judgment of nonsuit should have been granted for the reason that White was not a licensed contractor under the laws of this state. Respondent White admits that he was not a licensed contractor. He contends that it was not necessary that he be licensed for the work performed by him, which he claims was work incidental to the discovery or producing of petroleum, etc., on land leased by him. In this regard he relies upon section 2 of the Amendment of 1931 (Act of June 13, 1929, as amended by the Act of June 3, 1931; St. 1929, c. 791, p. 1591; St.1931, p. 1256, Gen.Laws.1931, Act 1660) and subdivision (d) thereof, which provides that the act shall not apply to "any construction, repair or operation incidental to the discovering or producing of petroleum or gas, or the drilling, testing, abandoning, or other operation of any petroleum or gas well, when performed by an owner or lessee."

Respondent White contends that as a part of the contract he assigned the lease to appellant, but retained by an agreement, in the nature of a reservation, a 20 per cent. interest in the production of the well he was to drill. Thus, he says, at the time the contract was made, he was the lessee of the property and at all times subsequent he retained a substantial interest in the lease and was in effect one of the lessees of the property. Upon that ground he submits that he was within the terms of the exception in the act relating to licensing of contractors.

The lease procured by White from the Hassons was for the purpose of exploring and developing the land for the discovery of oil. At the time no well had been drilled upon the property and no discovery of oil had been made thereon. Under the terms of his lease White was required under penalty of forfeiture to enter upon the land and commence within a limited time the drilling of a well for oil or gas and thereafter prosecute the same with diligence until completion. He was an experienced oil well driller and had arranged to obtain the use of the principal tools, implements, and appliances required in the drilling of an oil well; but he did not have sufficient funds to complete the necessary equipment for drilling nor to pay labor employed in such drilling and was unable without assistance to perform the requirements of said lease. Appellant, knowing all these circumstances, entered into the drilling contract with White, whereby White was to furnish such tools, machinery and appliances as are customarily used in the drilling of an oil well, and appellant was to advance from time to time such funds and credit as might be necessary to procure said tools, machinery, and equipment. Appellant was to supply such casing and other supplies and materials as are customarily furnished by the owner in the case of a drilling contract. Under the arrangement White was to transfer the lease to appellant. At the conclusion of the drilling and the completion of the well, appellant was supposed to determine the amount of money advanced to White, deduct the same from a certain sum, and pay the difference in cash to White.

Prior to the agreement with appellant, White had arranged with Wicker Drilling Company to assist him in carrying out the terms of the lease. If this arrangement had been carried out, or if White had had sufficient capital to carry on the operations by himself, there could be no question of his right to do the drilling without the requirement of a contractor's license. But he lacked the means of financing the project; and having called upon appellant for assistance, and having completed his part of the agreement with appellant, appellant would now have him go out of court with nothing, on the ground that he is not a licensed contractor. The inequity of this proposition stands out markedly when we consider that White owned the lease, drilled the well, and turned over to appellant a successful producing well. His work was incidental to the discovery of oil on land leased by him.

[1, 2] It is true that he executed an instrument which purports to be an outright assignment of his interest in the land. For the ascertainment of the legal nature and scope and effect of this instrument, the instrument must be examined by the light of the covenants of the drilling contract. "And where the language of an instrument in writing or the facts of a transaction are of a character to leave in some doubt what the parties thereto intended should be the precise nature or the legal effect thereof, and there is, from the nature of the subject-matter of such instrument or transaction, but one thing that it can be and have the effect of legally attaining any end, and such instrument or transaction is reasonably capable of a construction that will give to it legal vitality and effect, the rule is that, under such circumstances, the parties thereto must be presumed to have intended that the obligation arising therefrom is one that could be legally effectuated or enforced. In other words, such transaction must not be so construed as to lead to an absurdity, or so construed as to render it invalid, if it is reasonably susceptible of a construction that will render it valid, or will result in effectuating the manifest intention of the parties." Belden v. Farmers', etc., Bank, 16 Cal.App. 452, 457, 118 P. 449, 450.

[3, 4] Manifestly the intention here was for White to reserve a 20 per cent. interest in the production of the well he was to drill. The assignment of the lease was made in accordance with the provisions of the drilling contract, and, as we say, must be construed in the light of the

drilling contract to give effect to the intention of the parties.

The Act of June 13, 1929, as amended by Act of June 3, 1931, pertaining to the licensing of contractors was enacted to protect the public. "Control over the contractor is given to the director of professional and vocational standards through the power to revoke licenses for fraudulent and illegal practices." Alvarado v. Davis, 115 Cal.App. (Supp.) 782, 6 P. (2d) 121. The circumstances attending this case clearly except it from the operation of this act. At the time the contract was made, White was the lessee of the property and at all times subsequent he retained rights and obligations under the lease and was in effect one of the lessees of the property. In addition to the reservation of royalty interests in the oil produced, he remained obligated under the lease to pay the royalties reserved by the lease to the Hassons. His act in assigning the lease to appellant could not terminate his obligation to the Hassons or relieve him from the liability he assumed when he took the lease from them. If the royalties reserved by the Hassons were not paid by appellant, the Hassons could stand upon the terms of this contract made between the lessee (White) and his assignee (appellant) for the lessor's (Hasson's) benefit, and sue both parties to recover the royalties which they had agreed to pay, in the same manner and to the same extent as though both parties were the original obligors under the terms of the lease. Lopizich v. Salter, 45 Cal.App. 446, 187 P. 1075; Pinkerton v. Crail, 113 Cal.App. 484, 298 P. 532; Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann. Cas.1916E, 830; Pittsburg Consolidated Coal Co. v. Greenlee et al., 164 Pa. 549, 30 A. 489; 40 C.J. 1113.

[5] "Privity of contract, whether between landlord and tenant, or landlord and the assignee of a tenant, cannot be terminated by assignment by the latter, but continues till the end of the term, unless terminated in some legal manner. The fact that the landlord may consent to the assignment, and accept the assignee as a tenant, is immaterial; as is also, the landlord's acceptance of rent from the assignee. The effect of the assignment is to make the assignor a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal, bound while he is assignee to pay the rent and perform the covenants." 15 Cal.Jur. 755.

[6-8] Appellant next contends that in the White case the trial court was in error in refusing to allow appellant to show that the intention of the parties, at the time the contract was entered into, was that White was to furnish a "turnkey job." A "turnkey job" was defined in the course of the evidence as being a job wherein the driller of an oil well undertakes to furnish everything and does all of the work required to complete the well, place it on production, and turn it over ready to "turn the key" and start the oil running into the tanks.

Appellant claims that the trial court was most liberal to respondent's counsel in allowing inquiry into the intention of the parties, and that there was no reason why the question of intention should have been opened to one party and not to the other. A review of the record, however, discloses that no evidence was developed by the question objected to by counsel for appellant. Upon objection made and a discussion by the court and counsel the question was withdrawn. Thus it cannot be said that the court opened the question of intention to one party to the disadvantage of the other. The contract by its terms was not a "turnkey" contract as that term is defined in the evidence. In accordance with the drilling contract, White was to assign the lease in consideration of appellant's employment of him to drill a well on the land for a stipulated amount of money. He was engaged to drill a test well for oil and gas; operations were to commence within 15 days from the date of the contract and to continue with due diligence until the well was completed. Appellant was to furnish and install the derrick, and White was to furnish all necessary machinery, equipment, and drilling tools. Upon the commencement of drilling activities, appellant was to execute an assignment of a 10 per cent. participating interest in the well, and when White had turned over to appellant a completed successful producing well appellant was to execute a further 10 per cent. interest in the well to White. The language of the contract was not ambiguous, and therefore the court was correct in holding that it was not susceptible of explanation by oral testimony.

[9] With respect to the Exchange case it is urged by appellant that the trial court abused its discretion in denying appellant's motion for a continuance of this case on the ground that the essential matter in this case is similar to the essential matter in the White case. In other words, it is argued that the Exchange case should have been continued until the judgment in the White case had become final.

When the two cases were called for trial, Mr. Sullivan, on behalf of appellant, stated to the court: "Based on the opening statement as to what the plaintiff expects to prove in this case, and the contract involved itself, it will become apparent that our motion to continue this matter should be granted. Mr. Borton read from the contract, paragraph four—in our affidavit on file here and in the case of the Oil Tool Exchange against Hasson and others, the foreclosure of the mechanic's lien which is now before Your Honor, and which we offer in support of our motion for continuance, the question there is whether or not the Cascade Oil Company or Mr. White shall pay for certain drilling equipment which the Oil Tool Exchange alleges was purchased and ordered by White for the Cascade Oil Company. Assuming that Your Honor should give a judgment in favor of Oil Tool Exchange and in this matter he also gave a judgment against the Cascade Oil Company in favor of Mr. White, Your Honor has made us pay a $1530. bill twice." The court assured Mr. Sullivan that he would not do that. After a careful reading of the transcript, we have been unable to find wherein any motion was made to continue the Exchange case separate and apart from the White case. It seems, as best as can be determined from the record before us, that the court and counsel were at the time of Mr. Sullivan's statement talking about a motion to continue the White case. The record, however, is considerably confused, and it is difficult to say whether the colloquium involved a motion to continue both cases or not. All cases, including the mechanic's lien case, were before the same judge. The danger, as counsel puts it, of "being caught upon two judgments," would not materialize under such a set up. The trial judge, acquainted with all the phases of the several cases before him, was in a position to work out the procedure to the end that the justice of the situation would be subserved. We are satisfied that the trial judge, in the exercise of a proper discretion, considered faithfully and fairly the contentions and rights of the parties and that his denial of the continuance, assuming such a motion was made in the Exchange case, in no wise transgressed appellant's rights.

[10] It is finally urged by appellant that the evidence in the Exchange case is insufficient to support a judgment of any kind in favor of respondent Oil Tool Exchange, and against Cascade Oil Company. It appears from the evidence that on July 9, 1932, White entered into an agreement with respondent Oil Tool Exchange whereby the latter was to rent to White certain oil drilling equipment to be used in drilling the well in question. By the agreement White assigned a 5 per cent. interest in and to all oil and gas produced, and he agreed to pay to the Exchange a further consideration of $1,000 in cash. All payments were to be made out of the proceeds from the production. The assignment of this 5 per cent. interest was to enable White to fulfill his contract to drill the well.

At the time of the assignment, however, there was no permit of the corporation commissioner in force authorizing the issuance of same. On June 15, 1932, a permit was issued authorizing appellant to transfer to White a 10 per cent participating royalty interest. The certificates evidencing this interest were to be placed in escrow pending further written order of the corporation commissioner. This permit was on December 7, 1932, revoked, and another permit was issued authorizing an outright assignment to White of 10 per cent royalty interests. On January 6, 1933, White executed an instrument of assignment which referred to the permit of December 7th and the agreement between White and the Exchange. By this instrument White assigned to the Exchange an undivided 5 per cent interest of the 10 per cent authorized to be issued to him by appellant under the permit of December 7, 1932.

Appellant in its opening brief does not touch the permit of December 7, 1932, but labors with its contention that at the time of the first assignment by White on July 9, 1932, appellant could have transferred the White per cents. into escrow, but that White, by reason of the restrictions, in the permit, could not validly

assign the escrowed per cents. to another without the consent of the commissioner, which, of course, was not obtained. In its reply brief, appellant concedes that the assignment under these conditions was not void, but merely voidable at the election of the purchaser. But even at that, says appellant, the contract between it and White is "merely a promise on behalf of appellant to execute an assignment to White; and one of the purposes for which White brought this action against appellant was to force appellant to execute an assignment of the royalties claimed by White under the contract; and the trial court so found that appellant had not assigned the royalties claimed by White. Therefore, on January 6, 1933, when White executed his assignment to Oil Tool Exchange, White had nothing to assign and consequently the Oil Tool Exchange could take nothing."

Appellant is in the same position as the issuer of securities. The 10 per cent. authorized to be issued to White was in consideration of the transfer of the lease and his services in drilling the well. The 5 per cent. claimed by Oil Tool Exchange was issued by White in order to enable him to do the drilling. Appellant has received the benefit of the actual consideration for the 5 per cent. royalty interests claimed by the Exchange. In other words, appellant received the total net proceeds of the sale of the per cent. White was the medium through which this result was accomplished. Therefore, to all intents and purposes, appellant occupies the position of the issuer of the per cents. and the Exchange occupies the position of an innocent purchaser thereof. It seems, therefore, that appellant is in no position whatsoever to cause an innocent purchaser to suffer.

It was said in Eberhard v. Pacific Southwest, etc., Corporation, 215 Cal. 226, at page 228, 9 P.(2d) 302, 303: "The inhibitions of the Corporate Securities Act * * * against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in pari delicto where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' * * * and other kindred principles, immediately recur to the mind." Following the doctrine of this case, it was held in Domestic & Foreign Petroleum Co. v. Long (Cal. Sup.) 51 P.(2d) 73, that the assignee of a lease is bound by his assignor's sales of percentage interests in the production made in direct violation of the statute. See, also, Braunstein v. Title Guarantee & Trust Co., 216 Cal. 780, 17 P.(2d) 104; Western Oil & Refining Co. v. Venago Oil Corporation, 218 Cal. 733, 24 P.(2d) 971, 88 A.L.R. 1271.

The 5 per cent. interests assigned by White were transferable even though it be conceded that at the time of the assignment there had been no assignment made to him of his per cents. It is established by the evidence that the 5 per cent. interest had a potential existence, and in this regard the assignment will be considered as a present contract to take effect and attach as soon as this thing to which the assignment refers has ripened into reality, without the necessity of another act. 3 Cal.Jur. 247, 259, and cases cited.

Appellant had knowledge of the arrangement whereby White was to rent equipment from the Oil Tool Exchange, and it knew that the Exchange was to receive as part consideration for the rental of the equipment an assignment of a 5 per cent. interest in and to the well. Through the joint contribution of White and the Exchange to the development of the well, appellant was enabled to obtain a producing well. If appellant were allowed to defeat the assignment of the 5 per cent. royalty interest claimed by the Exchange on the grounds advanced by appellant an anomalous situation would exist whereby appellant would be enabled to retain the production of the well and thus be shielded by a statute which was enacted for the benefit of purchasers and not primarily to benefit the seller.

Respondent Oil Tool Exchange has asked the court to declare its rights in and to the assignment of the 5 per cent. interests in the production of the well, and we are satisfied upon the whole case that the trial court had determined these rights justly and correctly.

The judgments are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

MILLS v. STATE BAR OF CALIFORNIA.

L. A. 15668.

Supreme Court of California.

June 23, 1936.

Rehearing Denied July 23, 1936.

1. Attorney and client ⇐58

Evidence respecting attorney's breach of trust in connection with handling of his clients' funds *held* to require disbarment.

2. Attorney and client ⇐58

In considering punishment to be imposed on attorney for breach of trust in connection with handling of his clients' funds, previous record of attorney who had been suspended from practice of law for one year on another occasion could be considered.

In Bank.

Proceeding by Homer C. Mills to review an order of the Board of Governors of the State Bar of California recommending that petitioner be disbarred from practicing law within the state.

Petitioner disbarred.

Homer C. Mills, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

CONREY, Justice.

Before a local administrative committee in Los Angeles county charges were presented and examined, involving alleged professional misconduct of the petitioner, Homer C. Mills, a member of the State Bar of California. After hearing the evidence, that committee made findings and a recommendation to the board of governors of the State Bar, suggesting that the said Homer C. Mills be disbarred.

The matter came before the board of governors for further hearing, which included a sworn statement made by petitioner to the board. Upon modified findings, the board of governors made its recommendation to the Supreme Court that petitioner be disbarred. In the resolution of the board, this court was advised that in fixing the degree of discipline recommended, the board took into consideration petitioner's past record, which included a suspension from the practice of law, as ordered by the Supreme Court, during a part of the years 1930–1931. Mills v. State Bar, 211 Cal. 579, 296 P. 280, 297 P. 19. On petition of the said Mills we issued the writ under which the above-mentioned proceedings were brought before this court for review, and the record has been filed herein as required by writ.

[1] The first of the charges upon which the proceedings against petitioner are based relates to a sum of $100 collected by him for one Holcombe, who had intrusted to petitioner a certain note for collection. There is evidence substantially sufficient to prove that after collecting this money, petitioner applied it to his own use, and delayed performance of his duty to account for the proceeds of collection until after his client had made the complaint under which the State Bar has prosecuted this charge.

The second charge relates to the conduct of petitioner as attorney for one Mrs. Gripton. It appears that in the course of his transactions for and with Mrs. Gripton, as her attorney, petitioner received from her certain sums of money for payment of costs of the proceedings then being conducted on her behalf. The evidence shows that a part of this money was applied by petitioner to his own personal use and in violation of his duty to his client. There is some conflict in the evidence, and if the triers of fact, including this court, should give full credence to the testimony of petitioner, probably we should have to agree with that member of the local administrative committee who refused to join in the recommendation adverse to petitioner. But there are facts clearly and positively proved which make it very difficult to accept petitioner's excuses for his failure to pay over to his clients the moneys which he had received for their account. On the contrary, the findings are well sustained in this, that he did apply to his own use the said moneys of his clients, and that he did so in violation of his professional duty. A lawyer who keeps no books of account, and who does not make any bank deposits of his clients' funds while they are in his possession, should not be astonished when an examining committee or court refuses to believe his uncorroborated story that moneys thus placed in his possession have been stolen out of his office desk.

[2] As was pointed out by the board of governors, it is a fact that about five years ago this same petitioner was before the state bar and before this court in another case wherein it became necessary by way of discipline to suspend for one year his license to practice law. It is appropriate to

take into consideration this previous record in deciding what penalty should be imposed for the misconduct involved in the present proceeding. Whatever might be said in favor of a milder punishment for single misdemeanors not involving deliberate moral turpitude, there is no doubt in our minds that any lawyer who is guilty of habitual misuse of the funds of his clients should be deprived of the license under which he is authorized to practice law, and by which he has been recommended to the public as a person worthy of trust.

It is therefore ordered that petitioner, Homer C. Mills, be, and he hereby is, disbarred from the practice of law in this state and his name is stricken from the roll of attorneys in the state of California.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



6 Cal.2d 587

UMEMOTO v. McDONALD et al.

L. A. 15660.

Supreme Court of California.

June 25, 1936.

1. Automobiles ⇐245(72)

Pedestrian is not required to abandon all efforts to flee from danger and to remain in safety zone until hit by vehicle, in order to be absolved from charge of contributory negligence as a matter of law (Gen. Laws 1931, Act 5128, § 131½, subd. (c).

2. Automobiles ⇐245(72)

Pedestrian struck by truck at intersection outside of crosswalk could not be said to be contributorily negligent as a matter of law in absence of showing that pedestrian left crosswalk other than because of sense of imminent danger or that divergence was proximate cause of or contributed to injury (Gen.Laws 1931, Act 5128, § 131½, subd. (c).

3. Automobiles ⇐244(6)

In father's action for death of daughter struck by truck outside of crosswalk at intersection of which truck driver had unobstructed view, evidence *held* sufficient to support judgment for father (Gen.Laws 1931, Act 5128, § 131½, subd. (c).

4. Witnesses ⇐387

In father's action for death of daughter killed by truck while crossing intersection, sustaining father's objection to impeaching question concerning witness' previous statement before coroner's jury as to position of deceased in street at time of accident in which counsel omitted explanatory part of statement *held* proper (Code Civ.Proc. § 2052).

5. Witnesses ⇐388(8)

Where witness' testimony upon former hearing has been reduced to writing, transcript must be shown to witness, or if witness cannot read, or if language is unknown to witness, transcript must be read to witness before it may be used for impeachment (Code Civ.Proc. § 2052).

6. Appeal and error ⇐1048(7)

In father's action for death of daughter killed by truck while crossing intersection, error, if any, in sustaining father's objection to impeaching question from which counsel omitted part of previous statement *held* not prejudicial where other impeaching questions were permitted, and record contained ample evidence aside from testimony of witness attempted to be impeached to sustain judgment for father (Code Civ.Proc. § 2052).

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Mitsuo Umemoto against Archie Burns McDonald and another. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Prior opinion, 50 P.(2d) 68.

Lasher B. Gallagher, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

PER CURIAM.

This action was brought by plaintiff to recover damages for the wrongful death of his minor daughter, resulting from personal injuries caused by a truck and trailer driven by defendant McDonald. The scene of the occurrence was a street intersection in El Monte, Cal., to wit, the point where Valley

boulevard, an east-west boulevard, is intersected on the south by Lexington avenue, which avenue, however, is not cut through to the north. The minor, a sixteen year old girl, started from the southeast corner of Lexington avenue and Valley boulevard, to cross Valley boulevard from south to north in a designated twelve-foot pedestrian crosswalk or zone. Defendant McDonald was driving a ten-ton truck and trailer westerly along Valley boulevard at a speed of ten or twelve miles an hour. The day was clear and the driver's view, on approaching the crosswalk, was unobstructed. He testified that when he first saw the girl, she was running and was about one-third of the distance across the boulevard, in the crosswalk. The girl was struck by the left front of the truck either about as she reached the north half of the crosswalk or after she had run some five to ten feet northwesterly out of the crosswalk.

The jury, upon trial of the cause, returned a $3,500 verdict for plaintiff, from which defendant McDonald appealed, on two grounds: (1) That the deceased was guilty of contributory negligence as a matter of law; and (2) that the trial court committed prejudicial error in sustaining an objection to an impeaching question asked a witness, Taduko Midukami.

In support of the first contention appellant cites a local ordinance, which was duly introduced in evidence, and among other things provides that "When within any business district, no pedestrian shall cross a roadway other than by a crosswalk" and "It shall be unlawful for any person to be in any roadway other than in a safety zone or crosswalk, provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian." Appellant also calls attention to section 131½, subdivision (c), California Vehicle Act (Deering's Gen. Laws 1931, Act 5128, vol. 2, p. 2515), which provides: "Every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to vehicles upon the roadway, provided that this provision shall not relieve the driver of a vehicle or the pedestrian from the duty to exercise due care." From this premise appellant argues that as every witness in the case, save Taduko Midukami, whose testimony will be hereinafter discussed, agreed that at the time of impact the deceased was running and was outside of the confines of the crosswalk, she was guilty of contributory negligence as a matter of law. Appellant, in this connection, cites Hopkins v. Galland, etc., Co., 218 Cal. 130, 21 P.(2d) 553, 554, a case wherein a pedestrian, in violation of a local ordinance, attempted to cross a roadway of a central traffic district other than in a crosswalk, and this court, affirming a directed verdict for defendant, said: "If Ordinance No. 7691 is a valid enactment, it follows that at the place where he was injured the plaintiff was there in violation of the terms of the ordinance and that he was guilty of contributory negligence as a matter of law."

There is, on the facts, a vast difference between the case just cited and the instant case, which brings into operation an exception to the general rule referred to in the above quotation. This exception is recognized in Morris v. Purity Sausage Co., 2 Cal.App.(2d) 536, 38 P.(2d) 193 (also relied upon by appellant), which decision states that while the violation of a statute or ordinance as a general rule constitutes negligence, which will bar a recovery if such violation proximately contributes to the injury (19 Cal.Jur., pp. 632, 636), it may happen that prudence and safety of life or limb require the doing of an act which would otherwise be a violation of law, and liability therefor may be avoided by showing that under the circumstances of the particular case the violation was justifiable or excusable.

[1-3] In the instant case the deceased undertook to cross the boulevard in a designated crosswalk, and there was no showing that she left this zone other than because of a sense of imminent danger, or that her divergence was the proximate cause of or contributed in any way to her injury. A pedestrian is not required to abandon all efforts to flee from danger and to remain in a safety zone until hit by a vehicle in order to be absolved from the charge of contributory negligence as a matter of law. If in the instant case the deceased had remained in the zone, the accident probably would have occurred a few seconds sooner than it did; her departure westerly from the zone neither caused nor contributed in any manner to the injury, for it increased rather ties to avoid the collision. Under the evithan diminished the opportunity of both pardence in the record before us and such inferences as may reasonably have been drawn therefrom, the jury was amply justified in returning a verdict for the plaintiff.

[4, 5] Appellant's second contention is that the trial court committed prejudicial error in sustaining an objection to an impeaching question asked a witness, Taduko Midukami. This witness, a fifteen year old girl, was the only witness to testify that decedent was in the zone when struck, and her statements were somewhat contradictory. On direct examination she indicated, by marks on a chart, that the accident occurred just on the west edge of the zone; on cross-examination she asserted that decedent was not out of the zone. At the coroner's inquest she had stated as follows:

"Q. How far out in the street was she (decedent) when you first saw her? A. Almost across.

"Q. Was she out of the pedestrian zone at the time? A. I don't know; I couldn't see, but I think she was; *maybe she was trying to get away.*"

Cross-examining Taduko on trial of this case, appellant's counsel asked her as an impeaching question if she gave testimony at the coroner's inquest as above quoted, except that he omitted to read to her the italicized portion of her reply to the last question. Plaintiff's counsel objected that the entire reply had not been read to the witness and the court suggested this be done. Appellant's counsel refused to include the italicized words, claiming that they were a mere conclusion, whereupon the trial court sustained plaintiff's objection and the witness was not allowed to answer. This, appellant contends, was reversible error, in that the impeaching question, as asked, included all of the alleged contradictory statements of the witness, the portion omitted being a pure conclusion not necessary to include, and this evidence was directed at the very gravamen of plaintiff's case.

Section 2052 of the Code of Civil Procedure provides: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent, with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." In this case the trial court properly sustained the objection to the impeaching question because, in the incomplete form in which it was asked, it not only failed to meet the code requirements, but it was also unfair in that it omitted the very clause which was explanatory of the first part (itself of uncertain meaning) of the answer; appellant was not entitled to the benefit of part of the answer without the qualification, "maybe she was trying to get away." Indeed, the rule is that if the testimony of a witness upon a former hearing had been reduced to writing, the transcript must be shown to him, or in case he cannot read, or the language is unknown to him, it must be read to him before it may be used for the purpose of impeachment. People v. Larrios, 220 Cal. 236, 30 P.(2d) 404; People v. Lambert, 120 Cal. 170, 52 P. 307; People v. Hawley, 111 Cal. 78, 43 P. 404; People v. Lee Chuck, 78 Cal. 317, 20 P. 719; People v. Orosco, 73 Cal.App. 580, 239 P. 82; People v. Reynolds, 48 Cal.App. 688, 192 P. 343; People v. Lopez, 21 Cal.App. 188, 131 P. 104; Doudell v. Shoo, 20 Cal.App. 424, 129 P. 478; 27 Cal.Jur. par. 136, p. 163. The Code section (section 2052) contemplates the showing to a witness of his former testimony, if it has been reduced to writing, so that he may read it before impeaching questions are asked, or, if this cannot be done, relating to him, with circumstances of times, places, and persons present, his former statements. The statute also expressly accords to the witness the right to explain his former statements.

[6] Furthermore, even if the ruling of the trial court was erroneous, it is clear that the error was not prejudicial: First, because other impeaching questions were permitted. For example, on cross-examination Taduko testified that decedent was at the left of the truck and, for impeachment purposes, counsel introduced a prior inconsistent statement made by her at the coroner's inquest to the effect that decedent was at the right of the truck. In other words, the cross-examination of Taduko was not restricted in any manner, and a wide latitude was allowed appellant in the asking of all proper questions. Secondly, as appears from our discussion of appellant's first contention, the record contains ample evidence, aside from the testimony of Taduko, to sustain the verdict and judgment.

The judgment is affirmed.

FISCHER v. STATE BAR OF CALIFORNIA.

L. A. 15593.

Supreme Court of California.

June 30, 1936.

Rehearing Denied July 30, 1936.

1. Attorney and client ⇐53(2)

Evidence sustained recommendation for disbarment for alleged perjury and subornation of perjury.

2. Attorney and client ⇐53(2)

In proceedings for disbarment on ground of perjury, statutes requiring perjury to be proved by testimony of two witnesses or of one witness and corroborating circumstances *held* inapplicable, since disbarment proceedings are not criminal, and case sufficient to justify criminal punishment need not be established therein (Pen.Code, § 1103a; Code Civ.Proc. § 1968).

3. Attorney and client ⇐53(2)

Proof of misconduct involving moral turpitude and justifying disbarment or other disciplinary action may be made by any evidence which is relevant and credible, and proof need not establish particular crime within rules governing conviction of criminal offenses.

In Bank.

Petition by Sidney Fischer to review an order of disbarment of the State Bar of California.

Petitioner disbarred, and his name stricken from roll of attorneys and counselors at law.

See, also, 59 P.(2d) 805.

Sidney Fischer, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a review of an order of disbarment for perjury and subornation of perjury. In 1931 Anna Hirsch sued Barrett Sigel for personal injuries and recovered judgment for $6,500. Petitioner was attorney for Sigel. The plaintiff was unable to satisfy the judgment, and filed an action against Sigel and others, including petitioner, to set aside alleged fraudulent conveyances. The case was dismissed as to petitioner, and judgment for plaintiff was given against other defendants. The testimony of petitioner and of the defendant Leo Lewis before the superior court referee and at the trial was the basis for the present proceeding. It appears that shortly after the accident, Sigel transferred to Leo Lewis his business, worth about $8,000, and certain real property. Lewis immediately transferred them to a corporation organized by petitioner, with Sigel remaining in charge. The court in the fraudulent conveyance action found that these transfers were without consideration.

[1] Petitioner's explanation of the transaction was that there was an antecedent debt owing from Sigel to Lewis, and that Lewis also paid $4,000 in cash, which he handed to petitioner, who kept it in his safe deposit box for several months, during which Sigel withdraw sums from time to time until the money was all paid. He stated that the receipt was thereafter destroyed. Before the administrative committee Lewis testified that he never put up any money, that there never was any such transaction as was described, and that he never took possession of the business or the other property. Lewis further declared that petitioner told him he might testify to the purported transaction before the court referee because it was not a regular court, and that after the fraudulent conveyance action was filed, petitioner told him that he was already in the illegal transaction and that he had better sign the answer which set up the purported transfers.

The committee recommended disbarment and the board of governors approved the recommendation. The findings and recommendation are based on the testimony of Leo Lewis, the testimony of Judge Kincaid, who tried the fraudulent conveyance action, and the improbability of petitioner's story of how the $4,000 payments were handled secretly, without bank deposits, and without the keeping of any records. We are of the opinion that the evidence sustains the findings and recommendation.

[2, 3] Petitioner contends that under section 1103a of the Penal Code and section 1968 of the Code of Civil Procedure, perjury cannot be proved without two witnesses or one witness and corroborating circumstances. But disbarment proceedings are not criminal in character, and there is no necessity of establishing a case sufficient to justify criminal punishment. Proof of

misconduct involving moral turpitude and justifying disbarment or other disciplinary action may be made by any evidence which is relevant and credible, and it is not necessary that it establish a particular crime within the rules governing conviction of criminal offenses.

It is ordered that the petitioner Sidney Fischer be and he is hereby disbarred from the further practice of the law in this state, and that his name be and it hereby is stricken from the roll of attorneys and counselors at law of the state of California, this order to become effective thirty days from and after the filing of this opinion.



6 Cal.2d 537

KAISER v. HOPKINS, County Assessor.

L. A. 15439.

Supreme Court of California.

June 19, 1936.

1. Statutes ⇐174, 175

Courts will interpret measure adopted by vote of people in such manner as to give effect to intent of voters adopting it.

2. Statutes ⇐212

Voters are presumed to have judged of amendment they were adopting by meaning apparent on its face according to general use of words employed, where it did not appear that words were used in technical sense.

3. Constitutional law ⇐14

Words used in Constitution must be taken in ordinary and common acceptation because they are presumed to have been so understood by framers and by people who adopted Constitution.

4. Taxation ⇐204(1)

Soldier who enlisted and served after Armistice of November 11, 1918, *held* not entitled to exemption within constitutional provision allowing $1,000 exemption from taxation to residents who served in army, navy, or marine service "in time of war," since voters intended to exempt only those who had served during period of actual conflict (Pol.Code, § 3612, subd. 4 (u); Const. art. 13, § 1¼, amended November 8, 1932).

[Ed. Note.—For other definitions of "In Time of War," see Words & Phrases.]

5. Constitutional law ⇐20

Where two constructions can be placed upon a constitutional amendment and Legislature has enacted a law placing reasonable construction upon amendment, courts will ordinarily follow legislative construction.

6. Constitutional law ⇐229(2)
Statutes ⇐74(1)
Taxation ⇐195

Statute limiting period of service in war with Germany-Austria for tax exemption purposes to time preceding Armistice *held* not unconstitutional as denying equal protection of the laws or as violating state constitutional provision that all laws of general nature shall have uniform operation (Pol.Code, § 3612, subd. 4 (u); Const. art. 1, § 11; art. 13, § 1¼, amended November 8, 1932; Const.U.S. Amend. 14).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus action by Ford M. Kaiser against Ed. W. Hopkins, Assessor of Los Angeles County, a political subdivision of California. From a judgment for plaintiff, defendant appeals.

Reversed.

Prior opinion, 51 P.(2d) 431.

Everett W. Mattoon, Co. Counsel and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Roy C. Kaiser, of Los Angeles, for respondent.

PER CURIAM.

We granted a hearing in this case after decision by the District Court of Appeal, Second District, Division 2, because the decision of the appellate court was in conflict with the decision of another appellate district in Dooley v. Johnson, 133 Cal.App. 459, 24 P.(2d) 540. In said case a petition for hearing in this court was not filed. After careful consideration we are of the view that the opinion of the District Court of Appeal in the instant case, written by

Mr. Justice Wood, contains a correct statement of the law, and we therefore adopt said opinion as our decision. It follows:

Plaintiff petitioned the superior court for a writ of mandate to compel the defendant, assessor of Los Angeles county, to grant him exemption from taxation in accordance with the provisions of the State Constitution, wherein it is declared that "the property to the amount of $1,000 of every resident of this state who has served in the army, navy, marine corps or revenue marine service of the United States in time of war and received an honorable discharge therefrom * * * shall be exempt from taxation." Article 13, § 1¼. Plaintiff served in the United States Army from May 13, 1919, to May 12, 1922. Defendant appeals from a judgment in plaintiff's favor. The sole question for determination in the proceeding is whether a soldier who enlisted and served after the Armistice of November 11, 1918, is entitled to the exemption provided for those who served "in time of war."

[1-3] It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. Cooley on Constitutional Limitations (5th Ed.) § 66. It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed. Such is the rule where it does not appear that the words were used in a technical sense. Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am.St.Rep. 67. "Where a word having a technical as well as a popular meaning is used in the Constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense." The words used in a Constitution "must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers and by the people who adopted it." Miller v. Dunn, supra; City of Pasadena v. R. R. Commission of California, 183 Cal. 526, 192 P. 25, 10 A.L.R. 1425; San Pedro, etc., R. R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L.R.A.(N.S.) 686; Weill v. Kenfield, 54 Cal. 111; Sprague v. Norway, 31 Cal. 173.

[4] When the Armistice was effected on November 11, 1918, the conflict between the United States and Germany-Austria came to an end. All the war activities ceased, never to be renewed. It is true, as argued by plaintiff, that we were technically at war until July 2, 1921, during which time the peace commissioners negotiated the final terms of settlement, but in the minds of the people the war was over. A spirit of rejoicing swept the land, business cares were laid aside, people danced in the street and engaged in numerous impromptu celebrations. The young men of the nation were recalled from war, from the battlefields where their lives had been endangered. In commemoration of the ending of the great war the day of the Armistice was established as a legal holiday. When at a later date the people, in appreciation of the great sacrifices made by the soldiers in leaving their homes and occupations to suffer the privations and dangers of war, amended the Constitution to grant them certain tax exemptions, they doubtless did so to reward those who served in time of actual war and not those who served in time of actual peace, to reward war service and not peace service. Application of the rules above set forth to the present situation leads to the inevitable conclusion that the voters used the words in question in their "ordinary and common acceptation," and that they intended to exempt those only who had served during the period of actual conflict.

Our views are in accord with a decision of the Supreme Court of Massachusetts, where a case very similar to the one before us was considered. In that case the petitioner sought by writ of mandate to compel the granting of certain privileges under a statute which allowed the privileges of any person who had served "in time of war." In that case, as in our own petitioner joined the army after the Armistice. In denying the petition the court said: "When the armistice was signed it was generally recognized that the war had come to an end. It was so considered by the President of the United States who, on November 11, 1918, addressing the two Houses of Congress in joint assembly under the provisions of the Constitution, stated 'The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it.'" Scott v. Commissioner of Civil Service, 272 Mass. 237, 172 N.E. 218.

[5] The state Legislature, in making provision for carrying into effect the con-

stitutional exemption referred to, in 1929 enacted a law by which the words "in time of war" were given legislative interpretation. In section 3612 of the Political Code it is provided: "The following are recognized as wars within the intent and meaning of said section of the constitution: * * * War with Germany-Austria, April 6, 1917, to and including November 11, 1918." Where two constructions can be placed upon a constitutional amendment and the Legislature has enacted a law placing a reasonable construction upon the amendment, the courts will ordinarily follow the legislative construction. In San Francisco v. Industrial Acc. Comm., 183 Cal. 273, 191 P. 26, the court said: "In such a situation, where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the legislature has by statute adopted one, its action in this respect is well nigh, if not completely, controlling. When the legislature has once construed the constitution, for the courts then to place a different construction upon it means that they must declare void the action of the legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the constitution, a statute passed by the legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the constitution. * * *"

[6] Plaintiff contends that the legislative enactment, Political Code section 3612, subdivision 4(u), by which the war period is limited to the date of the Armistice, is in violation of the Fourteenth Amendment to the Constitution of the United States, in that (as alleged) it denies the equal protection of the laws, and that the enactment in question violates the section of the Constitution of California which provides that "all laws of a general nature shall have a uniform operation." In our opinion the legislative enactment does not violate either of these constitutional provisions. The Legislature merely placed a construction upon the language used by the people in amending the Constitution. By such construction it is held that the people granted certain exemptions to all members of a large group who served the nation in time of conflict and that in such group those are not included who served in the army after the conflict had ceased. Merchants' & Manufacturers' National Bank v. Pennsylvania, 167 U.S. 461, 464, 17 S.Ct. 829, 42 L.Ed. 236; San Francisco v. McGovern, 28 Cal.App. 491, 152 P. 980; 61 Cor.Jur. §§ 383, 384, p. 385.

The judgment is reversed.



6 Cal.2d 533

WOOD v. STATE BAR OF CALIFORNIA.

L. A. 15588.

Supreme Court of California.

June 19, 1936.

1. Attorney and client ⇐57

Recommendation by local administrative committee of state bar of discipline of attorney in form of reprimand *held* advisory only as regards action by Board of Governors of State Bar.

2. Attorney and client ⇐46

Attorney's claim of rehabilitation in disciplinary proceedings should be evidenced by honest intent to make whatever amends are necessary to clear record of past conduct and by attitude of co-operation with persons whose legal duty is to investigate conduct and make proper recommendations to Supreme Court.

3. Attorney and client ⇐58

Attorney who secured loan of $100 from employees of client to secure release from jail and thereafter gave check for such amount drawn on bank wherein he had no funds *held* guilty of conduct involving moral turpitude and dishonesty, requiring suspension for 6 months, notwithstanding attorney's claim that acts were committed while he was an alcoholic, and that he had subsequently rehabilitated himself, where attorney had failed to make good amount of check and failed to appear before Board of Governors of State Bar at hearing (Code Civ.Proc. § 287, subd. 5).

In Bank.

Proceeding on the petition of Buel R. Wood to review the recommendation of the Board of Governors of the State Bar of California that petitioner be suspended from practice of law for period of six months.

Petitioner suspended from practice of law for period of six months.

Maurice C. Myers, of Long Beach, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

CURTIS, Justice.

This is a proceeding to review the recommendation of the Board of Governors of the State Bar that petitioner be suspended from practice for a period of six months. Petitioner is charged with conduct involving moral turpitude and dishonesty in that petitioner secured a loan of $100 from employees of a client in order to secure his own release from jail on a charge of intoxication and reckless driving, and thereafter gave his check for that amount knowingly drawn on a bank wherein his account had been closed more than six months previously, and failed and neglected for more than six years to make good said check.

There is no doubt, as it is clearly shown by the record, that in October, 1929, petitioner requested one Edward H. Kane, an employee of the Pacific Loan & Investment Company, at that time a client of the firm of Medlar & Wood of which petitioner was a member, to furnish him with $100 in cash, stating that he had been arrested in Compton, Cal., on a charge of intoxication and reckless driving, and that unless he could raise the $100 he would be forced to spend Sunday in jail. Kane out of his own personal funds, together with funds borrowed from two other coemployees, furnished petitioner with the $100 upon petitioner's promise to send him a check for that amount just as soon as he got back to Los Angeles. There is also no doubt that petitioner sent a check for $100 to Kane, for although the check was subsequently mislaid by Kane, and was not available at the hearing before the local administrative committee, Kane testified that he received said check the following Monday and his testimony was corroborated by the two coemployees who testified that they personally had seen the check. Petitioner does not deny having sent the check. Thereafter, according to the testimony of Kane, the check was presented to the Bank of America for payment and was returned with the notation, "No Funds." It developed at the hearing that the account of petitioner had been closed in March, 1929. In March, 1935, petitioner was cited to appear before local administrative committee No. 14 upon said charge. At the hearing petitioner admitted that he must have gotten the money from Kane, stated that he did not remember whether or not he had issued any check therefor, and stated by way of explanation that at that time he was an alcoholic, had been in jail several times, but that shortly thereafter he had realized the seriousness of his condition, had given up his practice of law, and had shut up his office, and had gone to the mountains for over nine months, during which time he had not touched a drop of liquor, and had completely rehabilitated himself. The local administrative committee, after making findings affirming the charges made against him and finding that such conduct constituted moral turpitude and dishonesty within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure, recommended discipline in the form of a reprimand. The reason given by the local administrative committee for such recommendation was that the acts had been committed by the petitioner during a period of time when he was overindulgent in drink, and he claimed to have rehabilitated himself and to have ceased drinking entirely.

[1-3] This recommendation of the local administrative committee was, of course, only advisory. The petitioner, upon being cited to appear before the Board of Bar Governors, failed and neglected to appear at the time and place set. The hearing was therefore postponed and petitioner again notified to appear for oral argument to show cause why the decree of discipline recommended by the local committee should not be increased. Petitioner did not appear, but communicated with the board, stating that he had nothing to add to the record. Thereupon, the Board of Bar Governors approved and adopted the findings of the local administrative committee, but, instead of a reprimand, recommended that petitioner be suspended from practice of the law in the state of California for a period of six months.

Although petitioner claims to have rehabilitated himself, his failure to pay an honest debt and reimburse a friend who had stood by him in a time of need, and his

attitude toward the Board of Bar Governors when cited to appear before them, afford no basis for a belief that he recognizes the seriousness of his conduct in issuing a check without sufficient funds which at the time of its commission was a criminal offense. We are of the opinion that a claim by an attorney of rehabilitation should be evidenced by an honest attempt to make whatever amends are necessary to clear his record of past misconduct, as well as by an attitude of co-operation with those persons whose legal duty it is to investigate his conduct and make proper recommendations to this court. The seriousness of the charge against petitioner could have been considerably minimized by a proper attitude on the part of petitioner after his rehabilitation. Under the circumstances as presented by the record, we are satisfied that the penalty recommended by the Board of Bar Governors was proper.

It is therefore ordered that petitioner be, and he is hereby, suspended from the practice of law in this state for a period of six months; said period of suspension to commence 30 days from and after the date of the filing of this order.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.



6 Cal.2d 568

In re LANKERSHIM'S ESTATE.

LANKERSHIM et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

L. A. 14481.

Supreme Court of California.

June 23, 1936.

Rehearing Denied July 23, 1936.

1. Executors and administrators ⇐111(1)

Executor, administrator, or testamentary trustee who is an attorney and elects to act as his own attorney in performance of services incident to administration of estate is not entitled to allowance against estate for his professional services in absence of some statutory provision entitling him thereto (Probate Code, §§ 467, 901, 902, 910).

2. Executors and administrators ⇐501

Beneficiaries, who knew that attorney acting as special administrator proposed to waive all claims to fees as such administrator and to look only to such allowance as might be made for his services as attorney for administrators, *held* estopped, under circumstance, to contend that since attorney was one of administrators he could receive no compensation for legal services (Probate Code, §§ 467, 901, 902, 910).

3. Executors and administrators ⇐501

Order which purported to be an allowance in full of commissions and fees of special administrator and of attorneys prior to final settlement of estate *held* not objectionable on ground that amount of allowable fees was limited to percentage of estate as disclosed by final account (Probate Code, §§ 467, 901, 902, 910).

In Bank.

Appeal from Superior Court, Los Angeles County; May D. Fahey, Judge.

Proceeding in the matter of the estate of J. B. Lankershim, sometimes known as James Boone Lankershim, deceased, wherein Doria C. Lankershim and John I. Lankershim file objections to the allowance of special administrator's and attorney's fees to Bank of America National Trust & Savings Association and another, special administrators with general powers of the estate of J. B. Lankershim, deceased. From an order fixing such fees, the objectors appeal.

Affirmed.

For prior opinion, see 49 P.(2d) 307.

Edward M. Auslender, Loeb, Walker & Loeb, Milton H. Schwartz and Irving M. Walker, all of Los Angeles, for appellants.

J. Wiseman Macdonald, Byron Hanna, Hanna & Morton, and W. W. Wallace, all of Los Angeles, for respondents.

CONREY, Justice.

This matter comes before the Supreme Court upon hearing granted after decision by the Second District Court of Appeal, Division 2. The appeal is from an order of the trial court fixing the fees of a special administrator and the fees of an attorney who acted as attorney for the special administrators.

The following facts shown by the record are here given as stated in the opinion of the District Court of Appeal:

"The deceased, Colonel J. B. Lankershim, died in New York on October 16, 1931. Mr. J. Wiseman Macdonald, who for a number of years had been the attorney for the deceased, had in his possession a will which he had prepared for Colonel Lankershim in 1929, by the terms of which practically the entire estate was left to Doria C. Lankershim and John I. Lankershim, children of the testator, and who are the objectors and appellants herein. Mr. Macdonald cabled the beneficiaries, who were in France, and, in accordance with the authority cabled back, presented the will for probate in the names of the son and daughter and himself, these three being the executors named in the will. A few days later Mr. Macdonald was first informed of and received from a personal attendant of Colonel Lankershim a document purporting to be a will executed by the latter two weeks before his death, by the terms of which each of the children was to receive three-tenths of the estate, one-tenth was left to Mr. Macdonald and the remainder to other beneficiaries, and in which Mr. Macdonald and Bank of America were named as executors. Mr. Macdonald then filed a petition asking that this will be admitted to probate, also signing as in the petition for probate of the prior will, as attorney for the petitioners. The probate of the later will, that of 1931, was abandoned after a contest had been filed and, in this connection, it appears that Mr. Macdonald executed to the contestants, the children and beneficiaries under the first will, a transfer of any rights he might have under the 1931 will. Prior to the filing of the will of 1931 for probate, the Bank of America advised Mr. Macdonald that it desired him to represent the bank as its attorney in the probate proceedings, and this Mr. Macdonald agreed to do. In view of the contest and to preserve the estate and to do those things necessary until the executors should be appointed, Mr. Macdonald and the Bank of America were appointed as special administrators. The bank employed Mr. Macdonald to act as its attorney throughout the administration of the estate and he so acted until December, 1932, when executors were appointed. It was agreed between the bank and Mr. Macdonald that the latter would waive all right to administrator's fees and that the bank would do practically all of the work of administration and that Mr. Macdonald should receive only the fees of an attorney for the estate.

"In February, 1932, the powers of the special administrators were made general and so continued during their administration. The agreement of Mr. Macdonald in relation to the matter of fees was declared by him in open court at the hearing of the petition for special letters of administration and in the presence of counsel for appellants and was promptly communicated to Doria Lankershim and John Lankershim, appellants herein, and to their attorneys. No objection appears to have been made by the court or any person until the proceeding which gives rise to this appeal and after the services upon which the claim for fees was made had been rendered, and the record warrants the conclusion that appellants first made objection in the matter of the fees of the special administrator and the attorney fees claimed by Mr. Macdonald at the time the matter of fixing such fees was presented to the trial court. Prior to the filing of the accounts of the special administrators, Mr. Macdonald had performed all legal services required by the estate.

"Upon the filing of the final account of the special administrators and petition for allowance of fees, the trial court found and fixed the amount of the administrative fees to be allowed the Bank of America in the sum of $49,387.75 and the amount of attorney's fees to be allowed Mr. Macdonald in the sum of $56,443.15, minus the sum of $10,000 which had been paid him on account of such fees prior to the filing of the accounts. It appears that Mr. Macdonald also performed special legal services in the contesting of a claim filed against the estate by one Irene Herbert in the sum of $500,000, for which special services the trial court, basing its findings upon substantial proof in the record, fixed and allowed as reasonable compensation the further sum of $15,000.

"The basic contention of appellant is that Mr. Macdonald, by reason of the fact that he was one of the special administrators, could not, as a matter of law, receive any compensation for legal services, regardless of whether his employment was by both special administrators or solely the employment of his coadministrator, the Bank of America. It may be noted here that it is not contended that an adminis-

trator or executor may not perform legal services in estate matters but merely that, if he does so, he is entitled to no compensation therefor.

"Section 910 of the Probate Code provides that 'Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.' Sections 901 and 902 of the same Code provide for the commissions of executors for regular and extraordinary services, limiting the latter to what the court may deem just and reasonable and basing the regular compensation upon the amount of the estate accounted for. Section 467, by reference, makes the foregoing sections applicable to cases where the estate is handled by special administrators. There is nothing in our statutes bearing upon the question as to the right of an individual to act as both administrator or executor and as attorney, nor is there any specific provision of law in this state laying down the rule as to fees and commissions in such cases."

[1] In California it is established law that if an executor, administrator, or testamentary trustee, being himself a practicing lawyer, elects to act as his own attorney in the performance of the services incident to the administration of an estate, the general rule is that he will not be entitled to an allowance against the estate for his professional services in the absence of some statutory provision entitling him thereto. The rule is grounded upon the principle that the administrator in selecting himself to perform the duties of an attorney for the estate would become his own employer, and would be under temptation of self-interest which might lead him to act contrary to the duties of his trust. Therefore public policy establishes the rule as above stated. This rule and the legal history thereof has been restated by this court in Re Estate of Parker, 200 Cal. 132, 251 P. 907, 49 A.L.R. 1025. It is upon this case that appellants rely in support of their contention that respondent MacDonald should not be permitted to receive any fees for his services as attorney in the course of the special administration of this estate. Unquestionably the rule exists as stated in Re Estate of Parker, supra, and we have no disposition to modify the ruling made in that case.

But we are further of the opinion that the case at bar presents a suitable exception to the rule set forth in the Parker Case. The rule itself is not a rule of law as distinguished from equity. On the contrary it is a statement and illustration of a principle of equity. Equity or chancery law has its origin in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men. Therefore, while we recognize the equitable rule suggested by appellants as illustrated by the case of In re Estate of Parker, supra, we think that the case at bar involves and requires the application of further principles of equity which sustain the decision of the trial court. From the evidence it appears that this is not the ordinary case in which an attorney at law in the performance of the duties of an executor or administrator utilizes his own knowledge of the law in the performance of his official duty. Here it appears that the previous relations of Macdonald with the decedent and with appellants had made him the one person peculiarly and completely familiar with the property and business affairs of an estate amounting to nearly $7,000,000. For reasons which have been indicated, it became necessary to institute a special administration pending the determination of the questions relating to two purported wills, and preliminary to the establishment of a regular administration of the estate. Apparently with the consent of all parties in interest the court was requested to appoint the bank and MacDonald as special administrators. If those special administrators when appointed had chosen to employ another attorney at law to advise them in connection with their duties, there is no doubt that the administrators would have been entitled to one fee and the attorney so selected would have been entitled to another fee under the limitations of the statute and the orders of the court. But in the particular case it was apparent to all parties in interest that the principal part of the duties of administration in the way of routine work should be performed by the bank and that it would be greatly to the interest of the estate to have the duties of legal counsel performed by Mr. MacDonald.

[2] We may concede that if Mr. Macdonald had been appointed both as special administrator and as attorney without knowledge of the parties in interest that he was performing the duties of an attorney and without knowledge of the court that such course of action was to be pursued, the principles stated in Re Estate of Parker, supra, might be applicable in the determination of this appeal. But it further appears that before anything was done to fix and determine the conditions under which this trust was to be performed, the fact was openly stated to the parties in interest, including appellants and their attorneys, and it was well understood by the court, that Mr. Macdonald proposed to waive all claim to fees as special administrator and look only to such allowance as might be made for his services as an attorney for the administrators. The record leaves no doubt that this was clearly understood by appellants, and that although they were given full opportunity to state any objection which they might have to such arrangement, they made no such objection until the services had been fully performed, and the time arrived for payment. Under these circumstances we are of the opinion that appellants are now estopped by their own conduct. They have knowingly permitted Mr. Macdonald to expend much valuable time and to give them the benefit of important services without affording to him that opportunity of self-protection to which he was entitled if there was to be any challenge of his claim for compensation.

[3] It has been suggested that the order should be reversed on the ground that it purports to be an allowance in full of the commissions and fees of the special administrator and of the attorney prior to final settlement of the estate. This is based upon the fact that under section 901 of the Probate Code the total amount of allowable fees is limited to a percentage of the amount of the estate accounted for, and it is contended that this means the amount of the estate as disclosed by the final account. In response to this contention it is necessary only to refer to section 467 of the Probate Code, contained in the chapter on Special Administrators. It is there provided that the commissions of the special administrator and the fees of his attorney shall be fixed by the court, but that the total fee paid to the attorneys both of the special administrator and executor, or of the special administrator and general administrator "must not, together, exceed the sums provided in this code as compensation for the ordinary and extraordinary services of attorneys for executors or administrators." From the record herein, including the findings of fact and order of the trial court, it does not appear that the order as made is in conflict with the provisions of the statute. Moreover, it appears that the objection now suggested by appellants was not made in the trial court. Under these circumstances we find no sufficient reason for further consideration of such objection.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; THOMPSON, J.



6 Cal.2d 583

RICHARDSON v. BOARD OF EDUCATION OF LOS ANGELES CITY SCHOOL DISTRICTS et al.

L. A. 15687.

Supreme Court of California.

June 23, 1936.

1. Schools and school districts ⇐147

Statute giving board of school trustees power to govern schools in their district and duty to employ teachers and to fix and prescribe their duties authorized district board to fix required minimum number of days' attendance by teachers and schedule of excusable absences (Pol.Code, § 1607, subd. 1, as added by St.1917, p. 736; § 1609, subds. 2, 5(b), as added by St.1917, p. 738, and amended by St.1921, pp. 1664, 1665).

2. Schools and school districts ⇐136

Relation between teacher and school district is created by contract.

3. Schools and school districts ⇐133

Under statute providing that teachers should be classified as permanent after being successfully employed by district for two or three complete consecutive school

years, and contract specifying credit to be allowed for certain absences and providing that teacher must teach 195 days if year was to be counted as full school year, teacher who under contract was credited with 193 days of teaching for first year *held* not entitled to classification as permanent teacher at end of third year's service (Pol.Code, § 1607, subd. 1, as added by St.1917, p. 736; § 1609, subd. 2, as added by St.1917, p. 738, and amended by St.1921, p. 1664, and subd. 3 (e), as amended by St.1927, p. 1913).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Suit for writ of mandate by Paul Eddy Richardson against the Board of Education of Los Angeles City School District and others. From an adverse judgment, plaintiff appeals.

Alternative writ of mandate discharged and peremptory writ denied.

For prior opinion, see 51 P.(2d) 1162.

W. A. Alderson, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 1. Upon further consideration we are satisfied that the said court has correctly determined the issues, and we accordingly adopt the opinion of Mr. Justice pro tempore Shinn as the opinion of this court. It is as follows:

"Plaintiff seeks the mandate of the court requiring respondent school district to classify him as a permanent teacher. Plaintiff's rights are governed by his contract with the board and by section 1609, subd. 3 (e) Political Code (Stats.1927, p. 1913), under which it was the duty of defendant board to classify plaintiff as a permanent teacher if he had been 'successfully employed by the district for two or three complete consecutive school years,' as a probationary teacher. The three-year period applies under the provision of the section that the classification shall be made at the end of either the second or third year of the employment, at the option of the governing board of the district, no classification having been made at the end of the second year. The complaint alleges and the answer denies that plaintiff was so employed.

"Respondent admits that the second and third years' services were complete but contends that the first year's service (1928-1929) was incomplete. The court found that plaintiff's contract contained, among other provisions, the following: 'To all Probationary Teachers: According to the California School Law, a teacher who enters a School District must successfully serve as a probationary teacher on a probationary contract for two full, consecutive years. In order to count as a full school year, it is necessary to teach a minimum of one hundred ninety-five days. A teacher who serves less than one hundred ninety-five days in a school year cannot receive a permanent contract at the end of two years, but must continue to serve on a probationary contract until the requirements are met. However, the increase in salary can be earned by two years of service of not fewer than one hundred fifty school days each.'

"There is no statutory provision as to the number of days of teaching required to make up a complete school year as that term is used in said section 1609. In Los Angeles City High School District two hundred days was adopted as the maximum number of teaching days in the school year and under rules of the board one hundred ninety-five was fixed as the minimum number of days of teaching with which the teacher must be credited to make up a complete year. In addition thereto, under the rules of the board half pay was allowed for sick leave for not exceeding ten days during the school year, and full pay for not exceeding ten days when the teacher should be quarantined, not exceeding two such periods in a school year, and in certain other cases, not material here, full pay was allowed.

"During the year 1928-1929 plaintiff was credited with one hundred eighty-four days' actual teaching and was absent sixteen days, all on account of illness. He was credited with four days out of the sixteen on account of being quarantined and he was given a further credit for ten days' absence on account of illness, at half pay, or five full days. The remaining two days were charged against him as unexcused absences. This credit of nine days brought his total of paid teaching days to one hundred ninety-three, or two short of the required minimum. It was

upon the ground that this year's service was incomplete that the board refused to give him a rating as a permanent teacher and judgment went against him in the trial court.

[1] "Under its general powers to govern the schools in the district the board had power to make rules not inconsistent with the state law or the rules of the State Board of Education. Pol.Code, § 1607, subd. 1, Stats. 1917, p. 736. It was also the duty of the board to employ teachers, fix their compensation unless otherwise provided by law, and to fix and prescribe their duties. Pol.Code, § 1609, subd. 2, Stats.1917, p. 738, section 1609, subd. 5 (b), Stats.1921, pp. 1664, 1665. The district board, therefore, was fully competent to make the rules here involved, fixing a required minimum number of days' attendance by teachers and a schedule of excusable absences. Such rules, indeed, would seem to be necessary for a proper definition of the teachers' duties of attendance and to provide as well for emergency absences for which the teachers should not be penalized as to compensation or credit for attendance.

[2, 3] "The relation between the teacher and the school district is one that is created by contract. Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858; Gould v. Santa Ana High School District, 131 Cal.App. 345, 21 P.(2d) 623; Wood v. Los Angeles City School District, 6 Cal.App.(2d) 400, 44 P.(2d) 644. Plaintiff's several contracts made specific reference to the rules and regulations of the board, the employment being subject thereto. It appears, therefore, that essential terms of the employment to which the parties agreed were that one hundred ninety-five days of teaching service should be rendered each year, computed under the rules of the board, and that if the days of service fell below the minimum requirement the year in question would not be considered one during which plaintiff was successfully employed for a complete year.

"Plaintiff's rights are governed by the contract in all matters in which the law leaves the parties free to contract. There is no conflict between the rules of the board here involved, which were incorporated into the contract, and the state law on the subject. The provisions of the contract, therefore, are controlling. Plaintiff's services having fallen short of a complete year's service were insufficient to meet the requirements of the contract and the rules of the school district and he has failed to comply with the conditions upon which his right to a rating as a permanent teacher depends. Wood v. Los Angeles City School District, supra.

"Plaintiff's further contention that he was successfully employed for three complete years because a contract subsisted throughout each year is untenable. It would be violative of the clear purpose of the law and of the terms of the contract of employment, as well, to allow one holding a contract as a probationary teacher for three successive years to acquire the status of a permanent teacher without having rendered the successful service which furnishes the reason for the probationary period. Neither can we agree that substantial as distinguished from full compliance with the terms of his contract is sufficient to bring plaintiff within the classification he seeks. The authorities cited by him to the effect that illness does not of itself terminate a contract are not in point. The board did not seek to terminate plaintiff's employment nor does it appear that there existed any ground for such termination. The point is that the required services contracted for were not rendered. Respondent board acted properly in exacting performance upon plaintiff's part and in refusing to give him a classification he had not earned."

In support of the above conclusion, reference may also be made to Wood v. Los Angeles City School District, 6 Cal. App.(2d) 400, 404, 44 P.(2d) 644.

It may be noted, however, that the problem presented by the instant case will no longer arise, for by the enactment of section 5.503 of the School Code in 1931 (St. 1931, p. 1395) the Legislature provided that a probationary employee who has served for 75 per cent. of the school days shall be deemed to have served a complete school year.

The alternative writ of mandate hereto fore issued is discharged and the peremptory writ is denied.

The judgment is affirmed.

6 Cal.2d 593

CITY OF SOUTH GATE et al. v. CITY OF LOS ANGELES et al.

S. F. 15701.

Supreme Court of California.

June 25, 1936.

1. Appeal and error ⇐477

Supreme Court *held* without jurisdiction to hear petition for writ in aid of appellate jurisdiction where appeal from judgment was pending in District Court of Appeal.

2. Appeal and error ⇐458(2)

Writ of supersedeas will not issue to restrain or prevent party from acting or proceeding under judgment from which appeal has been taken, where no process of, or action by, court below is involved.

3. Courts ⇐209(2)

Supreme Court will not entertain applications in original proceedings in cases on appeal in District Court of Appeal unless and until cause be transferred to Supreme Court.

In Bank.

Petition for writ in aid of appellate jurisdiction by the City of South Gate, a municipal corporation, and another against the City of Los Angeles, a municipal corporation, and others.

Petition denied.

Clyde Woodworth, City Atty., of South Gate, Delbert A. Hessich, City Atty., of Huntington Park, and Robert H. Dunlap and George R. Larwill, Sp. Counsel, both of Los Angeles, for petitioners.

Ray L. Chesebro, City Atty., James M. Stevens, Asst. City Atty., G. Ellsworth Meyer, Deputy City Atty., and S. B. Robinson and T. B. Cosgrove, Sp. Counsel, all of Los Angeles, for respondents.

WASTE, Chief Justice.

The petitioning municipalities have filed in this court a "petition for a writ in aid of appellate jurisdiction."

The city of Los Angeles for many years last past has been, and is now, engaged in the business of supplying electric energy to consumers of light, heat, and power, and in that capacity receives electric energy for that purpose. It now plans to acquire from, and is under contract with, the United States government to receive a very large amount of the electric energy generated by the government at the power houses at Boulder Dam. Such plan calls for the construction, maintenance, and operation of a power line from the power house at the dam, capable of conducting a 275,000-volt load of electric energy to the city of Los Angeles. This power line will pass through and over the cities of South Gate and Huntington Park.

The petitioning cities and the city of Los Angeles, not being able to agree on the terms and conditions to which the use of streets in the petitioning cities shall be subject and the location of the power line, the city of Los Angeles brought an action in the superior court of Los Angeles county, under the provisions of the act granting to municipal corporations of the state of California the right to construct, operate, and maintain (among other utilities) electric power lines, against the cities of South Gate and Huntington Park "to have such terms and conditions and locations determined and adjudicated." Stats.1923, chap. 76, p. 147. Judgment in this action has been entered. Petitioners have appealed to the District Court of Appeal of the Second Appellate District, and the city of Los Angeles is constructing the power line through the petitioning municipalities under and in accord with the judgment.

[1, 2] The respondent city has appeared by demurrer and answer to the petition. At the outset of the hearing, we are confronted with the objection which we consider to be a conclusive answer to the petition. Whether we consider the petition an application for a writ in aid of appellate jurisdiction or one for a supersedeas or an injunction pending the determination on appeal of the cause on its merits, this court has no jurisdiction, and will not proceed in the matter. An appeal from the judgment has been taken to, and is now pending in, the District Court of Appeal. This court, therefore, has no jurisdiction. Rosenfeld v. Miller, 216 Cal. 560, 562, 15 P.(2d) 161. We there held the law to be well settled that in this state an appellate court has no jurisdiction to grant a writ of supersedeas except in aid of its appellate jurisdiction (citing article 6 of the Constitution, and former decisions of this court). Furthermore, a writ of supersedeas will not issue to restrain or prevent a party from acting or proceeding under a judgment from which an appeal has been taken,

where no process of, or action by, the court below is involved. In re Imperial Water Co., No. 3, 199 Cal. 556, 558, 250 P. 394. That is the case here. See, also, Rose v. Mesmer, 131 Cal. 631, 634, 63 P. 1010. The latest reported decision of this court on this subject is McCann v. Union Bank & Trust Co., 47 P.(2d) 283. This court was there asked to issue, in the exercise of its inherent power, a writ of supersedeas and an order restraining the enforcement of a judgment pending the determination of an appeal from an order made by the superior court in another action between the same parties. The decision has direct application to the cause now here.

[3] Finally, the District Court of Appeal, to which the cause was appealed, has entire jurisdiction. It is the settled rule that this court will not entertain applications in original proceedings in cases on appeal in the District Court of Appeal unless and until the cause be transferred to this court. Dawson v. Superior Court of Kings County, 158 Cal. 73, 110 P. 479; Cosgrave v. Donovan, 52 Cal.App. 625, 199 P. 808, 810.

The petition is, therefore, denied.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.



In re DUNTON'S ESTATE. *

DOHERTY v. GRANT.

Civ. 1971.

District Court of Appeal, Fourth District, California.

June 29, 1936.

1. Executors and administrators ⇨216(2)

Attorney for executor, as such and as sole legatee, *held* entitled to have extraordinary compensation for extraordinary services paid out of estate where attorney successfully represented executor in contest of will on ground of lack of testamentary capacity, undue influence, and fraud, since executor had duty to defend will and retain counsel in aid of such duty (Probate Code, § 381).

2. Executors and administrators ⇨216(2)

That order for extraordinary attorney fees rendered by attorney for executor did not designate upon which of services set forth in attorney's petition showing all services rendered by him, both ordinary and extraordinary, it was based, *held* not to render order erroneous where services rendered were easily distinguishable.

3. Appeal and error ⇨907(3)

Appellate court must assume fee of $3,500 in estate appraised at $13,800 for extraordinary services rendered by attorney in defending will was reasonable, supported by evidence and that trial court did not abuse its discretion, where appeal was on judgment roll alone and no abuse of discretion appeared from examination of judgment roll.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Proceeding in the matter of the estate of Alice B. Dunton, deceased, wherein F. F. Grant filed a petition for extraordinary attorney fees, as attorney for executor of the estate, opposed by Ralph Doherty, sometimes called Ralph Daugherty, executor. From an adverse order, the executor appeals.

Affirmed.

H. P. L. Beck and William H. Wylie, both of San Diego, for appellant.

F. F. Grant, of San Diego, in pro. per.

TURRENTINE, Justice pro tem.

Alice B. Dunton died testate, bequeathing all her estate to Ralph Doherty, sometimes called Ralph Daugherty, appellant, naming him executor thereof. Decedent left no surviving next of kin. The estate consisted of the community property of decedent and her husband, who had predeceased her. The will was duly probated and appellant appointed executor. Ralph Doherty was a stranger to the estate of both decedent and her predeceased husband. After the will had been admitted to probate the next of kin of the husband filed a contest of the will on the grounds that the decedent lacked testamentary capacity and that the will had been procured by undue influence and fraud. The first trial

resulted in a verdict and judgment for the contestants. A motion for new trial was granted and a second trial had, which resulted in a verdict and judgment sustaining the validity of the will. After the termination of the contests, F. F. Grant who, up to that time, had been the attorney for Ralph Doherty, as executor and also as sole legatee and devisee, filed a petition for extraordinary attorney fees. Thereupon Ralph Doherty discharged his then attorney, F. F. Grant, and retained different counsel, who filed objections to the petition for extraordinary attorney fees. The petition and objections were heard by the trial court which on August 23, 1935, signed an order for payment of extraordinary attorney fees as follows: "Upon reading and filing the petition of F. F. Grant, Esq., attorney for the executor in the above entitled estate, and good reason appearing therefrom, it is ordered, adjudged and decreed that Ralph Daugherty, the executor of the above entitled estate, and the sole beneficiary thereunder of the proceeds of the above estate, is hereby ordered to pay to said F. F. Grant, Esq., the sum of $3,500.00 as and for extraordinary attorney fees due him from said estate." From such order Ralph Doherty prosecutes this appeal and the attorney is designated as claimant and respondent. The estate was appraised at $13,800. The appeal is on the judgment roll.

[1] It was the duty of the executor to defend the will, after its admission to probate, against all attacks. Probate Code, § 381; In re Estate of Logan, 171 Cal. 357, 153 P. 388, 390. "When a will is admitted to probate it is the duty of the executor to defend and uphold the will against any subsequent attack for its revocation made upon it * * * and this duty primarily rests upon the executor, and not upon the legatees or devisees." In re Estate of Logan, supra, 171 Cal. 357, at page 362, 153 P. 388. It being his duty to defend the will, he was entitled to retain counsel to help him in performing his duty and it follows that the attorney is entitled to extra compensation for extraordinary services out of the estate. Mr. Woerner, in his work, Woerner on Administration, volume 2 (2d Ed.) § 517, lays down the following rule: "If, therefore, an administrator or executor incur expense at the request or in the interest of a legatee or devisee, in the fruitless attempt to establish a will, the parties are liable therefor, but not the estate. If the will is established, however, the costs and counsel fees, *being chargeable against those who are benefited by the litigation,* may be charged against the estate *if it go to the parties so benefited;* * * *" This rule was quoted with approval in Re Estate of Hite, 155 Cal. 448, on page 455, 101 P. 448, and the italics in the quotation were supplied by the Supreme Court.

In Re Estate of Brightman, 87 Cal.App. 80, 261 P. 1044, the court allowed extra compensation out of the estate to the executrix' attorneys for successfully defending the will contest after probate for the executrix who was substantially the sole beneficiary under the will. We are in accord with the rule laid down in Re Hegarty's Estate, 47 Nev. 369, 222 P. 793, 794, in which case the executrix was the sole beneficiary under the will and employed counsel to resist contest and was successful. Attorney fees in this case were allowed the attorney out of the estate, for successfully defending and maintaining the probate of the will, and the executrix and sole legatee appealed. The Supreme Court of Nevada there said:

"Counsel for appellant, in support of the contention that the court had no authority to make an allowance of attorney's fees in opposing the contest and in procuring the probate of the will, rely mainly upon the opinion in the Matter of Higgins' Estate, 158 Cal. 355, 111 P. 8. The reason why that case does not control is that in the instant case Mrs. Coleman, who employed counsel to procure the probating of the will, was named as executrix therein, and was the sole beneficiary thereunder, and prevailed in the contest. In the Higgins Case the testator left a widow and three children, Herbert, Albert, and Cornelia. Herbert was named in the will as executor. By the terms of the will the testator gave the widow one-half of his estate, and divided the other one-half as follows: One-sixth to Cornelia, two-sixths to Albert, and three-sixths to Herbert. The effect of the will, therefore, was simply to take from Cornelia one-half the share to which she would have succeeded as heir if the deceased had died intestate, and give the same to Herbert. When the will was offered for probate, Albert and Cornelia filed a contest. Herbert employed counsel to fight the contest. The court, in refusing to allow attorney's fees out of the estate to the attorneys employed by Herbert, said:

" 'The contest was practically nothing but a contest between the executor and Cornelia for one-twelfth of the estate of the decedent. No one else was or could be beneficially interested.'

"—and concluded that the executor should alone bear the expense of the contest. This clearly shows the distinction between the two cases. * * * The court did not err in the respect mentioned."

In Re Scott's Estate, 9 Watts & S. (Pa.) 98, it was said: "The executor litigated not for his own interest, but for the interest of the party who got the whole estate by the litigation, and now refuses to reimburse him his expenses. Devisees might just as reasonably object to allow him the costs of an ejectment for recovering their land. The case is too plain for argument." The court in Re Hegarty's Estate, supra, quotes the rule as laid down by Mr. Woerner (supra) and says: "This is the rule universally recognized as far as we are aware."

The cases relied upon by appellant are not in point in that none of the decisions are based on facts such as exist here. None of them involve a situation where an executor, after probate, who is the sole legatee and devisee, litigates to sustain the will and is successful. Other cases supporting the views we have herein expressed are Andrews' Ex'rs v. Andrews' Adm'rs, 7 Ohio St. 143; Meeker v. Meeker, 74 Iowa, 352, 37 N.W. 773, 7 Am.St.Rep. 489; Mathis v. Pitman, 32 Neb. 191, 49 N.W. 182; Mesick v. Mesick, 7 Barb.(N.Y.) 120.

The situation here presented would seem very analogous to the rule laid down in the line of cases which hold that where the validity of a trust, testamentary or otherwise, is assailed and successfully defended by the beneficiaries, that the attorneys for the parties maintaining the trust should be compensated for their entire services and that the compensation is payable from the corpus of the trust, and that the probate court has jurisdiction to fix and order paid such fees in a testamentary trust. See In re Estate of Duffill, 188 Cal. 536, 206 P. 42, and Trustees of Internal Improv. Fund v. Greenough, 105 U.S. 527, 26 L.Ed. 1157.

[2] Appellant contends that the order for extraordinary attorney fees is erroneous in that it does not show which of the services set forth in the petition were extraordinary services upon which the probate court based its order that appellant pay $3,500 as extraordinary fees. The petition is a recital of all that has been done by the respondent in the estate covering both the ordinary and extraordinary services. Which are ordinary and which are extraordinary are readily ascertainable from the face of the petition and the recitals respecting ordinary services may be considered as an introduction to the itemization of the special services rendered, and to show the condition of the estate so that extraordinary fees may be fixed and allowed. The petition shows additional extraordinary services in defending the estate against a claim of one Carrie Smith, for which compensation is sought. Inasmuch as the petition was for fees for extraordinary services by an attorney and the order made is for extraordinary services, it may safely be said that the payment for the ordinary services is still left open to be determined by the court in the settlement of the final account. We find nothing in Re Estate of Parker, 200 Cal. 132, 251 P. 907, 49 A.L.R. 1025, relied upon by appellant, in conflict with this view of the law.

[3] Inasmuch as this is an appeal on the judgment roll and we do not have the evidence before us, we must assume that the fee allowed by the probate court was reasonable, supported by the evidence, and that the court did not abuse its discretion in this matter. "The order of the lower court as to attorneys' fees will not be interfered with except in case of a plain abuse of discretion" (In re Estate of Brightman, 87 Cal.App. 80, 82, 261 P. 1044, 1045), and no such abuse appears from an examination of the judgment roll.

The order is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

14 Cal.App.2d 640

PACIFIC MFG. CO. v. LEAVY, Controller.

Civ. 10133.

District Court of Appeal, First District, Division 2, California.

June 18, 1936.

Hearing Denied by Supreme Court Aug. 17, 1936.

Municipal corporations ⇐339(1)

Contract between manufacturing company and contractor which had been awarded contract to construct high school, whereby company agreed to furnish millwork to be installed by contractor, *held* not contract for "public work" within charter provision, and hence company's failure to comply with charter did not preclude recovery against city for value of millwork.

[Ed. Note.—For other definitions of "Public Work," see Words & Phrases.]

Application for a writ of mandate by the Pacific Manufacturing Company against Leonard S. Leavy, as Controller of the City and County of San Francisco.

Writ granted.

Delancey C. Smith and Murray Draper, both of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (John J. Dailey, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

This is an application for a writ of mandate against the respondent Leonard S. Leavy, as controller of the city and county of San Francisco, to compel him to draw his warrant in favor of the petitioner in the sum of $3,375. The action presents no question of fact but solely a question of law. On the 25th day of March, 1935, MacDonald & Kahn Company, Ltd., was awarded a contract to construct the Marina Junior High School. The contract covered every item, including the furnishing of millwork and installing the same. It also provided that on the 10th day of each month during the performance of the contract a sum equal to 75 per cent. of the contract price for materials and work done during the preceding calendar month should be paid in accordance with an estimate to be made by the architect. On May 2, 1935, MacDonald & Kahn Company, Ltd., entered into a contract with the petitioner under which the petitioner was required to furnish the millwork so required by the general contract to be furnished and installed by MacDonald & Kahn Company, Ltd. Petitioner's contract contained nothing to the contrary, and the monthly claims for compensation were presented by MacDonald & Kahn Company, Ltd., and it disbursed to its subcontractors their proportion of each monthly claim. The claim so presented for the month of December included among other items $3,375 for millwork furnished by petitioner to MacDonald & Kahn Company, Ltd., and by the latter installed in the building. The fiscal officers of the city and county of San Francisco allowed and ordered paid the entire claim presented by MacDonald & Kahn Company, Ltd., except the said sum of $3,375, the amount representing the claim of this petitioner. It is admitted that the funds were available and in the treasury, but nevertheless the respondent refused to draw his warrant. The petitioner alleges and the respondent admits that the latter's refusal was based on the contention of the latter that this petitioner did not comply with the provisions of section 98 of the Freeholders Charter as the same was worded on May 17, 1935, and that petitioner did not comply with Ordinance No. 9.0923.

The contract awarded to MacDonald & Kahn Company, Ltd., by reference adopted the plans and specifications, and in particular specifications as to the millwork to be installed in the building. However, no claim is made that any of the millwork furnished by the petitioner was not in compliance with the plans and specifications. Except to deliver the millwork prepared by it, the petitioner, under the terms of its contract, was not called upon to do or perform any work whatever at the site of the Marina Junior High School building.

The petitioner claims that it has done and performed all things by it to be done and performed. The respondent asserts that such is not the fact because the petitioner did not comply with the provisions of section 98 of the charter, as that section was worded on May 17, 1935, and that petitioner has not complied with the provisions of said Ordinance No. 9.0923. To those statements the petitioner replies that

its contract did not come within the provisions of section 98 nor of said ordinance. That reply we think is well founded. As the ordinance mentioned was enacted to carry into effect the provisions of section 98 of the charter, and if the petitioner's contract did not come within the provisions of that section, it will not be necessary to further discuss the provisions of the ordinance.

Section 98 of the charter in part provides as follows: "*Every contract for any public work* or improvement, *exclusive of purchases,* to be performed at the expense of the city and county, or paid out of moneys deposited in the treasury, whether such work is to be done directly under contract awarded, or indirectly by or under sub-contract, sub-partnership, day labor, station work, piece work, or any other arrangement whatsoever, must provide: * * *," etc. As to whether the petitioner's contract was "for public work," or was one of "purchase," is not an open question in this state. Facts closely akin were passed on in the case of Neal Publishing Co. v. Rolph, 169 Cal. 190, 146 P. 659, 660. In deciding the case the court quoted with approval as follows from the opinion of the late J. M. Seawell, who was the trial judge: "In my opinion this contract does not provide for the *doing of work for the city and county,* within the meaning of this provision, but simply for the furnishing of certain finished articles of merchandise, which the contractor may have printed anywhere that he chooses. * * * These articles are the property of the contractor until delivered to the city, and do not seem to come within this provision. No *work* is done for the city. It is rather like the case of furnishing structural steel for the erection of a building. The contractor simply furnishes a certain chattel for the city in a completed state, and it is not work done for the city. In this instance it is the making and delivering to the city of this material. It is merely a chattel or merchandise delivered to the city." It then quoted from United States v. Ollinger (D. C.) 55 F. 959, 960, as follows: "It is clear to me that the building of the barges was in no sense a part of the public works; no more so than the mining of coal contracted to be furnished to the navy and marine service of the United States, according to specifications as to quantity and quality, or the furnishing under contract with the government of the United States of lumber and brick to be used in building quarters at Mt. Vernon barracks for officers or soldiers or any other public use, according to specifications as to kind, quantity, and quality. It would hardly be contended that the mining of such coal, the sawing of the lumber, or making the bricks, would be public works in contemplation of the act of Congress, or that the laborers engaged in the work of mining and in making the lumber and bricks were the laborers whose services and employment Congress has undertaken to regulate and limit. I fail to see any difference in principle in the cases mentioned and that under consideration." Then, concluding the point, Mr. Chief Justice Angellotti, writing the opinion for the court, stated: "A reading of the whole of the section of the charter in which the provision under consideration is contained makes it manifest that the provision is applicable only to contracts for work to be performed directly for the city and county, and that it was not intended to apply to any contract or agreement for the sale or furnishing of completed chattels." However, the section of the charter before the court in that case was not as favorable to the claimant as is section 98 above mentioned. A similar question arose regarding the construction of a public building in New York. It was decided in Bohnen v. Metz, 126 App. Div. 807, 111 N.Y.S. 196, 198, and affirmed by the Court of Appeals in 193 N.Y. 676, 87 N.E. 1115. In that case doors and windows were involved. The court said: "The manufacturer who worked his men more than eight hours and who did not pay the prevailing rate of wages was not a 'subcontractor or other person doing or contracting to do the whole or a part of the work' within the meaning of the statute. It was necessary that the windows and doors be made to measure, and therefore it was necessary that an order for their manufacture be given. The transaction amounted, however, to a mere purchase of material necessary for the building." Following the latter case, in Ewen v. Thompson-Starrett Co., 208 N.Y. 245, 101 N.E. 894, the court made a similar ruling regarding the quarrying, cutting, dressing, and trimming of granite for a public building.

The respondent cites United Iron Works v. Standard B. & C. Co., 69 Cal.App. 384, 231 P. 567; Golden Eagle Milling Co. v. Old Homestead Bakery, 59 Cal.App. 541, 211 P. 56; Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 P. 496; and Spencer v. Cone, 1 Metc. (42 Mass.) 283. No one of those cases involved public work and therefore no one of them is helpful.

Flynn v. Dougherty, 91 Cal. 669, 27 P. 1080, 14 L.R.A. 230, is a case involving a contract on a public building; however, it contains nothing helpful on the question before us. The first sentence reads as follows: "The only question involved in this appeal is whether the contract of the plaintiff 'to cut, furnish, and deliver' to defendant 'the stone-work of the asylum to be built at Agnew station, according to the plans and specifications of Mr. Jacob Leuzen & Son, architects,' is within the statute of frauds. Section 1739, Civil Code."

The respondent stresses the fact that to the contract was attached detailed specifications and plans, and furthermore it called for "mill work," and he earnestly contends that such facts demonstrate that the transaction was not a purchase and that it was a contract for "work and labor." But the question before us is not whether the contract called for work and labor, but whether it was a "*contract for public work.*" Moreover, the argument is not new. An examination of the record in Neal Publishing Co. v. Rolph, 169 Cal. 190, 146 P. 659, discloses that the same argument was vigorously presented. The hearing of the appeal first arose in the District Court of Appeal. In deciding the case that court adopted said argument and placed its decision largely on that reasoning. Neal Publishing Co. v. Rolph, 18 Cal.App.Dec. 425. The Supreme Court ordered a transfer and in writing its opinion it pointed out that said argument is not helpful in ruling this line of cases.

We think it is quite clear, and therefore hold, that the petitioner's contract was not subject to the provisions of section 98 of the charter hereinabove set forth.

It is therefore ordered that a peremptory writ of mandate issue as prayed.

We concur: NOURSE, P. J.; SPENCE, J.

14 Cal.App.2d 646

PACIFIC MANUFACTURING COMPANY (a Corporation), Petitioner, v. W. H. WORDEN, as Director of the Department of Public Works of the City and County of San Francisco, et al., Respondents.

Civ. 10132.

District Court of Appeal, First District, Division 2, California.

June 18, 1936.

Hearing Denied by Supreme Court Aug. 17, 1936.

De Lancey C. Smith and Murray Draper, both of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (John J. Dailey, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

This is an application for a writ of prohibition. It arises out of, and is based on, many of the same facts as the application for a writ of mandate in the case entitled Pacific Manufacturing Company, a Corporation, Petitioner, v. Leonard S. Leavy, as Controller of the City and County of San Francisco, Respondent (Cal.App.) 58 P.(2d) 1292, this day decided. Claiming that the contract awarded petitioner was governed by the provisions of section 98 of the charter, as said section was worded on May 17, 1935, and by the provisions of Ordinance No. 9.0923 enacted for the purpose of carrying said section into effect, Alfred J. Cleary, chief administrative officer; Leonard S. Leavy, controller; Henry Heidelberg, deputy city attorney; Charles H. Sawyer, city architect; and Sidney J. Hester, chief clerk, caused to be served on petitioner an order directing it to appear at the office of Alfred J. Cleary, chief administrative officer of the city and county of San Francisco, on January 31, 1936, at the hour of 10 o'clock in the forenoon of said day, to then and there show cause why said corporation should not be declared an irresponsible bidder by reason of violations of section 98 of the charter of the city and county and ordinances of said city and county in relation thereto, and more particularly having reference to violations in connection with payment of the highest general prevailing rate of wages.

As we have shown in Pacific Manufacturing Company, a Corporation, Petitioner, v. Leonard S. Leavy, as Controller of the City and County of San Francisco, supra,

that section 98 of the charter and the ordinances enacted to carry the same into effect have no application to the contract awarded to this petitioner, it follows that a writ of prohibition should issue as prayed. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.



15 Cal.App.2d 47

LONG v. BEVERS.

Civ. 1766.

District Court of Appeal, Fourth District, California.

June 26, 1936.

1. Appeal and error ⇐1011(1)

Conclusion of trial court on conflicting evidence which is supported by material and competent evidence cannot be disturbed on appeal.

2. Automobiles ⇐244(7, 36)

Evidence *held* to support finding that motorist negligently struck boy bicyclist who released his hold on truck traveling ahead of motorist, and that such negligence was proximate cause of boy's death.

3. Automobiles ⇐245(50)

Whether negligence of person injured by automobile contributed to injuries is usually question of fact for trial court or jury.

4. Automobiles ⇐212

Finding that alleged negligence of boy bicyclist in holding onto moving truck did not contribute to his death *held* proper, where proximate cause of his death was independent, efficient, intervening act of negligence of motorist following truck in striking boy after boy released hold on truck.

5. Appeal and error ⇐1056(1)

In action for death of boy bicyclist who was struck by following automobile when he released his hold on moving truck, alleged erroneous exclusion of testimony that boy understood and appreciated his father's warnings of danger of holding onto motor vehicles when riding bicycle *held* not prejudicial, where record showed boy had sufficient intelligence and mental development to understand such warnings.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Edward Long against Euel Bevers. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellant.

G. R. Lovejoy, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff damages suffered by reason of the death of James M. Long, his minor son.

Defendant urges three grounds for a reversal of the judgment: (1) That the evidence shows no negligence on his part; (2) that it shows contributory negligence as a matter of law on the part of James; (3) errors of the trial court in rulings on the admissibility of evidence.

On August 19, 1934, James M. Long was of the age of thirteen years. He was in the seventh grade in junior high school and was an intelligent, quick-minded, and well-developed youth. He was the possessor of a bicycle. His father on numerous occasions had told him not to hang onto the sides of vehicles when riding his bicycle on public roads, and had explained to him the danger of injury which is incident to such conduct.

On August 19th, James and John Bach, his youthful friend, left Fresno on their bicycles and traveled to Selma over highway No. 99. They started their return journey from that city about 2 o'clock in the afternoon. When a short distance north of Selma, they took hold of the right side of the body of a truck which was traveling northerly on highway 99. James took hold just to the rear of the driver's cab. John was holding on about 3 feet from the rear end. The truck body was wide, and occupied the major portion of the east half of the paved portion of the highway. The accident happened about 1½ miles north of Selma at a point where a railroad spur or switch crosses Highway Number 99.

At the place of the accident there is a paved strip 20 feet wide in the highway, with a 4 foot hard oiled shoulder on the easterly side of the pavement, and about 6 feet of dirt roadway between the shoulder and a fence along a railroad right of way paralleling the highway.

The two boys were riding on their bicycles with the wheels following the dividing line between the pavement and the oiled shoulder. The truck was traveling at a speed of about 30 miles an hour. As it approached the railroad crossing, James released his hold on the truck body and fell onto the oiled shoulder. His badly crushed body was found on the dirt portion of the roadway about halfway between the easterly edge of the oiled shoulder and the fence. John retained his hold on the truck until he had passed over the railroad crossing. He rode on past the point where James had fallen and was between the truck and James as the truck proceeded north. Because of this fact, and the further fact that several witnesses testified that the truck did not run over James, it is well established that he was not crushed by that vehicle.

Defendant, a young man of about 18 years of age, had been following the truck at a distance of about 30 feet for about a mile before the place of the accident. With him were riding two friends and a girl hitchhiker. Neither this girl nor the truck driver were present at the trial, as their identities were unknown.

Defendant testified that while following the truck he had been driving his automobile at about the center of the easterly half of the paved portion of highway 99. Both he, his two friends, and another witness testified that his automobile did not run over nor come into contact with James. No witness contradicted this testimony.

Witnesses described the marks on James' body as follows: That a straight line of bruises or contusions extended from his right hand along his right arm, across the upper right quadrant of his chest, his neck, chin, and head; that his chest, jaw, and skull were crushed; that the bruises or contusions had an extreme width of about 4½ inches and were the repetition of a symmetrical design of separate marks that left imprints in his skin from his hand to at least his neck. Without trying further to describe these marks, it is sufficient to say that this evidence furnished sufficient ground for the conclusion evidently reached by the trial court that they were made by the all-weather tread of the tire of a motor vehicle.

[1] The contention of defendant that the evidence is insufficient to support the findings and judgment because of the lack of proof of negligence on his part is divided into two phases: First, that there is no evidence that his automobile struck or injured James; and, second, if it be assumed that it did strike him, there is still no proof of any negligence on his part. The evidence of the tire marks on James' body is evidence that he was run over by a motor vehicle. It is clear that the truck did not run over him. Defendant's car was the only other vehicle in the vicinity. These facts support the inference that it caused the injury. Of course, this evidence is contradicted by the testimony of several witnesses that no tire of the Bevers car passed over James or came near to him. This state of the record merely produces a conflict in the evidence. The conclusion of the trial court on conflicting evidence cannot be disturbed on appeal where there is material and competent evidence supporting it.

[2] There is sufficient evidence in the record to support the finding that defendant was negligent and that his negligence was the proximate cause of the injury to James. The easterly half of the pavement was 10 feet wide. Defendant testified that he was driving his car along the center of this half. James fell onto the oiled shoulder and evidently slid easterly to the center of the 6 foot dirt portion of the road where he was run over. He was 7 feet from the easterly side of the pavement. In order to run over James, it was necessary for defendant to change the direction of his car and veer more than 8 feet to his right. Had he continued on the course he had been following, he could not have run over the boy. For an automobile driver with any degree of driving experience or competence to see a boy fall more than 30 feet in front of him and come to rest at least 7 feet away from the pavement upon which he was driving, and then to turn his car so that it ran over this boy, is certainly such proof of the lack of any care or caution on the part of the driver that the trial court could base a finding of negligence upon it. When this evidence is accepted as true, it is proof of negligence of high degree in that the driver failed to exercise any care for the safety of the boy. It shows a positive act of negli-

gence which caused the injury and death of James.

The trial court found that James was not negligent and that "the said injuries to the said James M. Long were not occasioned or contributed to and were not the proximate result of any negligence upon the part of the said James M. Long."

Defendant attacks this finding as not supported by the evidence and as contrary to all the evidence in the case. He argues that James' father had frequently told him not to hang onto motor vehicles while riding his bicycle and had fully explained to him the danger of such conduct; that the evidence shows James to have been a bright, intelligent boy of thirteen years of age who must have understood these warnings and appreciated the danger of violating his father's instructions; that, when James was riding his bicycle while holding onto the truck, he knew that the act was dangerous and that he was in danger of being injured; that therefore James was negligent; and that such negligence contributed to his injuries and death.

[3, 4] For the purpose of this opinion we will assume, without holding, that all of the foregoing argument is sound except the conclusion that the negligence of James contributed to his injuries and death. Thus we have assumed that James was negligent in holding onto the truck while riding his bicycle. The result of this negligence was his fall, which left him in the dirt portion of the road 7 feet from the pavement and well out of the path of defendant's car. If defendant had kept on his course, he could not have injured James. He did not keep on his course, but turned his car to his right and ran over James, who was not in a position of danger until defendant changed his course and headed his car for the boy. Thus we have an independent, efficient, intervening act of negligence on the part of defendant which the trial court concluded was the proximate cause of the injury to which the prior negligence of James did not contribute.

Whether the negligence of a person injured by an automobile contributed to the injuries is usually a question of fact for the trial court or jury. Skaggs v. Wiley, 108 Cal.App. 429, 292 P. 132; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Lindenbaum v. Barbour, 213 Cal. 277, 2 P.(2d) 161; Gomez v. Lindberg, (Cal. App.) 54 P.(2d) 1153. Under the facts before us, this should be particularly true. It follows that the trial court was justified in concluding that any negligence of James in holding onto the truck when riding his bicycle did not contribute to his injury by defendant. This portion of the finding absolving James from contributory negligence, being supported by the evidence, is sufficient to sustain the judgment. The finding that James was not guilty of negligence, being unnecessary to support the judgment may be disregarded by us.

[5] Defendant complains of rulings of the trial court in sustaining plaintiff's objections to questions whose purpose was to develop the fact that James understood and appreciated his father's warnings of the danger of holding onto motor vehicles when riding his bicycle. If we assume that these rulings were erroneous, they furnish no ground for reversal of the judgment. We have studied the record and have concluded that it shows without question that James had sufficient intelligence and mental development so that he understood these warnings. Therefore there could be no prejudice in the error, if one were committed.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

KEY NUMBER SYSTEM

PEOPLE v. FOSS.*

Cr. 2887.

District Court of Appeal, Second District, Division 2, California.

June 30, 1936.

Rehearing Denied July 15, 1936.

Hearing Granted by Supreme Court July 30, 1936.

1. Criminal law ⇨1159(2)

On appeal from conviction, court must review evidence in light most favorable to people.

2. Embezzlement ⇨44(4)

Evidence sustained conviction of club officer for embezzlement, as against contention that member could not be guilty of embezzling club moneys because club was partnership, in view of evidence that club was not partnership.

3. Embezzlement ⇐44(6)

In prosecution of executive secretary and chairman of entertainment committee of club for embezzlement, evidence authorized finding that accused had duty to turn over funds realized from club entertainment before date alleged in information.

4. Embezzlement ⇐11(1)

Prior demand *held* unnecessary to constitute executive secretary and chairman of entertainment committee of club guilty of embezzlement of funds realized from club entertainment, under facts.

5. Criminal law ⇐507½

In prosecution of executive secretary and chairman of entertainment committee of club for embezzlement, evidence authorized finding that women who sold tickets for club entertainment on commission were not accomplices whose testimony required corroboration.

6. Embezzlement ⇐44(6)

In prosecution of executive secretary and chairman of entertainment committee of club for embezzlement, evidence authorized finding that accused had not paid out all of money received by him in necessary authorized commissions and expenses.

7. Criminal law ⇐1178

Mere statement of appellant that refusal to give specified instructions was erroneous *held* insufficient to present error, where unsupported by citation of authority or argument showing in what manner refusal was erroneous or prejudicial, since contentions supported neither by argument nor citation of authority are deemed unfounded and abandoned.

8. Criminal law ⇐762(1)

Court's narration of circumstances developed by evidence which tended to militate against accused's contention *held* not erroneous as improper comment on evidence (Const. art. 6, § 19, as amended in 1934).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Garvin Foss was convicted of grand theft, and he appeals.

Affirmed.

William W. Larsen, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

[1] This is an appeal from a conviction of grand theft and from an order denying a new trial. Appellant and four other individuals formed an association to be known as the Pasadena Stage and Screen Club. They adopted a constitution and by-laws and elected officers. Appellant was elected executive secretary and chairman of the entertainment committee. It was provided in the constitution and by-laws that no member or officer of the club should receive any compensation from the club for any work which he personally might perform. It was also provided therein that all moneys belonging to the club should be deposited in a specific bank. Checks for the outgo of money were to be signed by the treasurer and countersigned by the president, and not by the appellant. It was decided that an entertainment should be put on at a large hotel in Pasadena. The task of selling the tickets and securing the entertainment was turned over exclusively to appellant. Appellant hired several women to put on an extensive telephone campaign to solicit the citizens to purchase tickets at the price of one dollar each for such entertainment. These women under their contract with appellant were to receive 25 per cent. of the amount obtained from the sale of each ticket. Tickets amounting to more than $1,100 were sold and the money collected. This was the minimum. Appellant also sold tickets in lots of five, but the amounts of these sales could not be easily proved, for he collected himself for the larger sales without the intervention of others. Eighty per cent. of all sales were paid for in cash. At the meetings of the club appellant stated that he was receiving practically no cash from the sale of tickets. At no time did appellant ever turn over any cash to the treasurer of the club; on the contrary, he converted the cash to his own uses. It is our duty on appeal, of course, to review the evidence in the light most favorable to the successful party.

[2] Appellant's first contention is that, being a member of the club, he could not be guilty of embezzling moneys belonging to the club, that the club was a partnership, and, being one of the partners, he

could not steal or embezzle from himself. There is substantial evidence in the record that there was no partnership, no joint venture, no agreement to share either in the profits or in the losses; indeed, there was an agreement that no member would receive any compensation and that all the proceeds would go for a clubhouse; also that the appellant was the agent of the club for the purpose of collecting and accounting for the money collected.

[3, 4] Appellant's next contention is that there was no substantial evidence that there was a duty upon the part of the appellant to turn over the funds before the date alleged in the information. This contention has already been shown to be without merit. A prior demand under the circumstances was not necessary. People v. Goodrich, 142 Cal. 216, 75 P. 796.

[5] Appellant next contends that the evidence is not sufficient for the reason that the damaging testimony against appellant is the testimony of accomplices uncorroborated by other evidence. Under this point, he contends that the women who sold the tickets over the telephone were accomplices. It would be hard to find any evidence in the record to indicate that these women were accomplices of the appellant; certainly there is substantial evidence that they were not accomplices.

[6] Appellant's next contention is that the evidence did not establish that the defendant had not paid out all of the money received by him in necessary authorized commissions and expenses. It must be borne in mind that on appeal this court is not discussing the weight of the evidence. It is sufficient to say that there is substantial evidence in this regard.

[7] Appellant next contends that the court erred in refusing to give certain instructions which were requested by the appellant. In this behalf he sets out in full twelve different instructions. Appellant makes no attempt to show wherein the action of the trial court was erroneous aside from the mere statement that its refusal to give the instructions was in each case erroneous. He has neither cited authorities nor presented argument to show in what manner the rulings were either erroneous or prejudicial. "Contentions supported neither by argument nor citation of authority are deemed to be without foundation and to have been abandoned." Bradley v. Butchart, 217 Cal. 731, 747, 20 P.(2d) 693; 2 Cal.Jur. 732.

[8] Appellant's final contention is that the court erred in commenting on the evidence in one of the instructions. At the appellant's request the court instructed the jury that the mere fact that the defendant did not render an accounting is not sufficient to convict him, and that in considering this phase of the case they were entitled to take into consideration any testimony which had been adduced to the effect that at the time of the defendant's arrest he was sick in bed and thereafter he was confined in jail. The court gave this instruction, but added thereto by briefly narrating a few circumstances developed by the evidence which tended to militate against the defendant's contention. The court's comment was fairly within the record, and was warranted under the terms of the constitutional provisions (Const. art. 6, § 19, as amended in 1934). People v. De Moss (Cal.Sup.) 50 P.(2d) 1031.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



15 Cal.App.2d 22

HORN v. LOS ANGELES NUT HOUSE et al.

Civ. 10181.

District Court of Appeal, Second District, Division 1, California.

June 26, 1936.

Hearing Denied by Supreme Court Aug. 24, 1936.

1. Appeal and error ⇐1073(7)

In action for one-half of the profits of certain business as contemplated by contract between parties, defendants could not successfully predicate error on question of proof of profits, where, as condition for not granting new trial, judge required plaintiff to accept amount based upon defendants' own testimony with respect to net profits.

2. Jury ⇐14(3)

Action for one-half of the profits of certain business as contemplated by contract, whereby plaintiff advanced money for the business and devoted his entire time to such

business, was action at law entitling plaintiff to jury trial, where plaintiff abandoned original allegations that partnership existed and that plaintiff was entitled to future profits that might accrue.

3. Account ⇨11

Evidence *held* to sustain verdict for plaintiff for one-half of the profits of certain business based on findings that contract existed between the parties whereby plaintiff advanced money for business and performed services for defendants and that money advanced to defendants was not, as contended by defendants, a loan, repayment of which constituted an accord and satisfaction between the parties.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Henry Horn against the Los Angeles Nut House, a copartnership, and others. From an adverse judgment, the defendants appeal.

Affirmed.

Barry Brannen and Harry T. Young, both of Los Angeles, for appellants.

Goldstone, Harris & Tracy, Jules C. Goldstone, and Gilbert E. Harris, all of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Appeal from a judgment awarding damages in contract to plaintiff. Plaintiff alleged in his complaint that on or about July 1, 1932, he entered into a contract with defendants whereby he was to install at their place of business a department with the necessary machinery for processing nuts and manufacturing peanut butter, and "in addition would purchase pecans in large quantities on the joint account of both plaintiff and defendants, with a view to selling the same at a profit"; further that, in so far as the purchase of pecans was concerned, he was to expend from his own funds one-half of the purchase price and one-half of the expense incidental thereto; the other half to be contributed by defendants; that he was to devote his entire time and energy to the installation, operation, supervision, and management of the nut department established by him, and also to the purchase of pecans; for all of which, it is alleged, defendants agreed to pay him at reasonable intervals "one-half of all profits earned in said department and one-half of all profits derived from the sale of pecans thus purchased." The complaint further alleged performance by plaintiff of all the work detailed above during the period of July 1, 1932, to October 23, 1933; also alleged that plaintiff expended from his own funds large sums of money for the purchase of pecans and necessary expenses incidental thereto; that on the last-named date, he was wrongfully barred by defendants from operation, supervision, and management of the nut department of defendants' business; that in the period mentioned the nut department and the pecan business earned a net profit of $45,000, to one-half of which plaintiff was entitled, as also to one-half of $5,000, the sum alleged to have been expended, necessarily, in the pecan purchasing business by plaintiff from his own funds, making plaintiff's total claim $25,000.

It was also alleged in paragraph VI of the first cause of action: "That by virtue of plaintiff's services thus rendered in the installation, management, supervision and operation of said defendants' business, other profits will accrue in the future, to which plaintiff will be entitled to one-half thereof."

In the second cause of action plaintiff set up a count for money had and received in the sum of $25,000. The complaint prayed for that amount in plaintiff's behalf; also for one-half of such other sums as might be earned as profit in the nut department.

On the opening day of the trial, plaintiff's counsel, by leave of court, filed an amendment to his complaint in the form of a third and additional cause of action alleging that the agreement which plaintiff and defendants made with regard to the pecans included buying and selling and was a partnership agreement; that the net profits of that business for the period above mentioned amounted to $5,000; that the plaintiff advanced for expenses in connection with purchases from his own funds the full amount of $5,000; that, by reason of such profits and expenses, he was entitled to $5,000, one-half the total of $10,000. By this amendment plaintiff added prayers to his complaint asking for a dissolution of the partnership and an accounting.

Before the case went to trial, the defendants objected to the impanelment of a jury, on the ground that the action was equitable in character. The objection was overruled

and the jury sworn to determine specifically three questions: First, whether there was, in fact, a contract of partnership as pleaded; second, whether that contract was entire or divisible; third, whether it was in fact terminated in October, 1933. The court at that time reserved the right—accepting or rejecting such advice, as might be given by the jury on the issues mentioned—to determine the amount and distribution of profits, if any, "under such contract as the jury may find existed." Several days later, and four days before he rested his case, if we may accept the statement in his brief, respondent dismissed the recently added third cause of action, and the court then notified the jury that this left "the action one at law pure and simple." Respondent also claims that on January 15, 1934, before he rested, he struck from his complaint paragraph VI of the first cause thereof, demanding profits accruing from the nut department after the filing of the action. Appellants, on the other hand, state in their opening brief that this withdrawal of claim for such profits took place "shortly before the conclusion of the trial," which it appears ended on January 24, 1934, nine days later than the date mentioned by respondent. Respondent's contradiction of this last statement is not refuted by appellants' counsel in his answering brief, nor are other contradictions. In addition, respondent's counsel charges his opponent with "dexterously omitting" certain words or passages from his references to exhibits introduced or proceedings had in the lower court, and directs our attention to various points in the record where a complete quotation gives us a somewhat different view than does the portion quoted by appellants. Under these circumstances, it has been necessary for us to resort constantly to the record to ascertain what actually transpired.

The appeal rests upon claimed errors of law occurring during the trial in regard to the admissibility of evidence; in regard to instructions given and refused; in permitting the case to be tried and finally decided by a jury. It is also claimed that certain special findings and the verdict by the jury are unsupported by the evidence; further, that appellants were prevented from having a fair and impartial trial by reason of misconduct on the part of respondent's counsel in presenting his case and examining witnesses. Finally, it is claimed that the verdict is the result of prejudice and bias on the part of the jury evidenced by the excessive amount of damages awarded.

[1] While the appeal is from the judgment solely, we note that a motion was made for a new trial, and one of the grounds relied upon was "excessive damages * * * appearing to have been given under the influence of passion and prejudice." At the hearing upon that motion, the trial judge suggested, as a condition of not granting it, acceptance by respondent of a reduction from the amount of $16,964.02, awarded by the jury, to the sum of $6,723.28. Upon this subject, and having read that portion of the transcript where the court explains his method of calculation, we believe respondent in his brief puts the matter in its true light when he says that the learned trial judge "in extreme fairness and caution based the damages upon appellants' own testimony with respect to net profits." In this situation it is difficult to see how appellants were injured in any way by testimony offered by respondent on the question of profits, for it is apparent that, on the motion for a new trial, that evidence was disregarded by the court in its determination to cure any possible error or injury that might result to appellants. We are satisfied that by the court's handling of the matter no injury did result; therefore no valid complaint arises on the question of proof of profits.

[2, 3] We cannot sustain the claim that the case should not have been tried by a jury. Pomeroy's Equity Jurisprudence (4th Ed.) § 178 and notes; Balfour v. San Joaquin Valley Bank (C.C., N.D.Cal., 1906) 156 F. 500; Willis v. Crawford, 38 Or. 522, 63 P. 985, 64 P. 866, 53 L.R.A. 904. As already noted, when plaintiff abandoned his third cause of action claiming a partnership, together with that paragraph in his first cause under which he asserted his right to future profits that might accrue, the court, knowing that defendants denied that any partnership existed, committed the case to the jury as "one at law pure and simple." And simple it is in its essence, although densely surrounded by verbiage in a lengthy trial and in lengthy briefs. It is a case of a man entering a business, working diligently in a newly established department thereof and, in a period of little more than a year, turning in a profit of many thousands of dollars. The side line

in which he engaged at the same time, namely, traveling to the Eastern seaboard, to the South and Middle West, and there purchasing and inspecting pecans, also netted several thousands of dollars. In this pecan business he met from his own funds the first demand for cash, namely, a bill for pecans in the sum of $7,284.33, and the freight bill amounting to $1,998.95. The total amount of these two items, $9,283.28, was returned to plaintiff more than a year later, on October 23, 1933, by means of a check bearing a notation, "payment in full for all money paid by you on pecans to 1/5/33." At the same time, and in the midst of great excitement, plaintiff was handed another check in the amount of $781.56, "interest in full to date for 433 days @ 7% on 9,283.-28." This last check was returned by plaintiff within a few days. He then filed his suit in the form above set out. It was claimed by the defendants that the money so paid by plaintiff was a loan, and that the repayment constituted an accord and satisfaction between the parties, but the jury, having all the facts before it, concluded otherwise, and, having read the entire transcript, we cannot say its finding on that subject was not supported by the evidence. Berger v. Lane, 190 Cal. 443, 213 P. 45; Meyer v. Henry Cowell Lime, etc., Co., 21 Cal.App. 602, 605, 132 P. 611. The same is true as to the other findings made on special issues submitted to them, and as to the verdict.

We have considered one by one, the multitude of objections made to the rulings of the trial court upon the admissibility of offered testimony, and find no error on any material point. Neither do we find that error arose in the matter of giving or refusing to give instructions. As to misconduct charged to respondent's attorney, we feel that upon the record and the testimony introduced there is no sound basis for such a charge, and we note that the court, during the trial, was careful to instruct the jurors to disregard statements of counsel as not being evidence, on one occasion saying: "The statements of counsel are statements of his inferences, in the way of argument, and are not to be regarded by the jury unless they are supported by the evidence."

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

15 Cal.App.2d 15

MORROW v. MENDLESON et al.

Civ. 10056.

District Court of Appeal, First District, Division 2, California.

June 26, 1936.

Rehearing Denied July 25, 1936.

Hearing Denied by Supreme Court Aug. 24, 1936.

1. Appeal and error ⇐1064(1)

In pedestrian's action for injuries sustained when struck by one of two automobiles which collided at intersection, erroneous and conflicting instructions as to what constituted obstructed intersection *held* not prejudicial to appealing motorist, where intersection was unquestionably an obstructed one and both appealing and nonappealing motorists were exceeding speed limits prescribed by statute for motorists in such case (St.1931, p. 2120, § 113(b), par. 2).

2. Appeal and error ⇐1064(1)
Automobiles ⇐246(9)

In pedestrian's action for injuries sustained when struck by one of two automobiles which collided at obstructed intersection, instruction that, if appealing motorist entered intersection first, he was not entitled to right of way if violating law regarding crossing of intersections, *held* erroneous and prejudicial to appealing motorist, where both motorists were violating speed law but nonappealing motorist was also passing a standing street car which amounted to negligence as matter of law (St.1929, p. 541, § 131; St.1931, p. 2120, § 113, subd. (b), par. 2, and subd. (d).

3. Trial ⇐203(1)

A party is entitled to have jury instructed as to his theory of case if facts warrant instruction.

4. Automobiles ⇐245(44)

In pedestrian's action for injuries sustained when struck by one of two automobiles which collided at obstructed intersection, whether rate of speed appealing motorist entered intersection prior to collision constituted negligence *held* for jury (St. 1931, p. 2120, § 113(d).

5. Trial ⇐194(20)

Where plaintiff was a semi-invalid, 63 or 64 years of age, instruction covering mortality tables *held* improper, since under such conditions question of life expectancy should

have been left to jury to be determined upon the evidence based upon condition of health of plaintiff prior to time of accident.

6. Damages ⇐167

Jury may consider the mortality or American experience tables only in respect to one who is in average or normal good health, since the presumption of life expectancy based upon such tables is one applying to a person of average normal health only.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Katherine Morrow, a widow, against Walter Mendleson and another. From an adverse judgment, the named defendant appeals.

Reversed.

Hearing denied by Supreme Court; SEAWELL and CURTIS, JJ., dissenting.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff brought this action against the two defendants to recover for injuries incurred when the automobiles operated by the defendants collided at the intersection of Jones and Sutter streets in San Francisco, as a result of which the car operated by Mendleson struck plaintiff as she was walking across the intersection. Judgment was had against both defendants, and Mendleson alone has appealed.

There is very little real conflict in the evidence. What appears to be a conflict rests mainly on the more or less unreliable testimony of eye-witnesses who saw disconnected events leading to the injuries which plaintiff suffered. The accident occurred about 6 o'clock on the afternoon of Sunday, the 14th of January, 1934. It had been raining during the day and the streets were then damp and slippery. Plaintiff was attempting to cross Jones street in the pedestrian lane running from west to east on the northerly part of the intersection. As she left the northwesterly curb, she was struck by the automobile operated by Mendleson, which immediately prior thereto had been struck by the one operated by Minehan. Mendleson was driving north on Jones street, while Minehan was driving west on Sutter. Preceding Minehan was a street car which had stopped at the edge of the property line of the northeast corner of the intersection. Passengers had alighted, and the street car had been started on its way, but had stopped after going approximately four feet to allow Mendleson to pass. Minehan, who had been trailing the street car, did not stop as required by the California Vehicle Act and an ordinance of the city and county of San Francisco, but, having taken a position at about the front end of the street car, proceeded across the intersection after the street car had stopped the second time as above stated.

It was the theory of the plaintiff at the trial of the action that her injuries were caused by the concurrent acts of negligence of the two defendants, and evidence was offered in her behalf tending to prove the negligence of both. In this respect testimony was offered showing that Mendleson approached and crossed the intersection at an unlawful rate of speed, that the intersection was an obstructed one within the terms of the California Vehicle Act and that, in crossing the intersection, he swung to the left of the center line of Jones street. It was also shown that the defendant Minehan, having trailed the street car in its course westerly on Sutter street, failed to stop to allow passengers to alight in safety as required by the California Vehicle Act, and failed to stop at a position 10 feet behind the street car as required by the city ordinance. The conductor on the street car testified that as it came to a stop Minehan's car was to the rear of the street car and that he then swung to his right and continued on across the intersection. The motorman of the street car testified as to the speed of the Mendleson car and as to its course across the intersection. A fair analysis of all the testimony is that Mendleson, having approached the intersection at an unlawful rate of speed and having seen the street car stop to let him pass, continued across the intersection at the same unlawful rate of speed. As to the defendant Minehan, he approached the intersection in an unlawful manner in violation of both the city ordinance and state statute, and continued across the intersection at an undetermined rate of speed, but in a negligent manner, because his view of the intersection was entirely obstructed by the street car. It was and is the contention of Mendleson that, notwithstanding the question of the speed of his car, he was entitled

to assume that Minehan, and all others operating motor vehicles westerly on Sutter street, would comply with the law and not proceed across the intersection when the street car was stopped.

The issues which were thus left with the jury upon plaintiff's theory of the case were that both defendants were negligent as a matter of law, and that the negligence of both was the concurrent and proximate cause of her injuries. By the verdict against both defendants the jury determined these issues in favor of the plaintiff, and our review of the evidence convinces us that it is sufficient to support this verdict, though it should be said in behalf of the appellant that if the jury had by its verdict adjudged the negligence of the defendant Minehan as the sole proximate cause of the injuries, there would have been sufficient evidence to support that verdict. Because of this the question of the propriety of the instructions on these issues becomes of vital interest to the appellant.

[1] At the request of the plaintiff the jury was instructed on the terms of paragraph 2 of subdivision (b) of section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1931, p. 2120) as it read at the time of the accident. At the request of defendant Minehan, an instruction was given on the same subject which was a combination of some of the language of the first and second paragraphs, but was palpably erroneous as it defined an obstructed intersection as one in which the driver did not have a clear view of the traffic for a distance of 100 feet in both directions. The first paragraph covering railway crossings fixed this distance at 400 feet; the second paragraph relating to highway intersections in general fixed the distance at 200 feet. Nowhere in the statute prevailing at that time was the distance of 100 feet used in defining an obstructed intersection. Conceding the error and the conflict between these instructions, we cannot say that any prejudice was suffered by the appellant therefrom. This may have been the reason why two of the jurors voted to absolve Minehan of negligence, but, as the evidence shows that the intersection was unmistakably an obstructed one under the definition of the statute and that both defendants were exceeding the limits therein prescribed, it is as reasonable to assume that the jury applied the erroneous instruction to the appellant as well as to his codefendant.

[2] As between the two defendants, the instructions given on the request of Minehan relating to the "right of way" were error and injected a false issue into the case. They were based upon the provisions of the California Vehicle Act of 1925 (St.1925, p. 412 § 131), and failed to take into account the amendment to section 131 thereof enacted in 1929 (St.1929, p. 541). Since the accident occurred in 1934, these amendments would be controlling. Instruction No. LXX given at the request of Minehan advised the jury that "Mr. Mendleson, the driver of the Chrysler automobile, was not entitled to the right of way under any circumstances, if you find he was violating the law regarding the crossing of an intersection." Instruction No. LXXV correctly gave the jury the provisions of section 131 (a) as amended in 1929 (St.1929, p. 541), but this was followed by No. LXXVII to the effect that if Minehan had entered the intersection in the exercise of ordinary care and without violation of law on his part at the same time that Mendleson entered the intersection, then the latter was required to yield the right of way to the former.

Numerous decisions have been written interpreting the law as it stood before the 1929 amendment, all holding that the privilege of asserting the right of way at an intersection was denied to any one who had entered at an unlawful speed. Lindenbaum v. Barbour, 213 Cal. 277, 281, 2 P.(2d) 161, where cases are cited. Following these decisions the clause reading, "provided such vehicle is traveling at a lawful speed," was eliminated from the section so that it read at the time of the accident that a driver approaching an intersection should yield the right of way to a vehicle which had entered the intersection, and that when two vehicles enter at the same time the driver of the vehicle on the left should yield to the driver of the vehicle on the right.

Here the contention of Mendleson was that he entered the intersection before Minehan. He would, therefore, have been entitled to assert the right of way under the amended section, but there was testimony, which the jury must have believed, that Mendleson entered the intersection at an unlawful rate of speed. Under the instructions complained of, the jury, having found this to be so, must necessarily have found that Mendleson was not entitled to the right of way. The instructions could not have been prejudicial to Minehan to the same extent because his entry into the intersec-

tion was in clear violation of the statute and ordinance and was, therefore, negligence as a matter of law. How far this error entered into the verdict against Mendleson we are unable to say. In view of the ruling in Couchman v. Snelling, 111 Cal. App. 192, 295 P. 845, as approved in Page v. Mazzei, 213 Cal. 644, 3 P.(2d) 11, it would seem that the only question of fact to be determined by the jury on the issue of the right of way was which of the two defendants first entered the intersection, and, since the physical facts indicate that Mendleson was the first to enter, these instructions would necessarily be prejudicial to him upon that issue because by them the jury was told that his prior entry would serve him no purpose if it had been made unlawfully.

Respondent defends the instruction on the authority of the cases interpreting the old section of the act, and adds that an identical instruction was given on the appellant's request. There is a slight difference in the wording between these two instructions, but a material difference in their meaning and effect. The latter reads: "Mr. Minehan, the driver of the Buick automobile, was not entitled to the right of way if he was violating the law regarding the passing of street cars when he entered the intersection."

[3, 4] It was appellant's theory that, since Minehan had entered the intersection in violation of the state statute and the local ordinance, he was unlawfully in the intersection from the beginning and hence was guilty of negligence per se. On the other hand, appellant's violation of the law related to his approaching and "traversing" an intersection at a speed in excess of that prescribed by the statute. But, as to appellant, his excessive speed "shall not be deemed to have been negligent as a matter of law," but the question whether such speed constituted negligence must be left with the jury. California Vehicle Act, § 113(d), St.1923, p. 553, as added by St. 1931, p. 2120. It is settled law that a party is entitled to have the jury instructed as to his theory of the case if the facts warrant the instruction, and this injunction is not met when the instructions remove that theory from the consideration of the jury. We do not hold that appellant's theory is sound or that it should have been sustained under the facts of this case; but, since the collision occurred at the extreme northwest portion of the intersection when appellant had almost cleared it, and since the points of contact of the two cars were the extreme right rear fender of appellant's car and the extreme right portion of Minehan's front bumper, it is apparent that, if appellant had been "traversing" the intersection at a faster speed, no collision would have occurred. Thus, the question whether the rate of speed at the time was in fact negligence was a question which, under appellant's theory, should have been left to the jury.

[5, 6] The appellant complains that the instruction given at the request of the plaintiff covering the mortality tables was improper because the evidence showed that the plaintiff was a semi-invalid, 63 or 64 years of age, and was not, therefore, at the time of the accident a normal person of average good health. Authorities are cited holding that a jury may consider the mortality or American experience tables only in respect to one who is in average or normal good health, and that the presumption of life expectancy based upon such tables is one applying to a person of average normal health only. The point has not been decided by any California case which has been called to our attention, but Norris v. Detroit United Ry., 193 Mich. 578, 160 N.W. 574, and Colbert v. Rhode Island Co. (R.I.) 67 A. 446, support the appellant and are sound in principle and reasoning. Since the evidence offered by the plaintiff herself showed that she had long suffered from high blood pressure, dizziness and many other physical ailments, and had been under the care of a physician for ten years before the accident, this might have dispelled the presumption of life expectancy (Smellie v. Southern Pacific Co., 212 Cal. 540, 553, 299 P. 529), and the question of life expectancy should therefore have been left to the jury to be determined upon competent evidence based upon the condition of health of the plaintiff prior to the time of the accident. For this reason instruction No. LIII should not have been given.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

15 Cal.App.2d 55

AVAKIAN et al. v. DUSENBERRY, County Clerk, etc.

Civ. 1807.

District Court of Appeal, Fourth District, California.

June 26, 1936.

1. Judgment ⇐218

Sufficiency of judgment rests in its substance, rather than its form.

2. Execution ⇐7

Judgment, ordering defendants to pay over to plaintiffs stated sum "loaned by defendants as trustees * * * in violation of their trust," *held* personal judgment for such sum, not merely order to pay it over if and when loans were repaid, so that plaintiffs were entitled to execution thereon; reference to loans being surplusage.

Original proceeding by Avak Avakian and others for a writ of mandamus to E. Dusenberry, County Clerk and Ex Officio Clerk of the Superior Court of the State of California, in and for the County of Fresno.

Peremptory writ granted.

F. W. Docker, of Fresno, for petitioners.

Dan F. Conway, Dist. Atty., W. C. Tupper, Asst. Dist. Atty., and Martin C. Thuesen, all of Fresno, for respondent.

BARNARD, Presiding Justice.

This is a petition for a writ of mandate to compel the respondent clerk to issue an execution.

It appears that the petitioners brought an action against five defendants for an accounting and for the recovery of certain trust funds held by said defendants. In the judgment they recovered in that action the court ordered the defendants, and each of them, to deliver to the plaintiffs as agents for a certain committee the sum of $602.18, then on deposit in a certain bank. The judgment then contained the following: "It is further ordered, adjudged and decreed that said defendants pay over to plaintiffs, as said agents of said Central Committee, the sum of $1205.00 *loaned by defendants, as trustees of the Fresno branch of said Daron-Dourooperan Compatriotic Union, in violation of their trust.*" (Italics ours.)

The petitioners took out an execution against one of the defendants which was later quashed by the court on motion of this defendant. Since then the respondent has refused to issue an execution, although asked to do so, and this proceeding was brought. The respondent filed a demurrer and an answer, and the only issue raised is as to whether or not the portion above quoted constitutes a personal judgment against the defendants in the former action.

On behalf of the respondent it is contended that this is not a personal judgment for $1,205 against the defendants, but that the same merely orders them to pay over that amount if and when the loans are repaid to them.

This controversy arises because of the presence in the judgment of the language we have emphasized. The real question presented is whether this portion changes the effect of that which precedes it.

[1] It is well settled that the test of the sufficiency of a judgment rests in its substance rather than in its form. Hentig v. Johnson, 8 Cal.App. 221, 96 P. 390, 391; Welch v. Reese, 82 Cal.App. 27, 255 P. 250; Pista v. Resetar, 205 Cal. 197, 270 P. 453. In the first of these cases the court said:

"It is urged that the judgment is not justified by the findings, and this for the reason that, instead of adopting the expression 'that plaintiff do have and recover,' etc., the court 'ordered, adjudged, and decreed that the defendant Mary Williams, within 10 days from this date, pay to the plaintiff F. G. Hentig the sum of,' etc. Appellant contends that this is not a judgment, but merely an interlocutory order. We cannot agree with this contention. While it is irregular in form, it nevertheless, in substance, conforms to the definition of a 'judgment' as contained in section 577, Code of Civil Procedure. It is a 'final determination of the rights of the parties in the action.' No good reason exists for departure from established and well-recognized forms; but, in the absence of any particular form being prescribed by the Code, the test of the sufficiency of a judgment must be the substance, rather than its form.

"With reference to the form of judgments, Mr. Black, in his work on the subject (section 115), states the rule as follows: 'It may therefore be stated as the modern rule that the form of the judgment is not very material, provided that in sub-

stance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated.' In discussing the same subject, another law writer says: 'That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal, if it show: (1) The relief granted, and (2) that the grant was made by the court in whose records the entry is written.' Freeman on Judgments, § 50. Measured by the above rules, the document in question constitutes a final judgment for money to be enforced by the issuance of a writ of execution against the property of defendant, as provided by section 684, Code Civ.Proc. As thus interpreted, it follows that the words, 'within 10 days from this date,' as here used, perform no office whatever. While their use is unwarranted, they are nevertheless, in our opinion, on the face of the judgment, of no force or effect. If this be true, the use of the words cannot prejudice the substantial rights of the appellant, and it is therefore unnecessary to order a modification of the judgment by striking therefrom words which are mere surplusage."

[2] It fully appears that the defendants in the former action were ordered to pay to the petitioners here the sum of $1,205 because they had loaned that amount in violation of their trust. The very fact that they were ordered to pay this sum instead of being ordered to turn over the evidences of debt representing such loans indicates that this was a personal judgment against them. Since they had violated their trust in loaning the money a personal judgment against them was proper and a reading of the entire judgment leaves no doubt that the court intended this portion of the judgment to have that effect. The part we have emphasized resembles a finding of fact, is merely descriptive, and gives a reason for the judgment. While not properly a part of a judgment, this portion may be disregarded as surplusage, and the remainder, while not a model, is sufficient to constitute a personal judgment against the defendants in that action.

For the reasons given the demurrer is overruled, and it is ordered that the peremptory writ of mandate issue as prayed for.

We concur: MARKS, J.; JENNINGS, J.

15 Cal.App.2d 53

WESTERN FRUIT GROWERS, Inc., v. METTLER.

Civ. 1771.

District Court of Appeal, Fourth District, California.

June 26, 1936.

Sales ⇨397

In action by buyer to recover money paid on contract for sale of onions, finding that buyer had paid $207.75 less for onions than contract price supported denial of judgment.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Western Fruit Growers, Incorporated, against Emanuel H. Mettler, wherein defendant filed a cross-complaint. From the judgment, plaintiff appeals.

Affirmed.

John Preston King, of Lindsay, and Simpson & Simpson, of Los Angeles, for appellant.

Osborn & Burum, of Bakersfield, for respondent.

MARKS, Justice.

Plaintiff instituted this action to recover $750, money had and received. Defendant answered, denying the allegations of the complaint. He cross-complained, seeking $1,384.50, damages for breach of a written contract. The trial court denied judgment to each party, and plaintiff has appealed.

The findings of fact are supported by competent and material evidence. Therefore, if the findings support the judgment, it must be affirmed.

On May 25, 1933, the parties entered into a written contract whereby defendant agreed to sell, and plaintiff to buy, fifteen carloads of onions of an established grade with an option on ten additional cars. Plaintiff paid defendant $750 on the contract. This sum was to be deducted from the price of the last cars shipped. The onions were inspected and accepted at Shafter, in Kern county, by the agent of plaintiff. Defendant consigned them in the name of the Mettler Fruit Company to the Mettler Fruit Company and attached the bill of lading and a diversion order to a draft on plaintiff for the contract price of each car. The drafts for the first four cars

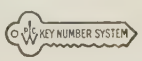
shipped were paid. The agent refused to sign the drafts for the remaining cars, and the bills of lading and diversion orders on the next six cars were not delivered to plaintiff and it did not pay defendant for them. The carrier diverted these cars without the consent of the shipper. The eleventh car contained 385 sacks of defendant's onions and 215 sacks belonging to another grower. In some manner plaintiff obtained the bill of lading for this car and received the shipment without paying for the onions.

Defendant put in a claim to the carrier for the onions diverted by it, and received from it $2,031, this being the contract price of the six cars of onions, less the advance payment of $750.

The contract price which plaintiff promised to pay for the ten cars and 385 bags of defendant's onions was $4,788.75. On this amount defendant received the following payments: Cash advance, $750; paid for first four cars, $1,800; paid by carrier, $2,031; total, $4,581, or $207.75 less than the contract price to which defendant was entitled. He has not appealed and is not here complaining of the judgment. As plaintiff is not entitled to recover anything from defendant, the judgment must be affirmed.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



15 Cal.App.2d 97

DORNER v. HEFFNER.

Civ. 10911.

District Court of Appeal, Second District, Division 2, California.

June 29, 1936.

Rehearing Denied July 17, 1936.

1. Appeal and error ⇐1008(1)

In action on subscription agreement, finding that there had been a delivery and acceptance by defendant of the agreement could not be disturbed by Court of Appeal.

2. Subscriptions ⇐21(3)

Where defendant alleged inconsistencies between subscription agreement and another instrument but failed to show that he thereby suffered any damage, alleged inconsistencies were no defense to action on subscription agreement.

3. Subscriptions ⇐16

Payment by plaintiff to clearing house of amount assumed by defendant in subscription agreement, which court found clearing house accepted for assignment to plaintiff of its cause of action against defendant, was not a voluntary payment by plaintiff of defendant's subscription which extinguished the subscription and prevented clearing house from assigning anything to plaintiff.

4. Subscriptions ⇐13

Where plaintiff recovered on subscription agreement, defendant was liable for interest and attorneys' fees, as provided in agreement, though he alleged inconsistencies between subscription agreement and another instrument, where he failed to show any damage from alleged inconsistency.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Adolf Dorner against Harry L. Heffner. From judgment for plaintiff, defendant appeals.

Affirmed.

Bailie, Turner & Lake, of Los Angeles, for appellant.

Dockweiler & Dockweiler, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment against the defendant on a so-called subscription agreement, herein sometimes called Exhibit 1, which was signed by certain stockholders of the German American Savings Bank of Los Angeles and by which they agreed to pay to the Los Angeles Clearing House Association the sums set opposite their respective names upon terms therein set out. The plaintiff sued as assignee of the clearing house as to the subscription of the defendant Heffner.

Exhibit 1 in the form as drafted by the clearing house required the subscribing stockholders to pay "on or before thirty (30) days from" June 20, 1933. Before the defendant signed the instrument he struck out the figures "30" and wrote above them in ink "90," and one of the other stockholders wrote above the place pre-

pared for the signatures of the subscribing stockholders the following: "The undersigned shall not be obligated unless at least $75,000.00 have been signed and if less than 75,000.00 sign, then the undersigned subscriptions are void." There were several copies of the original draft of Exhibit 1, but the changes, referred to, were made on only the one copy. The purpose of Exhibit 1 was to provide a way whereby the clearing house would take over all the assets of the bank and pay to the bank's depositors their deposits in full. The program proceeded with more or less inconvenience and difficulty. Mr. Heffner left the city and could not be found. The association demanded that the $75,000 be paid in cash and all of the $75,000 was paid in cash except the part subscribed by the defendant. In order to facilitate matters the plaintiff guaranteed to the clearing house that the defendant's subscription would be paid. The liquidation of the bank proceeded substantially as planned. At the end of the 90 days the defendant refused to pay the amount of his subscription, and thereupon the association assigned to the plaintiff its right in said subscription in exchange for the amount due from the defendant which was paid to it by plaintiff.

[1] The first contention of the defendant is that as to him there was no delivery or acceptance of Exhibit 1. Whether there was or was not, such a delivery and acceptance was a question of fact for the fact finder, which was determined adversely to the defendant on substantial evidence. The president of the clearing house testified denying the testimony of the defendant to the effect that he had withdrawn or canceled the subscription. It is not within the province of this court to weigh the testimony nor to determine where the preponderance of evidence lies.

[2] The defendant next contends that the terms of Exhibit 1 were uncertain and that there was no meeting of the minds of the various parties thereto. This contention seems to be based upon the theory that there are certain alleged inconsistencies between Exhibit 1 and a certain Exhibit D, which was an instrument dated June 30, 1933. But the defendant makes no showing that his rights were in any way or at all affected by Exhibit D. He does not point out one item of benefit, which he reasonably hoped to receive by signing the subscription, which he did not receive, nor a single detriment to himself other than the judgment against him for the payment of the subscription according to its terms.

Defendant next contends that there is no evidence in the record that Exhibit 1 was ever subscribed by stockholders who obligated themselves to pay $75,000 in the aggregate. The obvious answer is that it was not only subscribed up to $75,000, but that the entire amount thereof was paid except the portion subscribed by the defendant. Obviously there is no merit in this contention.

[3] The defendant next contends several different ways that the payment to the association by the plaintiff of the amount due from the defendant was a voluntary payment of his subscription and that the defendant's subscription having been paid by the plaintiff, it was extinguished and therefore nothing was transferred to him by the assignment. The trial court found in effect that what the clearing house did was not to accept the certificates of deposit given to it by the plaintiff as payment of defendant's obligation, but as a consideration for the assignment to the plaintiff of the association's claim against the defendant. This theory of the case and the findings thereon were supported by substantial evidence, and it is not for this court to interfere with said findings.

[4] The defendant next contends that the court should not have awarded judgment for interest and attorneys' fees, but the argument on this contention goes back to and depends upon the prior contention that the plaintiff was not entitled to judgment on Exhibit 1. If plaintiff was entitled to judgment on Exhibit 1 then he was entitled to judgment for interest and attorneys' fees as provided therein.

The defendant next contends that there was no valid assignment from the association to the plaintiff. Both the plaintiff and the officers of the association were in court and both parties to the assignment were satisfied as to its validity. The association will never contend, can never contend, that it still owns the claim against the defendant. There is no merit in this contention.

It is next contended that the court erred in overruling several objections of the defendant to the introduction of evidence and in denying the defendant's motions to strike such evidence when admitted. We have reviewed all these rulings and orders, but we see no merit in the defendant's conten-

tions with regard thereto; certainly there was no error such as would entitle the defendant to a reversal of the judgment in the light of article 6, section 4½, of the Constitution.

Finally the defendant sets forth in detail 36 specifications of error in the findings of fact, but they are all or practically all mere repetitions of the contentions which have been heretofore covered.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



15 Cal.App.2d 126

PEOPLE v. GILMORE et al.

Cr. 2879.

District Court of Appeal, Second District, Division 2, California.

June 30, 1936.

1. Burglary ⇐41(1)
Homicide ⇐235

Evidence *held* sufficient to sustain convictions for burglary of club from which slot machines were stolen and for murder of janitor who was shot and killed during perpetration of burglary.

2. Criminal law ⇐531(3)

In prosecution for burglary and murder, defendants' confessions *held* properly admitted in evidence under instruction that jury should determine whether alleged confessions were made freely and voluntarily without any influence of hope or fear and, if so, confessions could be considered, and, if not, they were not evidence.

3. Criminal law ⇐1172(7)

Where prosecutor had read individual burglary and murder confessions to four defendants and offered evidence to show conduct in face of accusatory statements, instruction that standing mute in face of accusation of crime may be taken as evidence indicating admission of guilt, but that, unless jury were convinced beyond reasonable doubt that defendants did stand mute when accusatory statements were made, such statements should be disregarded, was more favorable than defendants could legally demand and not prejudicial.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Vergus Gilmore, Victor Brown, Leon T. White, and Clarence E. Hogue were convicted of burglary and murder, and they appeal.

Affirmed.

Curtis C. Taylor, of Los Angeles, for appellants Vergus Gilmore and Clarence Edward Hogue.

John S. Cooper, of Los Angeles, for appellants Victor Brown and Leon T. White.

U. S. Webb, Atty. Gen., by Alberta Belford, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendants were charged in the first count of the information with the crime of burglary, and in the second count with the crime of murder. They were convicted of both crimes and prosecute this appeal from the judgments pronounced against them and the order denying a new trial.

[1] The contention is presented that the evidence is insufficient to justify the convictions. Early in the morning of November 5, 1935, the Apex Club, located on Central avenue in the city of Los Angeles, was burglarized and a number of slot machines were stolen. During the perpetration of the burglary the janitor of the club, John Davis, was shot and killed. The four defendants, together with one Jack Willis, were accused of the crimes. Upon their arrest statements were taken from the several defendants. All admitted that they went in an automobile together and stopped in the street in front of the Apex Club. Each admitted that he either entered the building or assisted in removing the slot machines from the premises. All admitted that they departed from the Apex Club in the automobile containing the slot machines. The evidence is sufficient to sustain the convictions as to all defendants.

[2] Complaint is made of the admission in evidence of the confessions of the defendants, the claim being made that the confessions were not free and voluntary. On this point the testimony was conflicting and the trial court, after deciding to admit the confessions, instructed the jury as fol-

lows: "It is for the jury to determine for themselves whether the alleged confessions of the defendants were made freely and voluntarily without any influence of hope or fear. If so, you may consider it, if not, it is not evidence. The slightest menace or threat, or any hope engendered or encouraged that the defendant's case will be lightened or more favorably dealt with if he will confess, is enough to exclude the confession thereby superinduced; and any words spoken in the hearing of the defendant which may, in their nature, engender such fear or hope, render it necessary that a confession made within a reasonable time afterwards shall be excluded, unless it is shown by clear and positive proof that the confession was voluntarily made after all trace of hope or fear had been fully withdrawn or explained away." The court also properly instructed the jury as to the meaning of the word "confession." Defendants Gilmore and Hogue complain of the failure of the court to give to the jury an instruction requested by them to the effect that it was the function of the jury to determine whether the confessions were voluntary. The court did in fact properly instruct the jury on this point. The contention of defendants is without merit.

[3] Defendants further complain that the confessions of some of the defendants were improperly received as to other defendants. The statements of the defendants were taken separately and reduced to writing. Thereafter all of the defendants were brought together and all of the statements read so that all could hear them. The court inquired the purpose of the district attorney in offering the evidence, and the district attorney replied that it was for the purpose of showing the conduct of the various defendants in the face of accusatory statements. On this subject the court instructed the jury as follows: "You are instructed that when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. The only purpose for which an accusatory statement is received in evidence is to show acquiescence or admission on the part of a defendant in the face of an accusatory charge, and unless you are convinced beyond a reasonable doubt that the defendant did stand mute when the accusatory statements were made such statements should be entirely disregarded by you." The defendants were not prejudiced by the ruling of the court, which was more favorable to them than they could legally demand.

The judgments and order denying a new trial are affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



15 Cal.App.2d 58

PEOPLE v. FLORES.

Cr. 2845.

District Court of Appeal, Second District. Division 1, California.

June 27, 1936.

As Modified July 23, 1936.

1. Homicide ⇨253(1)

Evidence *held* to sustain conviction of first-degree murder.

2. Criminal law ⇨743

Jury could, if they conscientiously felt warranted in so doing, after full and fair consideration, reject testimony of defendant accused of murder and accept evidence in contradiction thereof (Code Civ.Proc. §§ 1847, 2061).

3. Criminal law ⇨55

Voluntary intoxication is not defense for crime, and is only material when actual existence of any particular purpose, motive, or intent is necessary element to constitute any particular species or degree of crime, in which event jury may take into consideration fact that accused was intoxicated at the time, in determining purpose, motive, or intent with which he committed act (Pen. Code, § 22).

4. Homicide ⇨238

Evidence *held* to show that defendant accused of first-degree murder did not become intoxicated until after killing, as respects whether crime was reduced to manslaughter (Pen.Code, § 22).

5. Criminal law ⇨889

Re-reading instructions concerning possible verdicts that could be rendered in murder prosecution and their proper form

held not prejudicial error, as against contention that jury was thereby impressed with defendant's guilt, where jury had already decided that defendant was guilty and instructions were re-read for sole purpose of clarifying jury's duty so that verdict would not contain words "without parole," as in verdict which had been returned.

6. Criminal law ⇐913(1)

Unfamiliarity of defendant accused of murder with English language and his need for presenting testimony in foreign tongue through interpreter *held* not proper ground for motion for new trial (Pen.Code, § 1181).

7. Criminal law ⇐1035(3)

Need of defendant accused of murder for interpreter could not be raised for first time on appeal.

8. Jury ⇐120

Denial of challenge of defendant accused of murder to jury panel *held* proper, where defendant did not offer to substantiate grounds of his challenge (Code Civ. Proc. §§ 204–211, 214–220; §§ 225–228, as amended by St.1933, p. 1833).

9. Criminal law ⇐1035(6)

Defendant accused of murder who did not challenge individual jurors on ground of irregularity in their impanelment and length of service could not raise such question on appeal (Code Civ.Proc. §§ 199, 200).

10. Jury ⇐70(1)

Denial of challenge of defendant, accused of murder, to panel on ground that it was special venire, *held* not prejudicial error, where defendant did not object to special venire and did not demand drawn jury (Code Civ.Proc. § 226, as amended by St. 1933, p. 1833).

11. Jury ⇐70(1)

Under statute, court has discretion to order special venire, notwithstanding that there are sufficient in trial jury box (Code Civ.Proc. § 226, as amended by St.1933, p. 1833).

12. Criminal law ⇐1186(4)

Alleged irregularities in summoning of special venire did not warrant reversal, where miscarriage of justice did not result therefrom (Const. art. 6, § 4½).

13. Criminal law ⇐1063(1)

Appeal from order denying defendant's motion in arrest of judgment would be dismissed, where no such motion was duly and regularly filed, or argued or presented to trial court.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Frank Flores was convicted of murder in the first degree, and he appeals.

Affirmed.

Stephen J. Morris and Roy J. Farr, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Percy C. Heckendorf, Dist. Atty., and Martin J. Coen, Jr., Chief Deputy Dist. Atty., both of Santa Barbara, for the People.

WHITE, Justice pro tem.

This is an appeal from a judgment after conviction of the crime of murder, and from orders denying appellant's motions in arrest of judgment and for a new trial.

To the charge of murdering one Louis Mock, appellant interposed his pleas of not guilty and not guilty by reason of insanity. By the verdict of the jury appellant was found guilty of murder in the first degree, with the penalty fixed at life imprisonment. Subsequent to the rendition of the verdict aforesaid, appellant regularly and duly withdrew his plea of not guilty by reason of insanity.

The evidence, in our opinion, conclusively shows that on the 11th day of October, 1935, the appellant shot and killed Louis Mock. The evidence indicates that on the date of the homicide and for some months prior thereto, the appellant was occupying a room in the home of the deceased in Santa Barbara county; that appellant and deceased had been acquainted for several years, and prior to October 11, 1935, had worked together as general ranch hands. On the evening preceding the killing it appears that the deceased, his wife, appellant, Mrs. Frances Ontiveros, and the latter's daughter, Amparito Ontiveros, relatives of Mrs. Mock, were visiting in the home of deceased, along with one John Franzini. During the course of the evening Mr. Franzini and appellant left the house, and returned a short time later with two half-gallon jugs of wine. Some drinks of wine were served, but no one appears to have become intoxicated, nor is there any evidence of any quarrel or acrimonious dis-

cussion among those present. The record indicates that the deceased and his wife retired before the guests, and that about 11 o'clock Mr. Franzini left, the appellant retired to his room, and Mrs. Ontiveros and her daughter went to bed.

The following morning, October 11, about 8 o'clock, Mrs. Mock went to the kitchen to prepare breakfast, and at that time saw appellant, who came into the kitchen and got a jug of claret wine. About that time Juan Grijalva, of Santa Ynez, and a friend of appellant came into the kitchen of the Mock home to see appellant. The latter served Grijalva two glasses of wine, and he himself drank a like amount. At that time Mrs. Mock left Grijalva and appellant alone in the kitchen. The witness Grijalva testified that appellant asked him if he had a gun, to which Grijalva replied in the negative. Shortly thereafter Grijalva left the kitchen and returned to his home. In a short while Mrs. Mock returned to the kitchen and continued with the preparation of breakfast. The deceased, Mrs. Amparito Ontiveros, Mrs. Frances Ontiveros, and appellant all came into the kitchen about that time, and appellant began to complain to them that on the previous night, after 11 o'clock, he had gone to the home of a friend of his, Charles Ontiveros, where he had been denied admittance. The deceased told appellant that it was no time for him to be visiting at that late hour, advising him to forget it and eat some breakfast. Appellant refused to have any breakfast, and declared he would not stay in that house as it seemed to him he was not wanted. The deceased again urged appellant to eat breakfast and forget about the matter, but appellant left the kitchen. Amparito Ontiveros, Frances Ontiveros, and deceased went into the dining room, which adjoined the kitchen, and seated themselves at the table preparatory to eating breakfast. Mrs. Mock, who was serving breakfast, had just started into the dining room with a pot of coffee in her hand, when she observed appellant standing beside the bed in the bedroom of deceased and saw him take a .32-caliber Colt automatic pistol from a holster which was lying on the table beside the bed and walk out of the bedroom towards the front of the house. Stepping into the dining room, Mrs. Mock said to her husband, "He took the pistol," whereupon Mr. Mock got up from the dining room table and went towards the front of the house, through the kitchen, through the bedroom which appellant had just left, through the hall, into the living room, and out the front door. Mrs. Mock and the others in the front part of the house heard the deceased walking rapidly through the house and heard the front door slam, followed a few seconds thereafter by the sound of a shot, and the voice of appellant saying, "You are dying, huh?" and then immediately the sound of a second shot. The three women thereupon rushed to the front of the house by the same route taken by appellant and the deceased, and when they arrived at the front door they saw the deceased lying on the front porch. All the doors separating the various rooms through which the deceased walked and through which the three women followed were standing wide open, and the ladies testified that there had been no scuffling of any kind, nor did they hear any conversation between deceased and appellant in the house on the way out. After observing the deceased lying on the front porch, Mrs. Mock collapsed, and was taken into the house. Mrs. Amparito Ontiveros, however, testified she noticed appellant standing diagonally across the street, and also observed the next-door neighbor, Joe Calderon, and Modesto Monte, a visitor, standing in front of the former's house, which adjoins that of the deceased. At that time, she testified, she heard appellant say to the two men, "I killed the son-of-a bitch. Go pick him up." In this statement the witness was corroborated by the neighbor, Mr. Calderon, while Mr. Monte, who was standing near Calderon, testified he heard appellant say: "Calderon, I killed a man. Go pick him up. I shot him. He is shot."

What happened between appellant and deceased after the latter followed the former out of the house was observed by the witness Juan Grijalva, the friend of appellant, who at the time was standing near the front porch of Calderon's house. He testified that he saw deceased and appellant come out of the former's house, walking side by side; that they were walking out towards the gate; that they walked out to about the center of the grapevine arbor when the witness heard two shots; that the two men separated, the deceased going towards the porch, while appellant stood there a moment with an object in his right hand. The witness was unable to identify the object, and testified that appellant had

his coat over his left shoulder. This witness further testified that immediately following the shooting appellant exclaimed, "You will follow me!" This witness was only about 85 feet from the men when they walked out of the house, and was very definite in his statement that they were not fighting or wrestling, but were walking side by side towards the gate leading to the street. The evidence further indicates that shortly after the homicide appellant came into the lunchroom of E. C. Craig on the main street of Santa Ynez, and obtained from Craig a pint bottle of Old Quaker whisky. Craig testified that at that time appellant was sober. Appellant was next observed at the house of Mrs. Virginia Ontiveros, mother of the estranged husband of Mrs. Amparito Ontiveros, in the northwesterly part of Santa Ynez. It was to this home that appellant had gone the night before and at which house he had been denied admittance. Mrs. Ontiveros stated she heard appellant say that he had shot Mr. Mock with his own gun when the latter tried to kill him. This witness also secured the gun from appellant which he had taken from the bedroom of Mr. and Mrs. Mock. Upon being notified of the homicide, Constable Crabb traced the appellant to the home of Charles Ontiveros, where he found the appellant seated on the running board of a car in the rear of the house. When the constable placed appellant under arrest the latter said: "All right. I do not care if they put a rope around my neck or not." Appellant further told the constable that he had secured the gun from the bureau of the Mock home. Later appellant changed his story, and told the constable he had taken the gun away from deceased during a struggle. The constable obtained the .32-caliber automatic pistol from Mrs. Ontiveros, to whom appellant had previously given it, and also relieved appellant of the bottle of Old Quaker whisky, from the contents of which appellant had consumed one-half. The constable testified that at the time he arrested appellant the latter was sober, but by the time the deputy sheriffs arrived from Santa Barbara appellant was under the influence of liquor. During the conversation with the deputy sheriffs who had come from Santa Barbara, appellant appeared to be intoxicated, and later when examined by a physician was found by the latter to be under the influence of liquor. However, the doctor stated that in his opinion appellant could have become intoxicated as a result of the whisky which he had consumed after he left the Mock home following the shooting. Later on the day of the shooting, after being lodged in the county jail at Santa Barbara, appellant had a conversation with deputy sheriff Ross, in which appellant stated that the deceased had become angry with him for going over to the home of Teddy Ontiveros the previous night, and that deceased started to get his gun, but that appellant got the gun first, and that the two of them struggled over it. Appellant stated he shot Mr. Mock while they were still in the house. The day following, appellant was further questioned by a deputy district attorney in the presence of deputy sheriffs, and his statement was taken down in shorthand. In that statement appellant related that on the previous night, after the others had gone to bed, he went to the home of Teddy Ontiveros, but was refused admittance, whereupon he returned to his room at the home of deceased, and went to bed. He stated that the next morning, when he got up, he went to the kitchen, and was telling Mr. Mock about what had occurred the night previous. He said that the deceased became violently angry at him for going over to the Ontiveros house the night before, and started to get his gun in the bedroom. Appellant claimed he followed Mr. Mock into the bedroom, and when the latter took hold of the gun appellant threw his arms around Mr. Mock, standing in back of him, and grabbed onto the gun; that the two of them then wrestled around the bedroom, out into the hall, through the living room, out across the porch, and down the steps. Appellant said that he kept his hands on the gun all the time, and after they had reached the ground in front of the porch they fell down twice, and that it was at this time that the gun went off twice. Appellant claimed that he did not know where the bullet struck Mr. Mock, but said Mr. Mock released his grasp on the gun after the second shot, staggered to the porch, where he hung onto the railing for a few moments, and then slumped to the floor. Appellant further stated that he was not intoxicated at the time of the shooting, but became so after he had consumed the whisky which he obtained after the shooting was over. This was amplified by the testimony of the appellant at the trial, wherein he testified that he saw deceased go to the latter's room and reach for his

gun. Appellant further testified that the deceased had stated once on the morning of the fatal shooting that he was going to kill appellant, and accused appellant of communicating with Mr. Ontiveros about some family affairs. Appellant denied saying, "I killed the son-of-a-bitch," and claimed that when he hollered to the witness Calderon he said: "I thought Mr. Mock was shot. Please come and see Mr. Mock." Appellant admitted in his testimony at the trial that he knew deceased kept his gun on a little stand in the bedroom, and was further aware of the fact that the gun was already loaded.

[1, 2] Appellant assails the judgment on the ground that the evidence is insufficient to sustain the verdict of murder in the first degree, but in our opinion, a mere reading of the foregoing epitome of the testimony, made up from a reading by us of all the evidence adduced at the trial, at once indicates that while a conflict appears as between the testimony of the several prosecution witnesses and the happening as narrated by appellant, if the jury believed the testimony of the people's witnesses, as they evidently did and had a right to do, such testimony was of sufficient substantiality to support the verdict rendered. Reviewing judges are obviously in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly for that reason our Constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Carrying out the spirit and intent of this constitutional provision, the Legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ.Proc. § 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive. Code Civ.Proc. § 2061. It necessarily follows from the rules just noted that the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject the testimony of the defendant and to accept evidence in contradiction thereof.

In addition thereto, we must remember that a motion for a new trial was made in this case and denied by the trial court. The judge of that tribunal had the witnesses before him, was fortified with an opportunity to observe their manner and demeanor on the stand, and apparent candor or lack of the same, and the reasonableness or unreasonableness of the stories they told. In denying the motion for a new trial, the lower court concurred in the action of the jury, which rejected defendant's version of the fatal encounter and believed the testimony adduced showing that the killing was wilful, unlawful, felonious, and with malice aforethought. It might also here be observed that the jury's action in disregarding defendant's evidence finds some support and corroboration in the statements of the defendant, as above set forth, made at the time of and subsequent to his arrest, together with the improbability of appellant's claim that the gun was discharged both times during the scuffle, when viewed in the light of the testimony of the ballistics expert, Spencer B. Moxley, to whom was delivered a section of the tissue surrounding the wound in the left breast of the deceased, which tissue was removed from the body, and from a chemical and microscopic examination of which the expert testified it was powder-burned and torn from the pressure of the gases from the powder of the gun, indicating definitely, according to the expert, that the gun had been pressed tightly against the breast of the deceased at the time it was fired. The testimony also shows that the wounds in the leg indicated that the one on the outer side was the point of entrance and the one on the inner side was the point of exit, the bullet having gone downward and inward. Examination of the entrance hole in the leg of the overalls which deceased was wearing disclosed that there were no powder burns on the fabric. According to the ballistics expert, this indicated very definitely, in the light of tests made by the witness, that the gun had been held at a distance of more than 36 inches from the leg at the time it was fired. Added to this we have the testimony that immediately after the second shot was fired appellant was standing under the grapevine arbor in the front yard of deceased's home, with the gun in his hand and with his coat swung over his left shoulder. This of itself would warrant the jury in inferring that had appellant been engaged in a struggle, as he contends, which

continued from the bedroom to the front yard, during which appellant and deceased fell or stumbled twice, appellant would not have had his coat resting undisturbed upon his left shoulder. The state of the evidence in the record before us is such that the finding of the jury thereon is conclusive.

[3, 4] Appellant next contends that the evidence shows that he was intoxicated, and that because of such intoxication the crime, if any was committed, could be no greater than manslaughter. Voluntary intoxication never becomes available as a defense for crime, and is only material when the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, in which event the jury may take into consideration the fact that the accused was intoxicated *at the time,* in determining the purpose, motive, or intent with which he committed the act. Pen.Code, § 22; People v. Clifton, 186 Cal. 143, 198 P. 1065; People v. Burkhart, 211 Cal. 726, 297 P. 11; People v. Keyes, 178 Cal. 794, 175 P. 6; People v. Belencia, 21 Cal. 544. While there is in the record evidence to the effect that appellant was under the influence of liquor some time after the homicide, nevertheless the jury was warranted in concluding that such intoxication was the result of the consumption by appellant of the whiskey obtained by him at Craig's store after the shooting. In fact, appellant himself testified before the jury as follows:

"Q. You were sober when you were over there at the house, weren't you? A. Yes, I was sober.

"Q. You knew everything that went on there? A. Yes.

"Q. It is very clear in your mind? A. Yes."

Also, in this regard, the jury was fully and correctly instructed on the question of intoxication.

Appellant next contends that the court erred in the giving and refusing of certain instructions. We have examined and scrutinized the instructions called to our attention, and have considered the charge to the jury as a whole; and we are satisfied that no prejudical error has been committed. Article 6, § 4½, Const.; People v. Bealoba, 17 Cal. 389, 395; People v. Fleming, 218 Cal. 300, 310, 23 P.(2d) 28; People v. Hatch, 163 Cal. 368, 125 P. 907; People v. Ruef, 14 Cal.App. 576, 613, 114 P. 48, 54; People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806; People v. Kelley, 208 Cal. 387, 281 P. 609; 8 Cal.Jur. 314; People v. Rowland, 207 Cal. 312, 277 P. 1041.

[5] Appellant complains of the court's action in rereading certain instructions. In this connection, the record discloses that the jury brought in a verdict as follows: "We, the jury in the above-entitled cause, find the defendant, Frank Flores, guilty of murder in the first degree, and fix his punishment at confinement in the state prison for life, without parole." The surplus words, "without parole," were added to the verdict by the jury, and were in the handwriting of the foreman, and it is apparent from a reading of the transcript that the court reread the instructions with reference to the forms of verdict for the sole purpose of clarifying the jury's duty with respect to the form of any verdict, so that such verdict as they might bring in would not contain the additional words, "without parole." We find no merit in appellant's contention that the rereading of these instructions manifestly impressed the jury with the guilt of the defendant, because the jury, at the time the court reread the instructions, had already decided that the defendant was guilty, and we cannot assume that during their deliberations which resulted in that verdict they did not take into consideration all of the court's instructions. The instructions reread had only to do with the possible verdicts that could be rendered and their proper form, and in no way indicated that a verdict of guilty should be returned. In this procedure there was no prejudical error.

[6, 7] Appellant next contends that the court erred in refusing to grant his motion for a new trial, and as a ground therefor asserts that appellant was not familiar with the use of the English language and should have been given the opportunity of presenting his testimony in the Spanish language through an interpreter. We have no hesitancy in saying that the clarity, coherency, understandability, and intelligence of appellant's answers to questions propounded to him convinces us that he possessed an adequate understanding of the English language and was conscious of the meaning and

import of questions addressed to him and of the effect of his answers given thereto. It might also be observed that the record indicates that appellant was born in the county of Santa Barbara in this state, and has lived in a community of English-speaking people practically all of his 54 years of life. Also, counsel for appellant made no request for an interpreter at any time during the trial. This question cannot be raised for the first time on appeal.

[8] Appellant's next complaint deals with the challenge to the jury panel made at the time the case was called for trial, and with the affidavit concerning the jury panel filed at the time of his motion for a new trial. The challenge to the panel included as grounds therefor the allegation that the selection and returning of said jurors was in violation of the provisions of sections 204 to 211 of the Code of Civil Procedure, and that the drawing of the jury was in violation of the provisions of sections 214 to 220, inclusive, of the Code of Civil Procedure, and that the "summoning" of said jurors was in violation of the provisions of sections 225 to 228, inclusive, of the Code of Civil Procedure, as amended by St.1933, p. 1833. It also included allegations that the selection of the panel and jurors was "made and done in a material departure from the forms prescribed in respect to drawing and return of jurors"; and "that there was an intentional omission of the sheriff to summon one or more of the jurors drawn"; and further, "that the officer or officers in the selection and selecting of the panel and venire were prejudiced." The challenge included all possible grounds for a challenge to the panel, but failed to point out wherein there was a violation of the provisions of the Code of Civil Procedure, or wherein there was any omission by the sheriff in the summoning of one or more of the jurors drawn, or which officer or officers were prejudiced, and upon what basis that prejudice rested for support. So far as the record before us discloses, the appellant made no offer to prove, nor did he attempt in any manner to present to the court, anything to substantiate the grounds of his challenge. Obviously, there was nothing presented to the court, nor was there any showing made, upon which the court could do other than deny the challenge, and its action in this regard was proper.

[9] At the time of the hearing of the motion for a new trial, counsel for appellant filed an affidavit based upon a printed article which appeared in a publication known as "Town Talk," printed in the city of Santa Barbara, in which publication charges of irregularity in the impanelment and length of service of trial jurors in Santa Barbara county were made. At the time of the presentation of this affidavit there was no offer of proof, nor was there any effort made to present to the court anything that would substantiate the statements contained in the newspaper clipping; and further, appellant exercised no challenge to the individual jurors on the ground that they were precluded from serving by reason of the provisions of sections 199 and 200 of the Code of Civil Procedure. Having failed to interpose any such challenge to the individual jurors, if in fact there were any grounds for such a challenge, appellant cannot raise the question for the first time on appeal. Livesey v. Stock, 208 Cal. 315, 281 P. 70, citing People v. Mortier, 58 Cal. 262; People v. McFarlane, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L.R.A. 245; People v. Boren, 139 Cal. 210, 72 P. 899.

[10, 11] Assuming that appellant interposed a challenge to the panel on the ground that it was a special venire, although the record does not disclose that such a challenge was made, we are nevertheless of the opinion that the court's action in this regard was without prejudicial error; and at the time the order was made for a special venire of 50, the appellant was in court with his counsel, and no objection was interposed to the special venire, nor was any demand made for a drawn jury. The law is well settled in California that the court has discretion to order a special venire, as provided in section 226 of the Code of Civil Procedure, as amended, notwithstanding the fact that there are sufficient in the trial jury box. People v. Suesser, 142 Cal. 354, 360, 75 P. 1093; In re Estate of Wall, 187 Cal. 50, 54, 200 P. 929; Perkins v. Sunset T. & T. Co., 155 Cal. 712, 715, 103 P. 190; People v. Durrant, 116 Cal. 179, 195, 48 P. 75; People v. Vincent, 95 Cal. 425, 30 P. 581.

[12] Even assuming that there were irregularities in the summoning of a special venire, section 4½ of article 6 of the Constitution is applicable, and will apply if, after examination of the entire record,

including the evidence, it appears, as in this case, that a miscarriage of justice has not resulted therefrom. People v. Stennett, 51 Cal.App. 370, 398, 197 P. 372.

Other points raised by appellant do not require discussion.

[13] The attempted appeal from the order denying appellant's motion in arrest of judgment is dismissed, for the reason that the record discloses that no such motion was duly and regularly filed, nor argued or presented to the trial court.

Being of the opinion that appellant was fairly tried and justly convicted, the judgment appealed from and the order by which appellant's motion for a new trial was denied are, for the foregoing reasons, affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



15 Cal.App.2d 1

Ex parte BRUNS.

Cr. 300.

District Court of Appeal, Fourth District, California.

June 24, 1936.

1. Contempt ⇐35

Justice's court has jurisdiction to try criminal action for contempt of a superior court.

2. Contempt ⇐14
Grand Jury ⇐1

Grand jury is a judicial body, whose members are officers of the court, and contempt of which is contempt of court.

3. Grand jury ⇐36

Attorney who in investigation by grand jury of alleged conspiracy to bribe a public official refused to answer questions in reference to alleged delivery of money to alleged conspirator on ground of professional privilege *held* guilty of contempt (Pen.Code, § 166, subd. 6).

4. Contempt ⇐35

Witness could be convicted of contempt of grand jury under Penal Code in justice's court notwithstanding he was not taken before superior court and by it ordered to answer the questions involved, as provided in Code of Civil Procedure, since Civil Code has no bearing on prosecution for contempt under the Penal Code (Pen.Code, § 166, subd. 6; Code Civ.Proc. §§ 1209–1222, as amended by St.1933, p. 1906 et seq.; § 1991).

Paul Bruns was convicted in justice's court of criminal contempt of a grand jury, judgment was affirmed by the superior court, and he files petition for writ of habeas corpus.

Petitioner remanded.

Donald Mackay, of Los Angeles, for petitioner.

Thomas Whelan, Dist. Atty., and Seymour W. Wurfel, Deputy Dist. Atty., both of San Diego, for respondent.

TURRENTINE, Justice pro tem.

It appears that petitioner herein having been duly subpœnaed, did on the 16th day of December, 1935, appear as a witness before the grand jury of San Diego county for the year 1935 then in session at the San Diego county courthouse in the city, township, and county of San Diego, and which was then engaged in an investigation to determine whether one Edgar Dudley had feloniously conspired with others to bribe a public official, to wit, the district attorney of San Diego county. The petitioner having been first lawfully sworn to testify and it being material to this inquiry to learn what funds of money Dudley had at his command and who furnished money to him for the alleged purpose of bribing the district attorney of San Diego county, petitioner was interrogated by the deputy district attorney advising said grand jury and made reply to said questions as follows:

"Q. What is your name? A. Paul Bruns.

"Q. What is your profession? A. Attorney.

"Q. State whether or not you are the attorney for Edgar Dudley. A. I am.

"Q. State whether or not you gave Mr. LaBlanc $100 to deliver to Mr. Dudley some time ago. A. I refuse to answer.

"Q. On what ground? A. On the ground of professional privilege.

"Q. You know the law as well as I do, that where one person has come in and given you a message to give to a third person, that is not privileged. I will present the law to you if you want me to get it. I think you know it as well as I do—that the only communication that is privileged between attorney and client is when the client speaks to him privately as his attorney. That when the client, no matter who he may be, gives you a message to give to a third person, no matter who it may be, that conversation is not privileged. And certainly the act of delivery of money is not a privileged communication. Now, I will put the question to you again; did you deliver $100 to this Mr. LaBlanc to give to Mr. Dudley? A. I refuse to answer.

"Q. On what ground? A. On the ground of professional privilege.

"Q. Are you the attorney of Mr. La Blanc? A. I refuse to answer.

"Q. Have you talked to Mr. LaBlanc? A. I have.

"Q. What was the gist of your conversation? A. I refuse to answer.

"Q. On what ground, now? A. Professional privilege.

"Q. Now, let's get this clear, so that we can go before the Superior Court and will know where we stand. Do you state to this Grand Jury that you are his attorney? A. Well, I refuse to answer that question, also on the same ground.

"Q. Did you receive any money from any persons during this past year to give to Dudley? A. I refuse to answer on the ground of professional privilege.

"Q. Do you state that the individuals who gave you any money, if they did, were your clients? A. I refuse to answer, on the same ground.

"Q. Did you receive that money from individuals in San Diego? A. I refuse to answer, on the same ground.

"Q. Did you receive that money from an individual in Los Angeles? A. I refuse to answer, on the same ground.

"Q. Were you employed by any association or individuals to give Dudley money to carry on certain activities in San Diego? A. I refuse to answer, on the same ground.

"Q. You refuse to tell us whether or not you were attorney for these individuals; is that correct—those who gave you money? A. I don't think I heard the last part of the question.

"Q. You refuse to tell us whether or not the individuals who gave you the money are your clients? A. Yes, I do.

"Q. Did you receive some money from Mr. C. O. Richards of this city? A. I refuse to answer on the ground of professional privilege.

"Q. Are you the attorney of Mr. Richards, or were you at any time? A. I refuse to answer that question, on the ground of professional privilege."

No summary contempt proceeding was instituted against petitioner in the superior court in and for the county of San Diego, for these refusals to testify before the grand jury. The following day, however, on December 17, 1935, a criminal complaint was filed in the justice's court of San Diego township, charging petitioner with violating subdivision 6 of section 166 of the Penal Code, a misdemeanor. The foregoing facts, including a copy of the proceedings, were duly set forth in the amended complaint on which defendant was tried, as well as a charge in the wording of the statute. Defendant, having waived a trial by jury and trial within the statutory time, was tried by the court in department 4 of said justice's court on February 5, 1936, and found guilty of the offense as charged. Petitioner waived time for pronouncement of judgment and was on February 14, 1936, sentenced to serve sixty days in the county jail. At this time the 1935 San Diego county grand jury had not been discharged and was still in session.

Thereafter petitioner perfected an appeal from said judgment and sentence to the superior court in and for the county of San Diego following the procedure established by sections 1466, 1467, 1468, of the Penal Code (as amended by St.1935, p. 2145, §§ 1–3). Department 3 of said superior court on May 25, 1936, affirmed the judgment and sentence of the justice's court and petitioner was ordered into custody thereunder. Thereafter on May 27, 1936, petitioner surrendered his person to the sheriff of San Diego county and immediately filed in this court his petition for a writ of habeas corpus and secured his release pending decision thereon.

[1, 2] The justice's court has jurisdiction to try a criminal action for contempt of a superior court. In re Morris, 194 Cal. 63, at page 68, 227 P. 914. A grand jury is a judicial body. Ex parte Sternes, 82 Cal. 245, 23 P. 38; Irwin v.

Murphy, 129 Cal.App. 713, 19 P.(2d) 292. Grand jurors are officers of the court. In re Gannon, 69 Cal. 541, 11 P. 240; Irwin v. Murphy, supra. Contempt of a grand jury is a contempt of court. Matter of Tyler, 64 Cal. 434, 1 P. 884; In re Shuler, 210 Cal. 377, 292 P. 481.

[3] A recital of the facts herein is made very largely in the wording of the amended complaint, and it demonstrates that it states a public offense. Pen.Code, § 166, subd. 6.

Petitioner concedes the materiality of the questions, and that they were not privileged.

[4] Petitioner was not taken before the superior court and by the superior court ordered to answer the questions. He claims that these facts are jurisdictional, and as they were not pleaded or proved, that the amended complaint does not state a public offense, and that he was convicted on insufficient evidence, basing the claims on the provisions of Code of Civil Procedure, §§ 1209–1222 (as amended by St. 1933, p. 1906 et seq.) and Code of Civil Procedure, § 1991, and numerous cases considering and construing these Code sections. We think it clear from a review of Ex parte Karlson, 160 Cal. 378, 117 P. 447, 449, Ann.Cas.1912D, 1334, and In re Morris, 194 Cal. 63, 227 P. 914, that these Code sections have no bearing on a prosecution for contempt under Penal Code section 166. In Ex parte Karlson, supra, 160 Cal. 378, on page 383, 117 P. 447, 449, Ann. Cas.1912D, 1334, it is said: "It necessarily follows that the Penal Code has no application to a civil contempt, and that the question whether the particular act is punishable as a criminal contempt or not, under section 166 of the Penal Code, is immaterial to any inquiry arising in a contempt proceeding under section 1209 [Code Civ.Proc.]." We think the converse equally true.

Petitioner does not challenge the sufficiency of the evidence to prove the allegations of the amended complaint. It thus appearing that the amended complaint states a public offense, that the justice's court had jurisdiction, and that the conviction is based on sufficient evidence, the writ is dismissed, and the petitioner remanded.

We concur: BARNARD, P. J.; MARKS, J.

VINCENT v. GARLAND et al.

Civ. 1907.

District Court of Appeal, Fourth District, California.

June 23, 1936.

Hearing Denied by Supreme Court Aug. 20, 1936.

1. Appeal and error ⇐345(1)

Where notice of appeal was served and filed within 30 days after denial of motion for new trial but 61 days after notice of entry of judgment which was made on stipulation as to facts, appeal *held* not ineffectual on ground that facts being stipulated, there could be no new trial and motion for new trial was a nullity, since trial court had jurisdiction to hear and determine the motion even if new trial could not properly be granted.

2. Subrogation ⇐18

Where mortgagors conveyed property subject to mortgage and after mortgagee filed suit to foreclose mortgage mortgagors paid sum due on mortgage whereupon foreclosure action was continued against mortgagors' grantee, and mortgagee purchased property on promise of mortgagors that they would purchase property from mortgagee, grantee *held* not entitled to maintain action to quiet title to property, since mortgagor who has sold subject to mortgage debt upon being compelled to pay it, is subrogated to benefit of security without formal assignment.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Marcella A. Vincent against Grover T. Garland and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Charles E. Hobart, of Los Angeles, for appellant.

Salisbury & Robinson, B. R. Ware, and J. M. Lewis, all of Los Angeles, for respondents.

TURRENTINE, Justice pro tem.

Defendants William J. Garland et ux. mortgaged certain real property to Grover T. Garland. Thereafter, mortgagors conveyed the property to plaintiff, Marcella A. Vincent, subject to the mortgage. The mortgage becoming due and unpaid, the mortgagee, Grover T. Garland, instituted

an action to foreclose the mortgage and in the action Grover T. Garland was plaintiff and William J. Garland et ux., the mortgagors, and Marcella A. Vincent, the grantee of the mortgagors and plaintiff herein, were made defendants. After filing suit and duly serving the defendants, but before judgment, the mortgagor William J. Garland paid the sum due on said mortgage to Grover T. Garland whereon the action was dismissed as to William J. Garland et ux., and the action was continued in the name of Grover T. Garland pursuant to agreement between Grover T. Garland and William J. Garland. The foreclosure decree was entered October 3, 1931. November 2, 1931, the sheriff, pursuant to the decree of foreclosure, sold the property to Grover T. Garland. This was done on the promise of Grover T. Garland that he would purchase the property for William J. Garland. Plaintiff herein brought this action to quiet her title to the property covered by said mortgage against the defendants shortly prior to the expiration date of the equity of redemption. The lower court entered its decree that she take nothing by virtue of this action and that she has no right, title, interest, or estate in the property covered by said mortgage. From such judgment, plaintiff appeals.

[1] Respondents object to the jurisdiction of this court to entertain the appeal. The judgment herein was made on stipulation as to the facts. After entry of judgment the plaintiff duly filed notice of intention to move for a new trial and made his motion, which was denied. Notice of appeal was served and filed within 30 days after denial of the motion for new trial, but 61 days after notice of entry of judgment. Respondents' contention is that as the facts were all stipulated there could be no new trial, and the motion for new trial was a nullity; that the appeal must be perfected within 60 days from entry of judgment, and as it was not the appeal is ineffectual. If respondents' contention that the trial court could not properly grant a new trial because all of the facts were stipulated be sound, it does not follow that the appeal is not duly perfected. In Estate of Nutt, 180 Cal. 419, 422, 181 P. 661, 662, it was said: "If it be true that Ann Nutt Baker was an adverse party in the sense that unless by service she was made a party to the proceeding on motion for a new trial the trial court could not properly grant the motion, that fact would be a reason requiring the denial of the motion, but it would not deprive the trial court of jurisdiction to hear and determine the motion. This, we think, is the effect of the authorities. See Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 P. 719, and cases there cited. So it may not be held that a new trial proceeding was not pending in this case. Its facts clearly distinguish it from Whiting-Mead, etc., Co. v. Bayside Land Co., supra [178 Cal. 93, 172 P. 598], where there was no initiation of a new trial proceeding as to any adverse party. It follows from what we have said that the appeal taken within 30 days after the entry of the order denying a new trial was in time."

To the same effect see Peak v. Key System Transit Co., 199 Cal. 212, 248 P. 676; O'Malley v. Carrick, 60 Cal.App. 48, 212 P. 45; Pomper v. Behnke, 97 Cal.App. 628, 276 P. 122. These cases dispose of this contention adversely to respondents.

[2] Jones on Mortgages, § 768, lays down the following rule: "And so a mortgagor, who has sold subject to the mortgage debt, upon being compelled to pay it, is subrogated to the benefit of the security, without any formal assignment of it to him. He thereby becomes an equitable assignee of it, and may enforce it against the property." This rule is quoted with approval in Beach v. Waite, 21 Cal.App. 304, 131 P. 880. "If such vendee takes subject to the mortgage the land thereupon becomes, so far as the mortgagee is concerned, and as between him, the creditor, and the vendee, primarily liable for the payment of the debt. * * * When such conveyance is made, the relation of principal and surety springs up between the land and the mortgagor, he being the surety and the land the principal debtor. * * * He becomes at once entitled to all the protection which the law gives to sureties." Braun v. Crew, 183 Cal. 728, 192 P. 531, 533.

"The principal question in the case is whether the transfer of the note, and the assignment of the mortgage to the original mortgagor, after the premises had been sold subject to the mortgage, constituted in law a discharge of the mortgage, so that it could not be enforced against the property. We think it very clear that they did not. When the estate was sold subject to the mortgage, the mortgage was left as a primary charge upon the land, although the grantee did not make herself personally

liable for it by assuming it. The grantor, who was the maker of the mortgage note, was entitled to have the mortgaged property applied in payment of it. To protect her own interests, she might take an assignment of the mortgage and the debt, and enforce the mortgage by a foreclosure, as effectually as if she was not the maker of the note." Pratt v. Buckley, 175 Mass. 115, 55 N.E. 889.

"The distinction between the rights and liabilities of a grantee assuming a mortgage and a grantee who merely takes subject to a mortgage without assuming the payment of the mortgage is quite plain. See Pomeroy, Equity Jurisprudence (4th Ed.) §§ 1205, 1206; 15 Harv.L.Rev., p. 398; Stearns on Suretyship (3d Ed.) § 90. When the grantee assumes the mortgage debt as between the grantee and the mortgagor, not only is the land a primary fund for the payment of the debt, but likewise the personal liability thus assumed by the grantee. On the other hand, when the grantee merely takes subject to the mortgage, while it is true that the grantee assumes no personal liability whatever, nevertheless the security in his hands is liable for the payment of the mortgage debt, which liability as between the grantee and the mortgagor is primary. Therefore, to the extent of the value of such security properly applicable to the mortgage debt, the original mortgagor and the grantee subject to the mortgage stand in a relation one to another, which, while not a true suretyship, is nevertheless equitably analogous thereto and subject to the operation of the same principles. The original mortgagor is entitled to pay the debt at any time and to be immediately subrogated to the right of the mortgagee to foreclose the mortgage, although he has no personal claim against the grantee, and the mortgagee has no personal claim against such grantee to which the mortgagor could be subrogated." Zastrow v. Knight, 56 S.D. 554, 229 N.W. 925, 930, 72 A.L.R. 379.

In our opinion the judgment entered in this action was correct. If the action could be maintained at all after payment by the original mortgagors as set forth in the statement of facts, it could be maintained in the name of the original party. "In case of * * * transfer of interest, the action or proceeding may be continued in the name of the original party." Code Civ.Proc. § 385.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.



14 Cal.App.2d 718

STATE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10206.

District Court of Appeal, First District, Division 2, California.

June 23, 1936.

Hearing Denied by Supreme Court Aug. 20, 1936.

1. States ⇐191(1)

When state gives permission to be sued, it may state conditions under which such right is given.

2. States ⇐191(1)

As statutes conferring right to sue state are in derogation of state's sovereign capacity, such statutes will be strictly construed.

3. Statutes ⇐225

Where statute authorizing suits against state and statute prescribing conditions and limitations in respect to such suits were construed together and one contained provisions omitted in the other, the omitted provisions would be applied in proceeding under statute not containing such provision where not inconsistent with purposes of statute, since statutes were in pari materia (Civ.Code, § 1714½; Pol.Code, §§ 654–695, 688).

4. States ⇐191(1)

Statute prescribing conditions and limitations relative to bringing suit against state *held* applicable to actions sounding in tort as well as actions sounding in contract (Civ. Code, § 1714½; Pol.Code, §§ 654–695, 688).

5. Constitutional law ⇐70(3)

Question of inconvenience resulting from requiring person injured by a tortious act for which state was allegedly liable to bring suit in Sacramento county rested with Legislature, and was not a subject for consideration of court in determining applicability

to particular action of statute requiring actions against state to be brought in such county (Civ.Code, § 1714½; Pol.Code, §§ 654–695, 688).

6. Prohibition ⇐10(2)
States ⇐200

Statute providing that upon Attorney General's written demand venue of suit against state "must" be changed to Sacramento county was mandatory, and order denying such a motion, as respects action for injuries sustained in collision with automobile operated by state employee, was in excess of jurisdiction, making applicable the remedy of prohibition (Civ.Code, § 1714½; Pol.Code, §§ 654–695; § 688, par. 4).

Word "must" as ordinarily used is mandatory.

[Ed. Note.—For other definitions of "Must," see Words & Phrases.]

7. States ⇐191(1)

That statute imposing limitations and conditions upon bringing of actions against state had allegedly been construed by an appellate court so as to permit bringing of suit in county other than Sacramento and parties had relied upon such construction *held* not to estop state, on theory of waiver, from adopting contrary construction, in view of facts that such limitations were jurisdictional and could not be waived, and necessary intent to waive and necessary conferment of power to waive were not shown (Civ.Code, § 1714½; Pol.Code, §§ 654–695).

Application by the State of California for a writ of prohibition against the Superior Court of the State of California in and for the City and County of San Francisco.

Writ issued.

U. S. Webb, Atty. Gen., R. L. Chamberlain, Deputy Atty. Gen., and Cooley, Crowley & Supple and Richard F. Behan, all of San Francisco, for the State.

Leo R. Friedman, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an application for a writ of prohibition. It involves a consideration of the following facts: Martin B. Joost filed a complaint in the superior court of the state of California in and for the city and county of San Francisco, in which he alleged that while crossing the intersection of Dorchester street and Claremont boulevard in San Francisco he was struck and injured by a Ford car which was being operated by A. E. Kern, who was at the time acting within the scope of his employment and as the agent and employee of the state of California. He named as defendants the state of California, the Regents of the University of California, the University of California, and A. E. Kern. The state was served with summons and thereafter appeared by a special appearance and made a motion that the place of trial be changed from the city and county of San Francisco to the county of Sacramento. The motion was denied on February 4, 1935. Later the defendant filed a general demurrer which was overruled and thereafter the defendant filed an answer. Still later, on motion duly made, the action was set down for trial. The other defendants were not served and did not appear. Asserting that the order denying the motion to change the place of trial was in excess of jurisdiction, the state applied for this writ.

[1-4] The petitioner concedes that the right to sue the state was given by section 1714½ of the Civil Code, but it contends that such right may properly be exercised only as provided in article 18, chapter 3, title 1, part 3, of the Political Code, §§ 654–695, inclusive. The respondent contends that said chapter applies to actions arising ex contractu and not otherwise. That it does apply to actions arising ex contractu both parties concede is the settled law. Denning v. State, 123 Cal. 316, 55 P. 1000; Chapman v. State, 104 Cal. 690, 38 P. 457, 43 Am.St.Rep. 158; and Melvin v. State, 121 Cal. 16, 53 P. 416. However, it remains to determine whether said chapter applies to other actions. The first paragraph of section 688 is: "Any person who has, or shall hereafter have, a claim on contract or for negligence against the state must present the claim to the state board of control in accordance with the provisions of section 667 of this code. Should the claim not be allowed by the state board of control, the person having the claim is hereby authorized, subject to the conditions contained in this section, to bring suit against the state on such claim and to prosecute such suit to final judgment." It is patent that the language is so broad as to cover proceedings in actions arising ex delicto. Standahl v. Splivalo et al. (Cal. App.) 56 P.(2d) 298, was such a case. In

that case the plaintiff did not file the bond required by the third paragraph of section 688 of the Political Code. Because of that omission the defendants made a motion to dismiss the action. The trial court granted the motion. Its ruling was affirmed. Standahl v. Splivalo, supra. The plaintiff applied to the Supreme Court for an order transferring the action to that court for hearing and determination. The application was denied. That ruling is controlling in the instant case at least on the question of the failure to file an undertaking. However, there is certainly nothing in section 688 showing that the whole section is applicable in actions sounding in contract and only a part of it is applicable in actions sounding in tort. It follows that the several passages contained in said section expressing the conditions and limitations concerning actions against the state must be complied with. It will not be disputed that when the state gives permission to be sued it may state the conditions under which such right is given. Gill v. Johnson, 103 Cal.App. 234, 284 P. 510; 59 C.J. 304. As statutes conferring the right to sue the state are in derogation of the state's sovereign capacity, such statutes will be strictly construed. Westinghouse Electric & Mfg. Co. v. Chambers, 169 Cal. 131, 145 P. 1025. Furthermore, section 1714½ of the Civil Code authorizing such suits "in the manner directed by law," and the abovementioned chapter of the Political Code prescribing conditions and limitations, are statutes in pari materia. One of the general rules applicable is: "Where two acts in pari materia are construed together, and one contains provisions omitted from the other, the omitted provisions will be applied in the proceeding under the act not containing such provisions, where not inconsistent with the purposes of the act." 59 C.J. 1050.

[5] The respondent urges the great inconvenience that may follow. It is said that the person injured by the tortuous act may be impecunious and that it will be a great burden on him if he is required to put up a bond and is compelled to go to Sacramento and present his cause of action. Those claims will be freely conceded. It must as freely be conceded that in many instances the functions of the state will be seriously impaired if its officers and employees are required to leave Sacramento, their post of duty, and to attend at distant places to defend alleged actions arising ex delicto. Be these arguments as they may, the question of convenience or inconvenience rested with the legislature and does not rest with the courts.

[6] In support of its claim that prohibition is a proper remedy, the petitioner cites and relies on Carter v. Superior Court, 176 Cal. 752, 169 P. 667. The respondent replies that in that case the court issued only a limited writ, that is, a writ enjoining further action until the bond was filed. But the very reason on which that order was made was that the trial court was exceeding its jurisdiction in taking any action until the bond there involved was filed. Manifestly the same reasoning is pertinent in the instant case. However, in the instant case, we are also concerned with the failure to transfer the action on the demand of the Attorney General to Sacramento. The language of the statute pertinent to that part of the case is as follows: "It shall be the duty of the attorney general to defend all such suits; and upon his written demand made at or before the time of answering, the place of trial of any such suits must be changed to the county of Sacramento." Pol.Code, § 688, par. 4. The word "must," as ordinarily used, is mandatory. 44 C.J. 1498. An order contrary to the provisions of such statutes is in excess of jurisdiction. 59 C.J. 304; Carter v. Superior Court, supra.

[7] Finally the respondent asserts that where a statute has been construed by an appellate court and parties have relied upon such construction, the state is estopped from adopting a contrary construction in those cases where injury can result to the one who relied on a prior construction. It cites Angus v. Plum, 121 Cal. 608, 54 P. 97; Bates v. Escondido U. H. School Dist., 133 Cal.App. 725, 24 P.(2d) 884; and Gill v. Johnson, 103 Cal.App. 234, 284 P. 510. The first case cited deals with the doctrine of stare decisis. That doctrine is not here involved. The second case deals with the law applicable to a school district. That involves statutes not before us. The case last cited involved the Torrens Land Title Act (St.1915, p. 1932) and held it to be self-sufficient. And, as closely allied, the respondent contends that the state has waived its rights. To create a waiver there must be an actual intention to waive an existing right. 25 Cal.Jur. 927. Here there is no evidence of such intention. Moreover, power to waive must be shown to have been conferred on the state's agents. Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A.L.R. 1456, 1483,

1484. Our statutes show no such power was granted. Again, as we have shown above, the limitations and conditions imposed by the state in actions brought against it are jurisdictional. Being such, they may not be waived. 59 C.J. 304; Buckles v. State, 221 N.Y. 418, 117 N.E. 811. The Court of Appeals of New York, 221 N.Y. 418, 117 N.E. 811, at page 813, said: "Being thus a question of jurisdiction, it could be raised at any time, and could not be waived by any officer or authority representing the state. [Citing cases.]"

It is therefore the order of the court that a peremptory writ of prohibition issue restraining the superior court of the state of California, in and for the city and county of San Francisco, and the presiding judge thereof, from taking any further steps or proceedings against the State of California in connection with or based upon the allegations or prayer of the complaint of Martin B. Joost, in action No. 255308, now pending in said court, except to transfer said action to the superior court of the state of California, in and for the county of Sacramento.

We concur: NOURSE, P. J.; SPENCE, J.

KEY NUMBER SYSTEM

15 Cal.App.2d 110

BAMBER et al. v. BELPREZ et al.

Civ. 10516.

District Court of Appeal, Second District. Division 1, California.

June 30, 1936.

Rehearing Denied July 27, 1936.

Hearing Denied by Supreme Court Aug. 27, 1936.

1. Appeal and error ⇐1010(1)

Implied finding by reason of verdict for plaintiffs in wrongful death action that defendant was negligent and that deceased was not contributorily negligent *held* binding on reviewing court, where amply supported by evidence.

2. Automobiles ⇐245(6, 72)

Negligence of motorist and contributory negligence of pedestrian killed when struck by automobile while crossing street in unmarked crosswalk near intersection after pedestrian had crossed all but three feet of paved portion of street *held* for jury.

3. Trial ⇐133(6)

Testimony of deceased's wife in wrongful death action that defendant stated that he was heavily insured *held* not ground for mistrial where such reference was stricken and jury admonished, both by oral statement and written instruction, to disregard it.

4. Appeal and error ⇐1170(1)

Reviewing court may consider state of record to determine whether error is harmful or prejudicial (Code Civ.Proc. § 475; Const. art. 6, § 4½).

5. Trial ⇐295(1)

In determining whether jury was properly instructed, instructions must be read as a whole.

6. Appeal and error ⇐110

Order denying motion for new trial is nonappealable.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Mrs. George Edward Bamber and others against Alidor J. Belprez. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Nourse, Betts & Jones, of Los Angeles, for appellant.

Clock, McWhinney & Clock and Henry H. Clock, all of Los Angeles, for respondents.

ROTH, Justice pro tem.

Plaintiffs are the widow and children of George Edward Bamber, deceased, who was killed in an accident out of which this action arises. On February 2, 1935, at about 7:30 p. m., defendant was driving an automobile at a speed of approximately 40 miles per hour north on Cherry avenue at the point of its intersection with 65th street in the city of Long Beach. At the time defendant crossed the intersection and for some distance prior thereto, he was traveling approximately 75 feet back of another car. In front of the latter car there were several others. The corner of 65th street and Cherry avenue is a bus stop for busses operating north and south on Cherry avenue, and the southwest corner thereof is improved with a small business block, consisting of two

stores, a market, and a café. Opposite the café which is the corner store, there is an overhanging arc light. Immediately prior to the accident, deceased had been in the café, and had partaken of two glasses of beer, and was in the act of crossing Cherry avenue from west to the east to get to his automobile, which was parked on the dirt shoulder contiguous to the east edge of Cherry avenue. When 3 feet to the west of the east edge of the paved portion of Cherry avenue, deceased was struck by a portion of the bumper of defendant's car, lifted to the crown of the left front fender, carried to the cowl, where his body made an indenture, and then was thrown approximately 45 feet to the northwest. The impact was audible two blocks away. Defendant admitted he did not see deceased until 10 or 15 feet before the impact; that he did not see the arc light on the corner; that he is near-sighted and high-strung; that he did not look for any one near the business block mentioned, as he approached from the south to the north; that the visibility at the time of the accident was clear for 200 feet; that he struck deceased, who was in the easterly half of the highway; and that he sounded no warning. He stated, however, that he saw the car of the deceased, which, as stated, was parked on the dirt shoulder off the east edge of the highway. In this connection he testified: "* * * I was watching this car because it was on my side; in case it would pull out, there would be danger of a collision. * * *

"Mr. Clock: What did you do when you began watching this car so closely? A. I was right following the traffic, of the other car.

"Q. Did you slow down? A. No.

"Q. Did you sound your horn? A. I was too far away.

"Q. How far were you? A. About 75 or 100 feet."

The record shows that decedent, when he left the café, stopped at the curb before he crossed Cherry avenue, looked in both directions, and commenced to walk directly east in the unmarked crosswalk and was entirely sober at the time. Although the actual collision between deceased and the automobile was not seen, a logical inference is that deceased was struck by the front of defendant's automobile, an eyewitness testifying that because another auto passed between him and deceased at the time he did not see the actual impact. Defendant testified that at the time in question he could have stopped his car at 100 feet, and the evidence shows that when deceased "was a little past the center of the pavement," defendant's car was 150 feet to the south. The evidence showed, further, that defendant did not stop before or after hitting deceased. In this respect defendant testified that he applied his brakes, but that it was too late, and that after the impact he released the brakes and allowed the car to coast away for several thousand feet; that when he turned around and returned to the scene of the accident, he was afraid to stop, because of the muttering of the crowd that had already collected. Defendant admitted that he saw the café building when within 75 or 100 feet of it, but saw no one around it, nor did he see any one crossing Cherry avenue; that he did not sound his horn, because "he was too far away." At that time he testified he was 75 to 100 feet to the south. He then testified: "* * * About 15 or 20 feet before I reached the line of that car to the right (referring to deceased's car parked on the shoulder of the highway), I observed a person in the road, about in the middle of the road, a person walking east—. * * * So I applied my brakes, and it was barely a fraction of a second before the impact occurred." Then, according to his testimony, the following took place:

"Q. What happened when you applied them? A. I slowed up.

"Q. Did you keep going straight, or swerve? A. I did not swerve at all.

"Q. And you did not stop? A. No.

"Q. How much did you slow down, if you can say? A. I don't know.

"Q. Was it slightly, or a great deal? A. As soon as the impact occurred, it was such a nervous shock to me—

"Q. Were you hurt? A. No, but it happened so quick, there was no warning, everything became hazy."

[1] The jury brought in a verdict for plaintiffs. By its verdict the jury impliedly found that defendant was negligent, and that there was no contributory negligence on the part of deceased. These were questions of fact for the jury, and its findings thereon, being amply supported by the evidence, are binding upon this court. Gustafson v. Blunk, 4 Cal.App.(2d)

630, 41 P.(2d) 953; Donovan v. P. Lorillard Co. of Del. (Cal.App.) 51 P.(2d) 142; Park v. Orbison, 43 Cal.App. 74, 184 P. 428; Crooks v. Doeg, 4 Cal.App.(2d) 21, 40 P.(2d) 590; Jones v. Barion, 103 Cal. App. 59, 283 P. 885; Stealey v. Chessum, 123 Cal.App. 446, 11 P.(2d) 428; Maggart v. Bell, 116 Cal.App. 306, 2 P. (2d) 516; Off v. Crump, 40 Cal.App. 173, 180 P. 360; Long v. Barbieri, 120 Cal. App. 207, 7 P.(2d) 1082; Baldock v. Western Union Telegraph Co., 127 Cal.App. 141, 15 P.(2d) 199; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 242 P. 703; Coughman v. Harman, 135 Cal.App. 49, 26 P.(2d) 851; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125.

[2] Since we are of the opinion that, on the facts as governed by the authorities cited, the verdict returned by the jury cannot be attacked, it follows that the trial court did not err in refusing to grant a motion for a directed verdict. In our opinion, it would have been error to have granted such a motion. Henry v. Lingsweiler, 81 Cal.App. 142, 143, 253 P. 357; Hall v. Barber Door Co., 218 Cal. 412, 415, 23 P.(2d) 279.

[3] Plaintiff, Mrs. Bamber, during the course of the trial, testified that when defendant called upon her she said, among other things: "He told me he was very sorry. And, of course, I realized who he was. He told me he would be glad to do anything. That he was heavily insured, and he would give me anything he had, take care of the children." All reference to the insurance company was stricken out by the trial court and the jury was admonished not to regard such reference for any purpose both by an oral statement and a written instruction by the trial court. Defendant contends that, because of this allusion to the insurance company, a mistrial should have been granted in spite of the action of the trial court. Abundant authority sustains the trial court's position in its refusal to grant a mistrial under such circumstances. McPhee v. Lavin, 183 Cal. 264, 191 P. 23; Symons v. Wooden, 97 Cal.App. 39, 274 P. 987; Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603; Citti v. Bava, 204 Cal. 136, 266 P. 954; Maberto v. Wolfe, 106 Cal. App. 202, 289 P. 218; Harju v. Market St. Ry. Co., 114 Cal.App. 138, 299 P. 788; King v. Wilson, 116 Cal.App. 191, 2 P. (2d) 833; Handley v. Lombardi, 122 Cal. App. 22, 9 P.(2d) 867; Noble v. Bacon, 129 Cal.App. 177, 18 P.(2d) 699; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644; Weiner v. Mizuta & Tawa, 6 Cal.App. (2d) 142, 44 P.(2d) 42.

[4, 5] A number of instructions are complained of. A perusal of these instructions, separately and as a part of the charge as a whole, indicates no prejudicial error. We find evidence warranting all instructions requested by the plaintiff and given by the trial court. It is settled that the state of the record may be considered to determine whether the error is harmful or prejudicial [Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451]; that harmless error is to be disregarded [article 6, § 4½, Const. of California, Code of Civil Procedure, § 475; Clark v. McClurg, 215 Cal. 279, 285, 9 P.(2d) 505, 81 A.L.R. 908]; and that instructions must be read as a whole [Anderson v. Southern Pacific Co., 129 Cal.App. 206, 18 P.(2d) 703].

[6] The judgment appealed from is hereby affirmed, and the appeal from the order denying defendant's motion for a new trial is dismissed, as the law does not authorize an appeal from such an order.

We concur: HOUSER, P. J.; DORAN, J.

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